

Chapter 1

Introduction and background

Conduct of the inquiry

1.1 On 29 November 2006 the Parliamentary Joint Committee on Corporations and Financial Services resolved to inquire into the Exposure Draft of the Corporations Amendment (Insolvency) Bill 2007 and related draft regulations.¹ The bill and regulations were released for public comment by the Government on 13 November 2006. The inquiry was advertised in the *Australian* newspaper and on the internet. The committee agreed to a closing date for submissions of 26 February 2007, which coincided with the closing date of Treasury's public consultation on the bill, and a reporting date of 29 March 2007.

1.2 The committee held one public hearing in Melbourne on 5 March 2007. Witnesses who appeared before the committee are listed at Appendix 2, and the Hansard is available on the internet at <http://www.aph.gov.au/hansard>.

Background and purpose of the bill

1.3 The draft bill includes the most comprehensive package of insolvency law reforms since the Harmer review in 1988. Announcing the Government's intention to proceed with reforms to Australia's insolvency laws in October 2005, the Parliamentary Secretary to the Treasurer, the Hon. Chris Pearce MP, stated the reforms took into consideration a number of reviews and inquiries into the corporate insolvency framework. These include reports of the Corporations and Markets Advisory Committee (CAMAC) in 1998, 2000 and 2004,² the committee's 2004 *stocktake* report on corporate insolvency laws,³ and the 2004 report of the James Hardie Special Commission of Inquiry.

1.4 Given the specialised nature of insolvency, the Government decided to appoint an Insolvency Law Advisory Group to provide technical advice on the draft legislation. The Group includes practitioners, insolvency experts and representatives from the Institute of Chartered Accountants in Australia, CPA Australia, the National Institute of Accountants, the Australian Banking Association and the Insolvency Practitioners Association of Australia. According to Treasury: 'Tranches of the draft

1 The bill and Corporations and Australian Securities and Investments Commission Amendment Regulations 2007 were accompanied by detailed Explanatory Statements which are available on Treasury's website at: http://www.treasury.gov.au/documents/1186/PDF/ES_to_the_Bill.pdf

2 CAMAC, *Corporate Voluntary Administration*, 1998; CAMAC, *Corporate Groups*, 2000; CAMAC, *Rehabilitation of Large and Complex Enterprises*, 2004

3 Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Insolvency Laws: a Stocktake*, June 2004

legislation were progressively prepared and discussed with the advisory group on a confidential basis throughout 2006, culminating in the public release of the package on 13 November'.⁴

1.5 While earlier reports by CAMAC and the committee generally endorsed the current insolvency system, they proposed a range of measures to strengthen creditor protections and improve the efficiency of the insolvency process. Issues arising out of these reviews addressed four broad themes:

- strengthening creditor protections through enhancements to the General Employee Entitlements and Redundancy Scheme (GEERS);
- deterring potential misconduct by company officers through the establishment of an assetless administration fund and a new ASIC enforcement program targeted at phoenix company behaviour;
- improving the regulation of insolvency practitioners through enhanced disclosure requirements in relation to independence and remuneration; and
- fine-tuning voluntary administration through a package of technical amendments to enhance the efficiency and cost effectiveness of the process.⁵

1.6 The Parliamentary Secretary to the Treasurer stated the reforms will introduce greater flexibility into insolvency proceedings, remove unnecessary regulatory burdens and modernise legal frameworks to reflect market developments. Specifically:

The Bill proposes the introduction of important disclosure requirements, an improved registration regime, reforms to support the \$23 million assetless administration fund...and enhancements to the insolvency processes themselves...

The Bill aims to reduce the cost of insolvency proceedings for the benefit of creditors generally, for example by rationalising advertising and meeting requirements and by allowing for greater use of modern technology throughout proceedings. A key new innovation is a proposed statutory pooling process, which will allow for savings and improved returns to creditors through the consolidation of multiple insolvency proceedings for related companies.⁶

4 Mr Geoffrey Miller, General Manager, Corporations and Financial Services Division, Markets group, The Treasury, *Committee Hansard*, 5 March 2007, pp.6-7

5 *Corporate Insolvency Reform*, The Treasury, 12 October 2005

6 'Pearce announces most substantial insolvency reforms in almost 20 years', Press Release, 16 November 2006

Committee's approach

1.7 At the outset the committee welcomes the release for public comment of the draft bill, the first bill on insolvency in almost 11 years, and the Government's intention to have the legislation introduced and passed by the Parliament in 2007. The committee supports the major policy objectives of the bill and notes that a number of provisions have explicitly picked up on recommendations from its 2004 report (these recommendations are listed at Appendix 3). In particular, the committee welcomes the inclusion of provisions which:

- address concerns about the independence of administrators by requiring them to declare any 'relevant relationships' and declare any indemnities that have been provided (consistent with recommendation 1);
- allow creditors to appoint a different person as liquidator when a company proceeds from administration into liquidation or from a deed of company arrangement (DOCA) into liquidation (consistent with recommendation 2);
- remove the requirement for external administrators to publish notices, except where there are strong policy reasons for doing so (consistent with recommendation 19);
- introduce a facility to allow external administrators to send notices electronically provided certain conditions are met (consistent with recommendation 20);
- include the Australian Securities and Investments Commission as a party who may apply to the court for a review of the remuneration of administrators and deed administrators (consistent with recommendation 23);
- clarify the treatment of the superannuation guarantee charge (SGC) to ensure that superannuation contributions and the SGC attract the same priority (consistent with recommendation 46); and
- make it mandatory for a DOCA to preserve the priority available to employee creditors in a winding up unless affected creditors agree to waive their priority (consistent with recommendation 49).

1.8 The approach taken by the committee on the issue of insolvency has not significantly changed since 2004. As stated in its *stocktake* report, the committee believes that the foremost objective of insolvency law is to promote and maximise trust in the operation of the system on the part of the community in general and the business and corporate sector in particular. The committee continues to hold the view that an effective insolvency regime must strive to balance multiple and even

conflicting policies and objectives.⁷ This balancing act was foremost in the committee's deliberations on the evidence it received on the current bill.

Scope of inquiry

1.9 The committee decided that its inquiry would not traverse the same broad ground covered in its 2004 report, or consider in detail major provisions of the draft bill. The committee instead agreed to narrow the focus of its inquiry to issues raised by recommendations included in the 2004 report which the Government rejected, agreed with in principle or argued were matters falling under the jurisdiction of ASIC. This approach enabled the committee to seek the views of insolvency practitioners, regulators and other interested stakeholders on specific issues of continuing relevance which relate to four broad categories:

- the regulation of the insolvency process;
- the role of administrators and directors;
- the treatment of employee entitlements; and
- the need for empirical research and review processes.

1.10 To this extent, this inquiry has enabled the committee to provide a postscript to its comprehensive *stocktake* report of June 2004.

1.11 Recommendations from the committee's 2004 report which the Government rejected, supported in principle or argued were matters for ASIC, together with the Government's response, are listed at Appendix 4.

7 Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Insolvency Laws: a Stocktake*, June 2004, p.xix