



Corporations Amendment (Insolvency) Bill 2007

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Corporations Amendment (Insolvency) Bill 2007

Date introduced: 31 May 2007

House: House of Representatives

Portfolio: Treasury

Commencement: Various commencement dates as outlined on page 28 of this Bills Digest.

Purpose

The purpose of the Corporations Amendment (Insolvency) Bill 2007 ([the Bill](#)) is to implement a package of reforms to improve Australia's insolvency laws. There are six Schedules to this Bill and the amendments to the *Corporations Act 2001* by each Schedule deal with the following reform themes.

- **Schedule 1** seeks to improve outcomes for creditors by:
 - enhancing protection for employee entitlements,
 - better informing creditor decisions,
 - streamlining external administration, and
 - facilitating pooling in external administration.
- **Schedule 2** will implement measures to deter corporate misconduct.
- **Schedule 3** has measures to improve regulation of insolvency practitioners.
- **Schedule 4** includes measures to fine-tune voluntary administration in respect to:
 - rights to property during administration, and
 - liquidation following administration.
- **Schedule 5** deals with miscellaneous amendments including priority of administrative expenses in voluntary liquidation.
- **Schedule 6** deals with transitional measures.

Background to the Bill

The *Corporate Law Reform Act 1992* was the last occasion when major reforms of Australia's corporate insolvency laws occurred. This was to implement the recommendations of the Harmer Report.¹

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On 12 October 2005, the Hon Chris Pearce, Parliamentary Secretary to the Treasurer, [released](#)² details of [a package of reforms](#) titled *Corporate Insolvency Reform* to improve the operation of Australia's insolvency laws.³

The reform package stated that the reforms are specifically based on the findings of the following reviews and inquiries into the corporate insolvency framework:

- the 1997 Review of the Regulation of Corporate Insolvency Practitioners,
- the 1998 Corporations and Markets Advisory Committee (CAMAC) Report *Corporate Voluntary Administration*,
- the 2000 CAMAC Report Corporate Groups; the 2004 CAMAC Report [Rehabilitation of Large and Complex Enterprises](#),⁴
- the 2004 Parliamentary Joint Committee on Corporations and Financial Services (PJC) Report [Corporate Insolvency Laws: A Stocktake](#) and
- the 2004 Report of the James Hardie Special Commission of Inquiry.

The Australian Government's [response](#) to the PJC Report foreshadowed most of the measures in the Bill.

The Parliamentary Secretary to the Treasurer, the Hon Chris Pearce, [released](#) the draft Corporations Amendment (Insolvency) Bill 2007 and accompanying draft regulations for public comment on [13 November 2006](#). The exposure draft Bill and regulations were intended to implement the package of insolvency reforms announced by Mr Pearce on 12 October 2005.

The exposure draft of Bill included a range of measures intended to modernise Australia's insolvency laws. The exposure draft regulations included changes to the *Corporations Regulations 2001* and the *Australian Securities and Investments Commission Regulations 2001*. The PJC inquired into the measures in the draft Bill and issued its [report and recommendations](#) on 29 March 2007.

The measures in the Bill therefore implement the changes to insolvency laws considered necessary after observing the experience of implementing the recommendations in the Harmer Report over a period of nearly 15 years.

While the above information covers the broad background to the Bill, the background to the measures dealt with in this Bills Digest will be included with the main provisions of each Schedule to the Bill.

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Schedule 1—Improving outcomes for creditors

Part 1—Enhancing protection of employee entitlements

Background

In the winding up of a company, the law confers a priority on employee entitlements in section 556 of the *Corporations Act 2001* (Corporations Act). However, employee entitlements do not at present receive the same measure of protection under the voluntary administration procedure in Part 5.3A of the Corporations Act.

The object of the voluntary administration procedure is to provide a relatively inexpensive procedure for a company which is unable to pay its debts to enter into an arrangement with its creditors so that it could save the company or the business, or in the event of a liquidation, to maximize the return to creditors. Section 444A of the Corporations Act requires the compromise or arrangement, by which the creditors agree on the extent to which the company is to be released from its debts, to be set out in a deed of company arrangement (DOCA). Subsection 444A(5) states that the DOCA is taken to include the ‘prescribed provisions’, except so far as it provides otherwise. Regulation 5.3A.06 states that the prescribed provisions are those set out in Schedule 8A. It will thus be seen that the prescribed provisions in Schedule 8A are not mandatory and the DOCA may include provisions altering the priority that would apply in a liquidation.

Main provisions

Giving priority to eligible employee creditors

Item 4 of Schedule 1 inserts **proposed section 444DA** to give priority to eligible employee creditors. **Proposed subsection 444DA(1)** requires that a DOCA must contain a provision that any eligible employee creditors will be entitled to a priority at least equal to what they would have been entitled to on a winding up under sections 556, 560 or 561. However, **proposed subsection 444DA(2)** provides that the rule in **proposed subsection 444DA(1)** does not apply if:

- eligible employee creditors at a meeting convened before the meeting of creditors under section 439A, pass a resolution agreeing to the non-inclusion of such a provision (**proposed paragraph 444DA(2)(a)**), or
- the Court makes an order under **proposed subsection 444DA(5)** approving the non-inclusion of such a provision (**proposed paragraph 444DA(2)(b)**)

Proposed subsection 444DA(5) states that the Court may approve the non-inclusion of a provision protecting eligible employee creditors if the Court is satisfied that the non-inclusion would be likely to result in the same or a better outcome for eligible employee creditors as a whole than would result from the immediate winding up of the company.

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Proposed subsection 444DA(6) states that the Court may only make the order under **proposed subsection 444DA(5)** on the application of:

- (a) the administrator, or proposed administrator, of the DOCA; or
- (b) an eligible employee creditor; or
- (c) any interested person.

Superannuation contribution debts not admissible to proof

Superannuation contributions enjoy the same priority as wages payable by a company in respect of services rendered to the company under paragraph 556(1)(e) of the Corporations Act.

Subsection 556(2) defines superannuation contribution as a contribution by a company to a fund for the purposes of making provision for, or obtaining, superannuation benefits for an employee of the company, or for dependents of such an employee.

Section 52 of the *Superannuation Guarantee (Administration) Act 1992* (SGAA) provides that in a winding up of a company, any superannuation guarantee charge (SGC) payable by the company is, for the purposes of payment, to have a priority equal to that of a debt of the company of the kind referred to in paragraph 556(1)(e) of the Corporations Act. Section 52 does not deal with the priority of the SGC in a receivership, voluntary administration or a DOCA.

The purpose of the SGAA is to ensure that employers make a minimum contribution to a fund for the purpose of providing superannuation benefits to their employees and on failure to do so to impose a SGC which is a debt due to the Commonwealth. The SGC is imposed by the *Superannuation Guarantee Charge Act 1992* (SGCA) as a debt due to the Commonwealth. The Commonwealth thereafter distributes the SGC collected for the benefit of the employees concerned to a nominated fund.

In [*Deputy Commissioner of Taxation v Rathner*](#) [2004] VSC 352 it was held that unpaid superannuation contributions and unpaid SGC in relation to those superannuation contributions are separate and distinct debts. Further, in [*DP Excavation & Haulage Pty Limited v Commissioner of Taxation*](#) [2005] NSWSC 533, it was held that section 52 of the SGAA does not confer the same priority on the SGC as superannuation contributions enjoy under paragraph 556(1)(e) of the Corporations Act.

