

Improving Outcomes for Creditors - An Analysis of the Efficiency and Strength of Creditors' Protections provided by the Provisions of Part 1-4 of Schedule 1 of Corporations Amendment Insolvency Act 2007 (Cth)

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Published

2008

Conference Title

Corporate Law Teachers Association Conference : Securities Class Actions, Creditors Rights and Enhanced Corporate Governance: The Dawn of a New Age?

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**IMPROVING OUTCOMES FOR CREDITORS – AN ANALYSIS
OF THE EFFICIENCY AND STRENGTH OF CREDITORS’
PROTECTIONS PROVIDED BY THE PROVISIONS OF PART 1-4
OF SCHEDULE 1 OF *CORPORATIONS AMENDMENT
INSOLVENCY ACT 2007 (Cth)***

The rationale for the latest changes in corporate insolvency laws was in part to improve outcomes for creditors by strengthening creditor protections and improving the efficiency of the insolvency process. To do so four key areas were identified: enhancing employee entitlements protections; improving information to creditors; streamlining external administration by removing unnecessary procedural requirements and introducing a statutory pooling process.

It is contended, however, that the attainment of efficiency and strong creditor protections are divergent goals, made more so by the manner of regulating for such goals. The purpose of this article is to highlight with examples from the latest changes in external administration laws, the divergent nature of both goals; to show that the use of mandatory provisions while achieving creditor protection, may be at the expense of procedural efficiency, depriving the external administrator of flexibility; and that to maximise creditors’ outcomes requires a continual balancing of the goals of creditor protection and efficiency.

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INTRODUCTION

The latest amendments to the *Corporations Act 2001*(Cth) introduced a range of measures intended to modernise Australia's insolvency laws¹ as part of a long and protracted review of the Australian corporate insolvency framework.² While the review, 'generally endorsed the current insolvency system, at the same time (it) proposed measures to strengthen creditor protections and improve the efficiency of insolvency processes'.³ It is contended, however, that the attainment of efficiency and strong creditor protections are divergent goals and therefore to obtain both may require a balancing of such goals.

The divergence between the corporate insolvency goals of creditor protection and efficiency may also be attributed in part to the manner of regulating for such goals. Regulation of corporate insolvency may be achieved through two broad means. Either 'de-regulation policies',⁴ whereby the market is relied upon to ensure efficient realisation and distribution of the available assets of the insolvent company, and corporate insolvency laws exist to assist the market in this process. Or, corporate insolvency laws replace the market mechanism controlling or impeding its operation by imposing rules upon the market participants, which is known as 'command and control regulation'.⁵ Examples of both types of regulation can be found in the latest amendments to corporate insolvency laws which will be addressed within the body of the paper. It is not the intention of this article to determine which of either means is more appropriate, rather only that both means of regulation will be considered in terms of efficiency and creditor protection.

¹ Explanatory Statement to Exposure Draft on *Corporations Amendment (Insolvency) Bill 2007* (Cth) November 2006, 6.

² The reforms find their basis in the recommendations of the following reviews and inquiries: 1997 *Review of the Regulation of Corporate Insolvency Practitioners*; 1998 Corporations and Markets Advisory Committee (CAMAC) Report *Corporate Voluntary Administration*; 2000 CAMAC Report *Corporate Groups*; 2004 CAMAC Report *Rehabilitation of Large and Complex Enterprises*; 2004 Parliamentary Joint committee on Corporations and Financial Services (PJC) Report *Corporate Insolvency Laws: A Stocktake*.

³ Explanatory Memorandum to *Corporations Amendment (Insolvency) Bill 2007* (Cth), 5.

⁴ Angus Corbett, 'A Proposal for a more Responsive Approach to the Regulation of Corporate Governance' 1995 23 *Federal Law Review* 279-280. Corbett argues that the use of command and control compensatory remedies can distort the regulation of directors' duties where other elements of the corporate governance system are at work, namely the securities market.

⁵ Corbett, above note 4.

The rationale for the latest corporate insolvency law changes was in part to improve outcomes for creditors. Four key areas were identified as means of achieving this outcome:⁶

- (i) enhanced protections for employee entitlements;
- (ii) improved information to creditors;
- (iii) removal of unnecessary procedural requirements;
- (iv) introduction of a statutory pooling process to facilitate the external administration of related companies.

The purpose of this article is to determine whether the above-listed measures introduced by the *Corporations Amendment (Insolvency) Act 2007* achieve their stated aim. To that end the article will be broken into three parts:

- (1) to consider the multiple purposes of corporate insolvency laws
- (2) to consider the meaning of efficiency and creditor protection
- (3) to highlight with examples from the latest changes in external administration laws the divergent nature of both goals of efficiency and creditor protection and that to improve creditors' outcomes requires a balancing of such goals.

MULTIPLE PURPOSES OF CORPORATE INSOLVENCY REGIME

Australian corporate insolvency laws are chiefly concerned with providing an efficient process for the winding up of companies, the realisation of available company assets in an orderly manner and the equitable distribution of the sale proceeds there from to creditors and shareholders. Insolvent companies face one or more possible external administration procedures:

Liquidation

Voluntary administration or

Receivership.

⁶ Explanatory Statement , above note 1, 6.