Item 11 of Schedule 1 repeals section 52 of the SGAA. **Item 6** amends the Corporations Act to provide the same priority to unpaid superannuation contributions as well as the SGC relating to those contributions in the Corporations Act.

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When a superannuation contribution debt may be extinguished whilst under administration with a view to executing a deed of company arrangement

Item 4 of Schedule 1 also inserts **proposed section 444DB** to the Corporations Act to enable the administrator of a DOCA to determine whether the whole or part of a superannuation contribution debt is admissible to proof against the company. It does this by requiring that a DOCA must contain a provision to enable the administrator to make that determination having regard to whether a debt by way of a SGC:

- (a) has been paid, or
 - (b) is, or is to be, admissible to proof against the company
- and
- (c) the administrator of the DOCA is satisfied that the SGC relates to the whole or part of the debt by way of a superannuation contribution.

If the administrator of the DOCA is satisfied that the whole or part of a debt by way of a superannuation contribution is not admissible to proof against a company because of the above considerations, then the whole or part of the debt, as may be the case, is extinguished.

The proposed amendments avoid a duplication of claims being made in respect of superannuation contributions by giving the administrator the power to make a determination which will result in only the SGC being admitted to proof against the company and extinguishing the related debt in respect of the unpaid superannuation contribution.

When a superannuation contribution debt may be extinguished in a winding up of a company

Item 5 of Schedule 1 inserts **proposed section 553AB** into the Corporations Act to enable the liquidator to extinguish whole or part of a superannuation contribution debt when a related superannuation guarantee charge is admissible to proof against the company.

Clarification of the rights of subrogated creditors

When a person has made advances to a company to enable it to make priority payments due to employees under section 556 of the Corporations Act, section 560 provides that that person (generally referred to as a 'subrogated creditor') is entitled to the same priority in respect of the amount so advanced as the recipient would have been entitled to if the payment had not been made. The reader is referred to paragraphs 4.57 to 4.64 on pages 35 and 36 of the Explanatory Memorandum to the Bill where it sets out the various issues that have arisen in relation to the rights of subrogated creditors in the operation of section 560.

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Item 9 of **Schedule 1** replaces section 560 with **proposed section 560** to clarify these issues.

Part 2—Better informing creditor decisions

Part 2 of **Schedule 1** includes a number of amendments to the Corporations Act to address various issues in relation to administrators. Broadly these are intended to:

- address concerns about the independence of administrators by requiring them to declare any relevant relationships and declare any indemnities that have been provided (**items 16 to 24** and **item 36**),
- allow the Australian Securities and Investments Commission (ASIC) as a party who may apply to a court for a review of the remuneration of administrators (**item 27**),
- clarify that it is possible for an administrator to apply to a court for remuneration to be fixed when creditors have not met (**item 25**),
- set out the factors a court must take into account in deciding whether the remuneration of an administrator is reasonable (**item 28**),
- allow a liquidator to draw down a maximum of \$5,000 where a liquidator has called a meeting of creditors but failed to obtain approval for remuneration because of a lack of quorum (**items 29** and **32**),
- remove the requirement to hold an annual general meeting of members in a creditors' voluntary winding up (**item 37**),
- provide the liquidator in a creditors' voluntary winding up to either convene a meeting of creditors or to lodge with ASIC a progress report within the specified time (**item 38**),
- specify the details a progress report must contain such as an account of the liquidator's acts and dealings and the conduct of the winding up in the preceding year, a description of the acts and dealings that remain to be carried out by the liquidator and an estimate of when the winding up is likely to be completed (**item 40**).

Part 3—Streamlining external administration

Amendments relating to advertising and electronic communication

The amendments in **Part 3** of **Schedule 1** implement Recommendation 19 of the PJC Report which stated that the Australian Government should consider alternatives to the advertising and gazettal requirements in the Corporations Act.

The amendments in **Part 3** of **Schedule 1** remove various requirements in the Corporations Act for advertising (**items 58, 75, 80, 82, and 85**).

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However, the requirement in subsection 436E(3) of the Corporations Act to give a notice of the first meeting of creditors by advertising in newspapers in paragraph 436E(3)(b) will be retained by the insertion of **proposed subsection 436E(3A)** by **item 69**.

Similarly, the requirement in paragraph 450A(1)(b) to advertise in newspapers the appointment of an administrator is being retained and **item 78 of Schedule 1** inserts **proposed subsection 450A(1A)** to provide that a notice under paragraph 450A(1)(b) may be combined with a notice under paragraph 436E(3)(b).

Item 75 of Schedule 1 whilst repealing the subsection 445F(2) which requires advertising in newspapers inserts **proposed subsection 445F(2)** which requires written notice to be given to as many creditors as reasonably practicable of the meeting of creditors to consider any proposed variation or termination of a DOCA.

The above examples illustrate that the Bill repeals the requirement to advertise in newspapers except where the policy requires it to be done or substituted by written notice.

Amendments relating to electronic communication between administrators and stakeholders

Recommendation 20 of the PJC Report stated that the Australian Government should facilitate making technology and e-commerce options more available to improve communication between administrators and stakeholders in external administration.

Item 120 of Schedule 1 inserts **proposed section 600G** to permit electronic notification where notices and other documents are required to be sent under Chapter 5 of the Corporations Act which deals with external administration. **Proposed subsection 600G(1)** lists all the provisions in Chapter 5 where such electronic communication is permitted. Notes have also been inserted to the relevant provisions of Chapter 5 to indicate that a recipient of notices or documents may exercise the option of requesting electronic notification under **proposed section 600G**.

Proposed subsection 600G(2) provides that if a recipient nominates a fax number, or electronic address, by which the recipient may be notified, the notifier may give or send the notice or document by the nominated method of communication. **Proposed subsection 600G(3)** permits a recipient to nominate any other electronic means by which the notifier may notify them.

Proposed subsection 600G(4) provides that if a recipient nominates:

- (a) an electronic means (the nominated notification means) by which the recipient may be notified that such notices and documents are available, and

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- (b) the electronic means (the nominated access means) the recipient may use to access such notices or documents

the notifier may give or send the document to the recipient by notifying the recipient using the nominated means :

- (c) that the notice or document is available, and
- (d) how the recipient may use the nominated access means to access the notice or document.

Proposed subsection 600G(5) provides that a notice or document sent to a fax or electronic address or by other electronic means is taken to be given or sent on the business day after it is sent.

Proposed subsection 600G(6) provides that that a notice or document sent under **proposed subsection 600G(4)** is taken to be given or sent on the business day after the day the recipient is notified that the notice or document is available.

Other changes in Part 3 of Schedule 1

The other changes which the amendments to the Corporations Act in **Part 3 of Schedule 1** give effect to are listed below with references to the items and detailed explanations in the paragraphs of the [Explanatory Memorandum](#) (EM) to the Bill).

- The provisions requiring gazettal of matters relating to controllerships will be repealed. The ASIC database will be the main source of information regarding controllerships (**items 65 and 66** – paragraphs 4.152 to 4.156 on pages 52 and 53 of the EM).
- Only managing controllers will be required to maintain separate bank accounts instead of the current requirement that all controllers should maintain separate bank accounts (**items 53 to 57** – paragraphs 4.157 to 4.161 on pages 53 and 54 of the EM).
- Managing controllers will be required to report misconduct to ASIC. On failure to do so the Court may, on the application of a person interested in the appointment of the managing controller, direct the managing controller to lodge such a report (**items 59 to 64** - paragraphs 4.162 to 4.165 on page 54).
- The inconsistency that exists at present across voluntary liquidation, court-ordered liquidation and voluntary administration in regard to the ability of practitioners to consent to a transfer of shares or an alteration in the status of members of a company will be removed. **Item 87 of Schedule 1** will remove the existing provisions regarding the transfer of shares, and an alteration in the status of members in a court ordered liquidation. **Item 88 of Schedule 1** will replace these with new provisions in **proposed**

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section 468A. Similar amendments are made by items **92** to **94** to regulate the transfer of shares or an alteration in the status of members during a voluntary liquidation by **proposed section 493A**. Likewise, **items 7** and **8** of Part **1** of **Schedule 4** make amendments to effect similar changes for voluntary administration by **proposed section 437F** (paragraphs 4.166 to 4.176 on pages 54 to 56 of the EM).

- At present a members' scheme of compromise or rearrangement requires a resolution passed by an ordinary majority of members present and voting as well as a 75 per cent majority according to the voting rights attaching to share capital. A court has no discretion to approve a scheme if the resolution is not passed by both majorities. The amendments proposed will give the court a discretion to approve a scheme where the resolution is passed by the 75 percent majority voting rights attaching to share capital (**item 52** – paragraphs 4.177 to 4.181 on pages 56 and 57 of the EM).
- Amendments will remove doubts about whether corporate membership of a committee of creditors and a committee of inspection is possible (**items 70** to **72** and **item 117** – paragraphs 4.182 to 4.189 on pages 56 to 59 of the EM).
- Subject to certain modifications the process for commencing a creditors' voluntary liquidation will be streamlined to align it with the process of putting a company into voluntary administration (**item 91**, **items 96** to **99**, **102** to **107** and **110** to **112** – paragraphs 4.190 to 4.203 on pages 59 to 61 of the EM).
- Creditors will be permitted to appoint a different person as liquidator when a company proceeds from administration into liquidation or from a DOCA into liquidation (**item 22**, **23** and **112** – paragraphs 4.204 to 4.210 on pages 61 and 62 of the EM).
- Provision will be made for multiple 'joint' or 'joint and several' appointments in liquidations and receiverships unless the resolution of appointment provides otherwise (**items 41** to **48**, **67**, **113** and **114** – paragraphs 4.211 to 4.223 on pages 62 to 64 of the EM).
- A number of changes will be made relating to changing the names of companies under external administration to allow practitioners to be able to change the name of a company where it is in the interests of the creditors to do so (**items 49**, **50** and **121** – paragraphs 4.224 to 4.234 on pages 64 to 666 of the EM).
- A discretion will be granted to ASIC to permit a public company exemption from the requirement to hold an annual general meeting on an application by an external administrator (**item 51** – paragraphs 4.235 to 4.240 on pages 66 and 67 of the EM).

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Part 4—Facilitating pooling in external administration

Item 133 of **Part 4** of **Schedule 1** inserts **proposed Division 8** titled Pooling, in Part 5.6 of the Corporations Act.

Proposed Division 8 provides for two types of pooling in the case of liquidation of company groups, namely, voluntary pooling and court-ordered pooling.

Voluntary pooling – pooling determinations

In the case of voluntary liquidation of a group of companies the liquidator may make a determination under **proposed section 571** that the winding up be conducted on a pooled basis. The liquidator must submit that determination to separate meetings of the ‘eligible unsecured creditors’ of each of the companies proposed to be pooled under **proposed subsection 574**. The pooling may proceed if the eligible unsecured creditors resolve to approve the making of the determination under **proposed subsection 577(1)**. A resolution under **proposed subsection 577(1)** must be approved by 75 per cent of the eligible unsecured creditors by value and 50 percent by number of each of the companies in the group as required by **proposed subsection 577(2)**.

The consequences of a pooling determination are set out in **proposed subsection 571(2)**. It means that each company in the group is taken to be jointly and severally liable for each debt payable and each claim payable against each company in the group. Also, each debt payable by a company in the group to any other company in the group is extinguished. Further, each claim that a company in the group has against any other company or companies in the group is extinguished.

A pooling determination takes effect under **proposed subsection 578(1)** immediately after the resolutions approving the making of the determination are passed.

If a pooling determination comes into force in relation to a group of 2 or more companies, **proposed subsection 571(5)** provides that the order of priority applicable under sections 556, 560 and 561 of the Corporations Act is not altered for a company in the group.

The reader is referred to paragraphs 4.246 to 4.259 on pages 68 to 71 of the [Explanatory Memorandum](#) for other aspects of pooled determinations.

Court-ordered pooling – pooling orders

Proposed subsection 579E provides that a court may, by order, if the court is satisfied that it is just and equitable to do so, determine that a group of 2 or more companies is a pooled group for the purposes of this section.

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The just and equitable criteria, which the court must have regard to before making a pooling order, are set out in **proposed subsection 579E(12)**. They are:

- (a) the extent to which the company in the group and the officers or employees of a company in the group were involved in the management or operations of any other companies in the group,
- (b) the conduct of a company in the group and the officers or employees of a company in the group towards the creditors of any of the other companies in the group,
- (c) the extent to which the circumstances that gave rise to the winding up of any of the companies in the group are directly or indirectly attributable to the acts or omissions of: any of the other companies in the group; or the officers or employees of any of the other companies in the group,
- (d) the extent to which the activities and business of the companies in the group have been intermingled,
- (e) the extent to which creditors of any of the companies in the group may be advantaged or disadvantaged by the making of the order,
- (f) any other relevant matters.

The consequences of a pooling order set out in **proposed subsection 579E(2)** are the same as the consequences of a pooling determination in **proposed subsection 571(2)** which was described above.

If a pooling order comes into force in relation to a group of 2 or more companies, **proposed subsection 579E(5)** provides that the order of priority applicable under sections 556, 560 and 561 of the Corporations Act is not altered for a company in the group.

The reader is referred to paragraphs 4.260 to 4.268 on pages 71 to 73 of the Explanatory Memorandum for other aspects of pooled determinations.

Schedule 2—Deterring corporate misconduct

Compulsory powers to ASIC to investigate liquidators' conduct

Background and main provisions

Part 3 of the *Australian Securities and Investments Commission Act 2001* (ASIC Act) provides the investigative and information gathering powers of the Australian Securities and Investments Commission (ASIC). Section 13 of the ASIC Act enables ASIC to

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investigate, as it thinks expedient for the due administration of the corporations legislation, where it has reason to suspect that there may have been committed:

- a contravention of the Corporations legislation or
- a contravention of the law of a State or Territory which concerns the management or affairs of a body corporate or managed investment scheme (MIS) or involves fraud or dishonesty and relates to a body corporate or MIS or to financial products.

Section 536 of the Corporations Act gives ASIC the power to inquire into:

- any matter where it appears that the liquidator has not faithfully performed his or her functions, or
- a complaint by any person with respect to the conduct of a liquidator

The Explanatory Memorandum to the Bill in paragraph 5.3 on page 75 indicates why the existing investigating powers of ASIC may not be adequate to investigate the actions of liquidators as follows:

5.3 However, it is not always clear that ASIC can use the full suite of its compulsory powers in Part 3 of the ASIC Act for the purposes of investigating the extent to which a registered liquidator has satisfied the duties owed by them in various proceedings. Unlike directors' duties, the fiduciary duties of registered liquidators are not codified in the corporations legislation.

Item 1 of Schedule 2 inserts **proposed subsection 13(3)** to the ASIC Act to enable ASIC to use its powers under Part 3 of the ASIC Act to investigate the conduct of a registered liquidator where ASIC has reason to suspect the liquidator :

- (a) has not, or may not have, faithfully performed his or her duties, or
- (b) is not, or may not be, faithfully performing his or her duties.

Schemes of compromise or arrangement – right of recovery for breach of condition or alteration

Background and main provisions

Section 411 of Part 5.1 of the Corporations Act deals with the administration of compromises or arrangements between creditors and members which a court may approve under subsection 411(6) subject to such alterations or conditions as it thinks fit.

The Explanatory Memorandum (EM) in paragraph 5.9 on page 76, states that currently there is no provision for recovery of a loss or damage suffered by a person as a result of a breach of an alteration or condition imposed by a court under subsection 411(6). The EM also states that the desirability of a mechanism to provide a court with broader powers to

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protect persons who may be adversely affected by a proposal was highlighted in the James Hardie report.

Item 2 of Schedule 2 inserts **proposed subsection 411(6A)** to enable the Court to make such orders as it thinks fit where a body contravenes an alteration or condition made by the Court in approving a compromise or arrangement under subsection 411(6).

Proposed subsection 411(6B) provides that the Court may make either:

- an order that the body pay compensation of such an amount to the person who has suffered a loss or damage as the order specifies, or
- in the case of an alteration - an order directing the body to comply with the provision or provisions of the compromise or arrangement to which the alteration relates and in the case of a condition an order requiring compliance with the condition.

Proposed subsection 411(6C) provides that **proposed subsection 411(6B)** does not limit **proposed subsection 411(6A)**.

Court orders preventing company officers and others from avoiding liability

Background and main provisions

On the application of a liquidator or provisional liquidator, the Court has powers under section 486A of the Corporations Act to make a range of orders to prevent an officer or related entity from avoiding liability to a company. Paragraph 486A(1)(d) allows the Court to make an order prohibiting an officer or employee of the company, or a related entity of the company that is a natural person, from leaving the jurisdiction or Australia without the Court's consent.

The Explanatory Memorandum in paragraph 5.15 on page 77 points out that in a case where an application to wind up a company has been made but the winding up has not commenced, there will not necessarily be any liquidator or provisional liquidator to make the application under subsection 486A(1)

The amendments proposed by **items 4, 5, 6 and 8 of Schedule 2** reorganise subsection 486A(1) and **item 7 of Schedule 2** inserts **proposed subsection 486AA(2)** to enable a liquidator or provisional liquidator or ASIC to make application under the reorganised subsection 486A(1) to the Court.

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Warrant to arrest a person

Background and main provisions

The power of a court to issue a warrant to arrest a person who is absconding or who has dealt with property or books, in order to avoid obligations in connection with a winding up is dealt with in section 486B of the Corporations Act.

The Explanatory Memorandum at paragraph 5.24 on pages 78 and 79 states that Cooper J in an unreported case took the view that the provision does not give the court any express power to order the person remain in custody, or make other orders.⁵

Item 10 of Schedule 2 inserts **proposed Subdivision B** at the end of Division 3 of Part 5.4B to set out procedures relating to section 486B warrants. Thus **proposed section 489A** sets out the procedure for arresting a person subject to a section 486B warrant, **proposed section 489B** provides that the Court must order that the arrested person be remanded on bail, or remanded in custody or released and **proposed section 489C** sets out the procedure on remand on bail.

The reader is referred to paragraphs 5.23 to 5.31 on pages 78 to 80 of the Explanatory Memorandum for details of the procedures.

Time limits for the lodgement of reports by liquidators

Background and main provisions

Section 533 of the Corporations Act requires the liquidator, who ascertains in the course of winding up of a company that:

- a past or present officer or employee or a member or contributory may have been guilty of an offence under a law of the Commonwealth, or a State or Territory, and
- a person who has taken part in the formation, promotion, administration, management or winding up of the company has misapplied or retained funds or may have been guilty of negligence, default breach of duty or breach of trust in relation to the company, or
- the company may be unable to pay its unsecured creditors more than 50 cents in the dollar

must as soon as practicable lodge a report with respect to the matter to ASIC.

The Explanatory Memorandum in paragraph 5.34 on page 80 states that reports are often lodged outside the time of two months given in ASIC guidelines and sometimes reports are lodged years after the commencement of liquidation. Such late lodgement results in it being too late to take remedial action.

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Item 11 of **Schedule 2** amends paragraph 533(1)(d) to require the liquidator to lodge such reports as soon as practicable and in any event within six months.

Removal of penalty privilege

Background and main provisions

In *Rich v Australian Securities and Investments Commission* [2004] HCA 42, the High Court held that the banning and disqualification orders under sections 206 C and 206E of the Corporations Act were penalties.⁶ In consequence an affected person could invoke the common law privileges protecting the disclosure of information that may expose a person to a penalty in a banning or disqualification proceeding.

In simple terms the penalty privilege applies to prevent a defendant (in proceedings for the imposition and recovery of a penalty) from being compelled to produce documents/information which may 'prove' the defendant's liability to the penalty. In other words, the underlying principle is that those who allege criminality should prove it.

ASIC is therefore precluded from obtaining discovery of documents in proceedings seeking a banning or disqualification or licence suspension or cancellation order.

Item 12 of **Schedule 2** inserts **proposed section 1349** to the Corporations Act to remove penalty privilege for a range of proceedings under the Corporations Act or the ASIC Act or a proceeding in the AAT. The key changes are set out succinctly in paragraphs 5.42 to 5.47 and these are set out below for ease of reference.

5.42 The Bill will remove penalty privilege for proceedings where a disqualification, banning, suspension or cancellation order, or a declaration to that effect, is being sought. A person in such an administrative, civil or criminal proceeding will not be entitled to refuse or fail to comply with a requirement on the grounds that to do so might tend to make the person liable for a penalty by way of a disqualification, banning, suspension or cancellation order, or a declaration to that effect. This will restore the longstanding provision that penalty privilege does not apply to these types of proceedings.

5.43 The Bill will also remove penalty privilege in relation to a person complying with a statutory requirement under the Corporations Act or the ASIC Act on the grounds that to do so might tend to make the person liable for a penalty by way of a disqualification, banning, suspension or cancellation order, or a declaration to that effect.

5.44 The requirements that a person is not entitled to refuse or fail to comply with in relation to the proceeding or other statutory compulsion include:

- to answer a question or give information; or

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- to produce a book or any other thing; or
- to do any other act whatever.

5.45 These requirements are deliberately wide so that they will encompass any of the requirements ASIC could have imposed on a person prior to the *Rich* decision when it was seeking such an order and no other penalty. At that time, as penalty privilege could not be claimed, a defendant could not rely on it to refuse to do any act or fail to comply with any requirement. While these amendments do not affect the High Court's classification of these orders as penalties, the removal of penalty privilege is limited to when ASIC is seeking one of these remedies and no other penalties.

Proposed subsection 1349(4) has the effect that information (evidence) discovered as a consequence of the abrogation of the penalty privilege will be admissible in proceedings. The privilege will not be available either in court proceedings or during the investigative stages of an inquiry.

The amendments limit the type of penalty proceedings to disqualification, banning, suspension or cancellation order or a declaration to that effect, and **new subsection 1349(6)** makes clear that 'penalty' also includes 'forfeiture'.

The reader is referred to paragraphs 5.48 to 5.55 on pages 83 and 84 of the Explanatory Memorandum for a detailed explanation of the provisions of **proposed section 1349**.

Schedule 3—Improving regulation of insolvency practitioners

Background and main provisions

Professional indemnity insurance

Currently, section 1284 of the Corporations Act requires a successful applicant for registration as a liquidator to lodge and maintain with ASIC a security for due performance of his or her duties as a liquidator as determined by ASIC.

As the required securities, namely insurance performance bonds, are no longer available the Explanatory Memorandum in paragraph 6.13 on page 87 states that ASIC has been waiving this requirement for many years. **Item 8 of Schedule 3** repeals section 1284 and substitutes it with **proposed section 1284** which will require a registered liquidator or a liquidator of a specified body corporate to maintain adequate and appropriate professional indemnity insurance and fidelity insurance to cover for claims that may be made against the liquidator.

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Cancellation of registration by ASIC

ASIC has a discretion under subsection 1291(1) of the Corporations Act to cancel the registration of an official liquidator, who is on the Register of Official Liquidators maintained under subsection 1286(2), at any time. This provision does not extend to persons who are on the Register of Liquidators maintained under subsection 1286(1).

Subsection 1292 (2) gives the Companies Auditors and Liquidators Disciplinary Board (CALDB) the authority to cancel the registration of a liquidator on the Register of Liquidators on an application made by ASIC.

The Explanatory Memorandum in paragraph 6.20 on page 88 states that when a person becomes disqualified by reason of bankruptcy or disqualification from managing corporations and where a person fails to maintain the insurance required to cover their work as a registered liquidator, it is appropriate that ASIC should have power to expeditiously cancel that person's registration.

Item 10 of Schedule 3 inserts **proposed section 1290A** to give ASIC the power to cancel the registration of a liquidator in the circumstances referred to above without reference to CALDB.

Other changes on regulation of liquidators

The other changes made by the amendments to the Corporations Act in **Schedule 3** regarding the regulation of liquidators are listed below with references to detailed explanations in the paragraphs of the Explanatory Memorandum (EM).

- Extending the prohibition on inducements for the referral of work (**items 1 to 3** and **item 4** – paragraphs 6.1 to 6.4 on page 85 of the EM)
- Education criteria for registration as a liquidator (**items 5** and **6** – paragraphs 6.5 to 6.9 on page 86 of the EM)
- Experience criterion for registration as a liquidator (**item 7** - paragraphs 6.10 to 6.12 on pages 86 and 87 of the EM)
- Triennial statements to be replaced by annual statements (**item 9** - paragraphs 6.16 to 6.18 on page 88 of the EM)
- Transfer of books (**item 14** - paragraphs 6.23 to 6.25 on page 89 of the EM)
- Disciplinary proceedings – CALDB (**items 11 to 13** – paragraphs 6.26 to 6.33) on pages 89 and 90 of the EM)

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Schedule 4—Finetuning voluntary administration

Background and main provisions

The amendments in **Schedule 4** are in three Parts. The titles of these Parts with reference to **items** of **Schedule 4** and paragraphs of the Explanatory Memorandum (EM) are set out below.

Part 1—General (**items 1 to 46** – paragraphs 7.1 to 7.148 on pages 91 to 115 of the EM)

Part 2—Rights to property during administration (**items 47 to 59** – paragraphs 7.149 7.181 on pages 116 to 121 of the EM)

Part 3—Liquidation following administration (**items 60 to 71** – paragraphs 7.182 to 7.227 on pages 122 to 129 of the EM)

As it is not within the scope of a Bills Digest to cover each item of finetuning effected by Schedule 4, the more significant items from each Part of Schedule 4 have been selected for comment.

Part 1—General

Court's power to bind secured creditors

Division 10 of Part 5.3A of the Corporations Act deals with the execution and effect of a deed of company arrangement (DOCA). Subsection 444B(2) provides that the company must execute the instrument within 21 days after the end of the creditors' meeting authorising the company to execute a DOCA. Subsection 444B(5) states that the administrator must execute the instrument before, or as soon as practicable, after the company executes it.

Subsection 444B(6) states that when executed by both the company and the administrator, the instrument becomes a DOCA.

Section 444F provides that the court may limit rights of a secured creditor or owner or lessor in certain circumstances. Paragraph 444F(1)(a) states that this section applies where it is 'proposed' that a company execute a DOCA. There have been concerns that this section may apply from the time that the administrator forms the view that it would be in the creditors' interests to enter into a DOCA, which may be a point in time earlier than when the creditors approve that a DOCA be executed.

To remove this doubt, **item 28** of **Schedule 4** is repealed and substituted by **proposed paragraph 444F(1)(a)** to make section 444F apply from the time a meeting of creditors convened under section 439A resolve that the company execute a DOCA.

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The reader is referred to paragraphs 7.1 to 7.7 on pages 91 and 92 of the Explanatory Memorandum for further details of this amendment.

Third party guarantees

On the execution of a DOCA, section 444H of the Corporations Act provides that the company is released from a debt only where the DOCA provides for its release and the creditor concerned is bound by the DOCA.

Where third parties have guaranteed or indemnified a creditor against loss for various debts owed by the company to creditors there is uncertainty whether creditors' rights under guarantees and indemnities are unaffected on the execution of a DOCA.

Item 30 of Schedule 4 inserts **proposed section 444J** which states that section 444H does not affect a creditor's rights under a guarantee or indemnity, thus removing the uncertainty.

The reader is referred to paragraphs 7.8 to 7.13 on pages 92 and 93 of the Explanatory Memorandum for further details of this amendment.

Decision period for a chargee to enforce a charge

The holder of a charge over the whole or substantially the whole of the property of a company may enforce the charge without regard to the administration within the 'decision period' under section 441A of the Corporations Act. The 'decision period' as defined in section 9 is generally the 10 business day period following notification to the chargee of the appointment of the administrator. Business day as defined in section 9 means a day that is not a Saturday, a Sunday or a public holiday or bank holiday in the place concerned.

Item 1 of Schedule 4 will amend the definition of 'decision period' in section 9 to allow 13 business days instead of 10 business days.

The reader is referred to paragraphs 7.8 to 7.13 on pages 92 and 93 of the Explanatory Memorandum for further details of this amendment.

Meetings

The amendments by **items 5, 6, 11 and 13 to 20 of Schedule 4** allow a longer time for holding the first and second meetings of creditors and matters related to these meetings. A summary of the reforms in relation to these meetings which is set out in tables in paragraph 7.120 on pages 110 and 111 of the Explanatory Memorandum is reproduced below:

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First meeting	Current	New
<i>Timing of meeting</i>	5 business days	8 business days
<i>Notice of meeting</i>	2 business days	5 business days

Second meeting	Current	New
<i>Convening of meeting</i>	21 or 28 days	20 or 25 <u>business days</u>
<i>Notice of meeting</i>	5 business days	No change
<i>Timing of meeting</i>	Within 5 business days after the end of the convening period	Within 5 business days before or after the end of the convening period
<i>Adjournment period</i>	60 days	45 <u>business days</u>

The reader is referred to paragraphs 7.112 to 7.126 on pages 109 to 112 of the Explanatory Memorandum for further details of these amendments.

It should be noted that **items 9, 21, 24, 37 and 38** of **Schedule 4** substitute business days for days. The Explanatory Memorandum in paragraph 7.130 on pages 112 and 113 explains that Part 5.3A of the Corporations Act currently uses two different types of methodology for establishing periods or dates, namely, ‘business days’ and ‘days’. The change to ‘business days’ is being made for the adoption of consistent terminology.

Other changes in Part 1 of Schedule 4

The other changes which the amendments to the Corporations Act in **Part 1** of **Schedule 4** give effect to are listed below with references to the items and detailed explanations in the paragraphs of the Explanatory Memorandum (EM) to the Bill).

- Right to terminate a deed: (**items 33 and 34** – paragraphs 7.14 to 7.23 on pages 93 and 94 of the EM)
- Notification when deed wholly effectuated: (**items 31, 32 and 35** – paragraphs 7.24 to 7.28 on pages 94 and 95 of the EM)

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- Power to consent to a transfer of shares of the company: (**item 8** – paragraphs 7.29 to 7.38 on pages 95 to 97 of the EM)
- Administrator’s right of indemnity: (**items 22** and **45** – paragraphs 7.39 to 7.48 on pages 97 to 99 of the EM)
- Deed administrator’s ability to sell the company’s shares: (**item 29** – paragraphs 7.49 to 7.60 on pages 99 to 101 of the EM)
- Lodgement of accounts with ASIC: (**item 10** – paragraphs 7.61 to 7.66 on pages 101 and 102 of the EM)
- Reporting to creditors: (**item 12** – paragraphs 7.67 to 7.69 on page 102 of the EM)
- Fundraising in administration: (**item 46** – paragraphs 7.70 to 7.75 on pages 103 and 104 of the EM)
- Appointment of administrator by directors and chargees: (**items 2** and **4** – paragraphs 7.76 to 7.91 on pages 104 to 106 of the EM)
- Transition from liquidation to voluntary administration: (**items 3** and **39** – paragraphs 7.92 to 7.101 on pages 106 and 107 of the EM)
- Stay and termination of a liquidation: (**items 43** and **44** – paragraphs 7.102 to 7.107 on pages 107 and 108 of the EM)
- Application to replace administrator: (**item 40** – paragraphs 7.108 to 7.111 on pages 109 of the EM)
- Decision period for chargee to enforce a charge: (**item 1** – paragraphs 7.127 to 7.129 on page 112 of the EM)
- Conversion of ‘days’ to ‘business days’: (**items 9, 21, 24, 37** and **38** – paragraphs 7.130 to 7.132 on pages 112 and 113 of the EM)
- Role of administrator and administrator of deed: (**items 23, 25** and **26** – paragraphs 7.133 to 7.136 on page 113 of the EM)
- Notification that a company is subject to a deed: (**items 41** and **42** – paragraphs 7.137 to 7.144 on pages 114 and 115 of the EM)
- Resolutions for removing an administrator: (**item 7** – paragraphs 7.145 to 7.148 on page 115 of the EM)

Part 2—Rights to property during administration

Right of a person to retain pledged property

Section 440C of the Corporations Act provides that owners or lessors of property used, occupied by or in the possession of the company cannot take possession of the property or otherwise recover it, except with the administrator’s written consent or with the leave of the Court.

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Likewise, section 440B provides that a chargee cannot enforce a charge on property of the company, except with the administrator's written consent or with the leave of the Court.

There is some doubt whether a person who has a lien or pledge over property of a company will be entitled to retain possession of the property and sell or otherwise enforce the lien or pledge during the administration of the company.

Item 48 of Schedule 4 inserts **proposed section 440BA** to provide that the holder of the lien or pledge may continue to possess the property but cannot sell or otherwise enforce the lien or pledge, except with the administrator's written consent or with the leave of the Court

Power of an administrator to sell property subject to a lien, pledge or retention of title clause

Subsection 442C(1) of the Corporations Act provides that the administrator of a company must not dispose of property of a company that is subject to a charge or property that is used, occupied by or in the possession of the company but of which someone else is the owner or lessor.

Subsection 442C(2) provides an exception where the disposal is in the ordinary course of business of the company or with the written consent of the charge, owner or lessor as the case may be or with the leave of the court.

As there is some doubt whether the administrator may sell the property subject to a lien, pledge or retention of title clause, the Explanatory Memorandum in paragraph 7.154 on page 117 states that there is a need to clarify the law and that the reforms need to strike an appropriate balance between protecting the interest of the owner and security holder, and facilitating the rescue of viable companies in the interest of other creditors and stakeholders.

The amendments proposed by **items 47 and 55 to 59 of Schedule 4** bring about the following reforms which are succinctly stated in paragraphs 7.155 and 7.156 of the Explanatory Memorandum as follows.

7.155 Section 442C of the Corporations Act will be amended to provide that the administrator may sell property subject to a lien, pledge or retention of title clause, in the ordinary course of the company's business, or with the written consent of the owner or security holder, or with the leave of the Court. The amendments will also allow for a chargee, lienee, pledgee, lessor or owner to apply to the Court for an injunction if a proposed sale of the property would prejudice their interests. The administrator will be provided a right of inspection for property held under a lien or pledge, and a right to take possession to sell such property in order to effect a sale. The purchaser of the property would take clear title.

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7.156 To protect the interests of the security holder, the administrator will be obliged to retain the amount secured by a lien or pledge, for payment to the holders of those securities, when a power of sale is exercised over property subject to a lien or pledge. The administrator will be required to act reasonably in exercising the power of sale. Similar provisions will be introduced for property that is in the possession of the company but owned by a third party due to the operation of a retention of title clause.

The reader is referred to paragraphs 7.157 to 7.174 on pages 117 and 118 of the Explanatory Memorandum for details of the proposed amendments.

Right of a creditor to sell property subject to a lien or pledge

The amendments proposed above clarify that the holder of a lien or pledge may not sell the property secured without the consent of the administrator. **Item 54 of Schedule 4** inserts **proposed section 441JA** into the Corporations Act to clarify how the sale proceeds are to be dealt with. **Proposed section 441JA** provides that the holder of the lien or pledge is entitled to retain the sale proceeds where they equal or fall short of the debt secured. Where the net proceeds falls short of the debt secured, the holder of the lien or pledge will be able to prove for the balance as an unsecured creditor.

However, where the sale proceeds exceeds the debt secured the holder of the lien or pledge will be required to pay the excess to the administrator.

Other changes in Part 2 of Schedule 4

The other changes which the amendments to the Corporations Act in **Part 2 of Schedule 4** give effect to are listed below with references to the items and detailed explanations in the paragraphs of the Explanatory Memorandum (EM) to the Bill).

- General moratorium for bankers' liens and collateral lodged with clearing
- and settlement facilities (**item 49** – paragraphs 7.168 to 7.172 on pages 119 and 120 of the EM).
- Clarifying the injunction power allowing a court to prevent enforcement (**item 53** - paragraphs 7.173 to 7.175 on page 120 of the EM)
- Clarifying the powers of a court to allow the enforcement of a charge (**items 51 and 52** - paragraphs 7.176 to 7.181 on pages 120 and 121 of the EM)

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Part 3—Liquidation following administration

Priority for debts incurred during administration

To clear the uncertainty about priority of post-DOCA creditors where a liquidation follows a DOCA, **item 67 of Schedule 4** will amend section 556 of the Corporations Act by inserting **proposed subsection 556(1A)** to provide that the priority afforded to post-DOCA creditors under paragraph 556(1)(a) only applies to expenses:

- incurred by the administrator of a DOCA, and
- relating to a debt or claim admissible under section 553(1A) for debts incurred during a DOCA,

if the administrator is personally liable for the expenses.

The reader is referred to paragraphs 7.149 to 7.152 on page 116 of the Explanatory Memorandum for further details of the proposed changes.

Report as to affairs

Division 12 of Part 5.3A of the Corporations Act deals with the transition to creditors' voluntary winding up and section 446 deals with the administrator becoming the liquidator in certain circumstances.

There is no requirement at present for the creditors to be given an updated report if an administration or DOCA proceeds to liquidation. In consequence, a liquidator who takes over from an administrator is handicapped without a report on the affairs of the company at the point of takeover.

Item 63 of Schedule 4 inserts **proposed section 446C** to provide that the liquidator may require the submission of a report about the company's affairs at a date specified in a written notice from an officer of the company. An officer of a company is defined in section 9 to include an administrator or an administrator of a DOCA.

Proposed subsection 446C(7) requires the liquidator to lodge a copy of the report with ASIC within 7 days of receipt of the report.

Proposed subsection 446C(10) provides that the failure to comply with a notice to submit a report on the company's affairs is an offence of strict liability.

The reader is referred to paragraphs 7.210 to 7.222 on pages 126 to 128 of the Explanatory Memorandum for further details of the proposed changes.

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Other changes in Part 3 of Schedule 4

The other changes which the amendments to the Corporations Act in **Part 3** of **Schedule 4** give effect to are listed below with references to the items and detailed explanations in the paragraphs of the Explanatory Memorandum (EM) to the Bill).

- Priority for borrowings during administration (**items 60** to **62** – paragraphs 7.188 to 7.196 on pages 122 and 124 of the EM).
- Uncommercial transactions during voluntary administration and deed of company arrangement (**item 68** – paragraphs 7.197 to 7.203 on pages 124 and 125 of the EM).
- Period of challenging voidable transactions (**items 69** and **70** – paragraphs 7.204 to 7.209 on pages 125 and 126 of the EM).
- Priority of costs of making winding up application (**item 65** – paragraphs 7.223 to 7.227 on pages 128 and 129 of the EM).

Schedule 5—Miscellaneous

Priority of administrative expenses in voluntary liquidation

Section 512 of the Corporations Act provides that all proper costs, charges and expenses of and incidental to the winding up (including the remuneration of the liquidator) are payable out of the property of the company in priority to all other claims.

Section 513, a provision of Part 5.6 which deals with winding up generally, states that except so far as the contrary intention appears, the provisions of the Corporations Act about winding up apply in relation to the winding up of a company whether in insolvency, by the Court or voluntarily.

Subsection 556(1), which is a provision of Part 5.6 also deals with the determination of priority of amount payable in a creditors' voluntary winding up.

To resolve what may appear to be a duplication of provisions, the Explanatory Memorandum in paragraph 8.2 on page 131 states that section 512 is no longer necessary.

In consequence, **item 7** of **Schedule 5** repeals section 512.

Share capital reductions—partly-paid shares

Part 2J.1 of the Corporations Act deals with share capital reductions and share buy-backs. Division 1 deals with reductions in share capital not otherwise authorised by law.

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Subsection 256B(1) states that a company may reduce its share capital in a way that is not otherwise authorised by law if the reduction:

- (a) is fair and reasonable to the company's shareholders as a whole,
- (b) does not materially prejudice the company's ability to pay its creditors, and
- (c) is approved by the shareholders under section 256C,

If this provision is used to cancel partly-paid shares it would appear that creditors will be prejudiced as the company would have cancelled a right to claim monies from the holders of partly paid shares which would add to the pool of assets available to the creditors. The Explanatory Memorandum in paragraph 8.10 on pages 132 and 133 states that there was some discussion of the issues arising from the interpretation of this provision in the context of the James Hardie inquiry.

Item 5 of Schedule 5 inserts **proposed subsection 256B(1A)** which states that to avoid doubt, a cancellation of a partly-paid share is taken to be for consideration.

The Explanatory Memorandum states in paragraph 8.11 on page 133 that the effect of this amendment is that the share cancellation process in section 256B(1) can only be used to cancel partly-paid shares if the cancellation does not materially prejudice the company's ability to pay its creditors. We might add that while this comment in the Explanatory Memorandum relies on paragraph 256B(1)(b) being an overriding provision, there is scope for the view that a cancellation of partly-paid shares must also pass the test that the reduction is fair and reasonable to the company's shareholders as a whole as provided in paragraph 256B(1)(a).

Schedule 6—Transitional

Item 1 of Schedule 6 adds **Part 10.9** to the Corporations Act. This Part is titled: Transitional provisions relating to the Corporations Amendment (Insolvency) Act 2007.

Proposed section 1480 gives the application dates for the introduction of the amendments made by various items in **Schedule 1** as well as transitional arrangements.

Proposed section 1481 gives the application dates for the introduction of the amendments made by various items in **Schedule 2** as well as transitional arrangements.

Proposed section 1482 gives the application dates for the introduction of the amendments made by various items in **Schedule 3** as well as transitional arrangements.

Proposed section 1483 gives the application dates for the introduction of the amendments made by various items in **Schedule 4** as well as transitional arrangements.

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Application

Sections 1 to 3 of the Act commences on the day on which it receives the Royal Assent as stated in Column 2 of table item 1 in the table to **clause 2** of the Bill (the table).

The commencement dates of the items in the various Schedules are given in the table and it is set out below.

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent.	
2. Schedule 1, items 1 to 48	A single day to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day on which this Act receives the Royal Assent, they commence on the first day after the end of that period.	
3. Schedule 1, items 49 and 50	On the first day after the end of the period of 6 months beginning on the day on which the provision(s) covered by table item 2 commence.	
4. Schedule 1, items 51 to 120	At the same time as the provision(s) covered by table item 2.	
5. Schedule 1, item 121	At the same time as the provision(s) covered by table item 3.	
6. Schedule 1, items 122 to 133	At the same time as the provision(s) covered by table item 2.	
7. Schedule 2, items 1 to 10	At the same time as the provision(s) covered by table item 2.	
8. Schedule 2, item 11	At the same time as the provision(s) covered by table item 3.	
9. Schedule 2, item 12	At the same time as the provision(s) covered by table item 2.	
10. Schedules 3 to 6	At the same time as the provision(s) covered by table item 2.	

Note: This table relates only to the provisions of this Act as originally passed by both Houses of the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

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It will be noted that table item 1 adds that anything in this Act not elsewhere covered by this table also commence on the day on which the Act receives the Royal Assent.

Financial implications

The [Explanatory Memorandum](#) to the Bill in paragraph 2.10 on page 4 states that there is no financial impact from implementing the measures in the Bill.

Concluding comments

Importance of an effective and transparent corporate insolvency regime

The important role played by an effective and transparent corporate insolvency regime in the modern Australian economy was described by the Hon. Chris Pearce on [10 November 2006](#):⁷

Australia's corporate insolvency regime is a critical part of our economic infrastructure. Insolvency law underpins the system of financial and contractual relationships that enable trade and commerce to take place.

A modern credit-based economy needs predictable, transparent and affordable means for enforcing secured and unsecured credit claims. A well-designed insolvency system helps business to obtain financing more easily and at a lower cost.

Insolvency laws and processes also complement the general body of rules governing directors' duties, as they provide a set of incentives and sanctions that guide the behaviour of directors during the life of a company.

The need for an effective insolvency regime has also been highlighted by a number of high profile corporate collapses in the recent past, including:

- the collapse of the HIH Insurance group in March 2001, which had far reaching adverse consequences for individuals, businesses and government. The [final report of the HIH Royal Commission](#) estimated that, on formal winding up in August 2001, HIH had debts of between \$3.6 billion and \$5.3 billion, making it one of, if not the, largest corporate collapse in Australian history. By October 2006 the Commonwealth Government had paid out \$490 million through the government-funded HIH Claims Support Scheme. By that time over 15 000 applications had been received (see [here](#));
- the \$1.7 billion failure of One.Tel in June 2001. Legal and investigative costs associated with the One.Tel collapse were recently estimated by one newspaper article as exceeding \$30 million;⁸ and

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- a more recent spate of property company collapses, including the Westpoint, Fincorp and Estate Property groups.

ASIC's insolvency appointment statistics set out below suggest that a considerable number of companies enter external administration annually. This highlights the need for a more effective and transparent corporate insolvency regime.

Companies entering external administration and insolvency appointments — 2003-07

	2003	2004	2005	2006	2007a
Companies entering external administration ^b	6661	6618	7277	7737	2225
Insolvency appointments ^c	11 042	10 823	11 758	12 486	3461

Notes: ^a Figures for 2007 cover the period January to April; ^b Number of companies entering into a form of external administration for the first time. ASIC advises that a company will be included only once in these statistics, regardless of whether it subsequently enters into another form of external administration. The only exception occurs where a company is taken out of external administration, for example as the result of a court order, and at a later date re-enters external administration. ^c ASIC's Insolvency Appointments statistics show the number of insolvency appointments recorded, categorised by type of appointment. As a company can be under more than one form of insolvency administration at any one time and can progress from one type to another, a company can be included in these statistics more than once. For this reason, the number of insolvency appointments will always be greater than the number of companies going into external administration for the first time.

Source: [ASIC insolvency statistics](#) (2003, 2004, 2005, 2006, 2007)

Greater scrutiny of insolvency practitioners

The Bill contains a number of measures aimed at providing greater scrutiny of insolvency practitioners. These include provisions which require practitioners to declare prior advisory and other relevant relationships and to provide more timely information on fees.

The issue of declaring practitioner interest was discussed in detail in submissions and in the [Corporate Insolvency Laws: A Stocktake](#), the report of the Joint Committee on Corporations and Financial Services (PJC). For example (p. xx):

Problems about the lack of independence of external administrators were commonly expressed in submissions and confidential evidence received by the Committee into the conduct of particular administrations... The Committee considers that a statement of independence which would disclose professional, personal or business

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relationships between the administrator or his/her firm and the company or its officers, members or creditors would be an important factor not only to improve the perception of independence but encourage actual independence. It would alert creditors to any possible conflict of interests that the administrator may have and assist them at their first meeting in considering whether or not to remove the administrator.

The level of practitioner fees was also a prominent area of concern expressed in submissions to the PJC. The PJC's final view was that, while a legislatively prescribed schedule of fees would be anti-competitive, greater and more timely disclosure in relation to the basis of fees was required.

There have been a number of comments from insolvency practitioners in relation to these changes. For example, Mr Michael Hughes, a member of the Insolvency Practitioners Association of Australia (IPAA) national committee, stated:

What is capturing everyone's attention are the declarations of relevant relationships that have to be made at an early point. It's very important that creditors see that there is independence in practitioners. This reform will make all practitioners turn their mind to this issue.⁹

Mr John Melliush, president of the IPAA, also stated that:

The existing legislation is now out of context... These amendments represent 15 years of clean-up.¹⁰

The changes set out in the current Bill in relation to disclosure of prior relationships also appear broadly in line with the [best practice guidelines of the IPAA](#) released in 2003.

Protection of employee entitlements

The Regulation Impact Statement (RIS) which is included in Chapter 3 of the Explanatory Memorandum considered two options in relation to the priority of employee entitlements in voluntary administration. These are included in paragraphs 3.26 and 3.27 on pages 10 and 11 of the Explanatory Memorandum.

Option 1 was to leave the voluntary administration procedure unchanged in relation to the priority of employee entitlements.

Option 2 was the PJC Report recommendation that the Government amend the law to make it mandatory to preserve the priority available to creditors in a winding up, unless affected creditors agree to waive their priority. The PJC also recommended that creditors or the administrator should have the right to initiate court proceedings to have the deed upheld.

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The RIS at paragraph 3.42 on page 13 concludes that the recommended option is for the law to recognise that the priority of employee entitlements should be safeguarded in DOCAs but not necessarily in precise terms proposed by the PJC.

The measure in the Bill will enable creditors as a whole to vote against the inclusion of a priority for employee entitlements in a DOCA. There is provision in the Bill for any dispute between creditors as a whole and eligible employee creditors in relation to the recognition of priority of employee entitlements to be resolved by a Court on the application of the administrator, or an eligible employee creditor or any interested party. The Court may approve the non-inclusion of a provision protecting eligible employee creditors if the Court is satisfied that the non-inclusion would be likely to result in the same or a better outcome for eligible employee creditors as a whole than would result from the immediate winding up of the company.

The measures in the Bill appear to have struck a balance between competing public interests, namely, enhancing protection of employee entitlements and providing greater flexibility to the voluntary administration procedure to enable businesses to tide over temporary difficulties. The RIS concludes that the impact of the measures in the Bill in relation to recognition of the priority of employee entitlements in a DOCA be monitored by ASIC and the Treasury.

Endnotes

1. Australian Law Reform Commission, [General Insolvency Inquiry](#) (ALRC36), 1988, generally referred to as the Harmer Report after the Commissioner in charge of the Inquiry Mr. Ron Harmer.
2. The Hon Chris Pearce, MP, Parliamentary Secretary to the Treasurer, [Pearce Announces Insolvency Reform Package](#), Press Release, Canberra, 12 October 2005.
3. The Treasury, [Insolvency Reform Package](#), 12 October 2005.
4. Corporations and Markets Advisory Committee (CAMAC), [Rehabilitating large and complex enterprises in financial difficulties](#), Report 2004.
5. *ASC v Greig Ronald Heilbronn* (No. G 302 of 1995, Fed No. 27/95, Federal Crt of Australia in Qld.
6. [2004] HCA 42..
7. Hon Chris Pearce, MP, Parliamentary Secretary to the Treasurer, address to the Insolvency Practitioners Association of Australia, [Corporate Insolvency: Looking to the Future](#), 10 November 2006.
8. Moran, Susannah. 2007, [‘One.Tel case resumes as bill hits \\$30m’](#), *The Australian*, 29 January 2007, p. 5.

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9. Zempetakis, Helene. 2007, [‘Insolvency reforms lift scrutiny’](#), *The Australian Financial Review*, 9 February 2007, p. 70.
10. Zempetakis, Helene. 2007, [‘Insolvency reforms lift scrutiny’](#), *The Australian Financial Review*, 9 February 2007, p. 70.

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