Regardless of which procedure is instituted all have the common objective (in part) of obtaining the maximum return possible for creditors and members.⁷

Individually, the best possible outcome for all creditors, whether secured or unsecured, preferential or non-preferential, faced with an insolvent company debtor is to maximise the amount of repayment of their debt in a timely manner.⁸ The amount of repayment available to creditors is dependant upon the total distributable funds available to the external administrator. To a large extent this distributable fund is a discrete pool. The capacity of the Administrator to enlarge this pool is limited but may be increased by:

- (i) adopting efficient procedural methods so as to decrease external administration costs;
- (ii) allowing for greater flexibility to be given to the administrator so as to derive greater returns from the disposal or non-disposal of insolvent company assets;
- (iii) injection of external funds.

Given that the costs of administration reduce the amount of distributable funds⁹ any measures increasing the efficiency of the external administration should increase this pool of available funds, improving the outcome of all creditors. The removal of unnecessary procedural requirements and the introduction of a statutory pooling process should achieve greater availability of funds for creditors in general.

However, enhancing protections for employee entitlements will improve outcomes for employee creditors in the form of larger benefits being paid, but this may well be at the expense of other creditors or stakeholders. The delivery of improved information to creditors may lead to more timely and appropriate decision-making on the part of creditors resulting in improved returns to the administration. However, this must weighed against the costs of providing such information.

⁷ S435A *Corporations Act 2001* (Cth) The objective of the voluntary administration scheme is to administer the business, property and affairs of an insolvent company so as to maximise the chances of the company, or as much as possible of its business, continuing in existence or failing that, results in a better return for the company's creditors and members than would result from an immediate winding up of company.

⁸ Particular categories of creditors such as employees may consider the continued existence of the company's business in a restructured form part of this best possible outcome.

⁹ Preferential creditors include the costs of administration or liquidation including the administrator's or liquidator's remuneration. S556 *Corporations Act 2001*(Cth) .

MEANING OF EFFICIENCY

Historically, economic analysis has sought to assess corporate governance laws on the basis of their efficiency, principally by minimizing transaction costs.¹⁰ Essentially, a company's separate legal personality accompanied by its limited liability¹¹ reduces transaction costs, whether those transaction costs arise from aggregating capital for business ventures; or subsequent monitoring costs once investment in a particular business venture has taken place. Economic efficiency is achieved by minimizing such transaction costs, potential returns on investment in the business venture are then maximized and thereby enterprise is encouraged.

A similar analysis can be applied to corporate insolvency laws. The external administration laws applying to an insolvent company, govern the possible reconstruction or winding up of the company and the distributions of its assets amongst its stakeholders. By minimizing the transaction costs involved in the reconstruction or winding up process, economic efficiency is achieved, potential returns to creditors and other stakeholders are maximised, the risk levels of investment and consequently the cost of credit minimized.

In economics, efficiency can be measured in two ways: in terms of "pareto efficiency" established by the Italian economist Vilfredo Pareto's whose concept of efficiency known as Pareto efficiency or Pareto optimality is that a situation is efficient or optimal where it is not possible to change the situation to make someone better off without making someone else worse off;¹² or the more lenient measure of Kaldor-Hicks efficiency developed by two British 20th century economists, which holds a change is efficient if in aggregate the benefits associated with the change exceed the costs of the change. Those who gain can compensate those who lose, although there is no need for compensation to occur under their model.¹³

A third measure of efficiency adopted by Rizwaan Mokal¹⁴ draws upon concepts developed by Oliver Williamson is called 'transaction cost efficiency' which labels 'a

¹⁰Transaction cost is used in an economic context to include agency costs and opportunity costs. See Frank Easterbrook & Daniel Fischel, *The Economic Structure of Corporate Law* 1991, 9-11, 141.

¹¹ Frank Easterbrook & Daniel Fischel, *The Economic Structure of Corporate Law* 1991.

¹²A.M. Polinsky. *An Introduction to Law and Economics* 2003.

¹³ Brian Cheffins, *Company Law: Theory, Structure and Operation* 1997, 15.

¹⁴ Mokal R. *Corporate Insolvency Law Theory and Application* 2005, 25 Mokal offers a number of criticisms of Pareto and Kaldor-Hicks concepts of "efficiency" as part justification for his 'transaction cost efficiency'.

method is efficient, given a particular amount of resources dedicated towards its implementation, when it can operationalize the set of substantive goals to a greater degree than would be possible for any other feasible method'.¹⁵ Mokal argues that the attainment of transaction cost efficiency should be a procedural goal of every part of a morally defensible legal system.¹⁶ Transaction costs are then sub-divided into co-ordination costs and motivation costs. Co-ordination costs being the costs to eliminate the informational asymmetries so that fuller, more uniform levels of information are available to all parties. Motivation costs being those resources expended so as to align the interests of all parties to pursue a set of co-ordinated substantive goals.¹⁷

Adopting Mokal's analysis, a substantive goal of corporate insolvency laws is to provide creditor protection, whereas the achievement of efficiency in the administration of current insolvency laws is a procedural goal.

MEANING OF CREDITOR PROTECTION

Creditors obtain protection for their debt in various ways. For example, secured creditors as a matter of contract agree with the debtor prior to insolvency, that they have first priority of repayment from the proceeds of the sale of the fixed charge asset. Aside from contractual agreement insolvency laws give protection to certain creditors based upon public policy grounds.¹⁸ Without such protection the principle of *pari passu* (pro rata) distribution applies to the unsecured debts and claims where the property of the company is insufficient to meet them in full.

For example, employees enjoy preferential status as unsecured creditors in the distribution of an insolvent company's property. This priority afforded to employee entitlements in the distribution of an insolvent company's property also applies to the repayment of debts by a receiver appointed under a floating charge and is now a mandatory default provision (unless specifically excluded) under a Deed of Company Arrangement (DOCA) in a Voluntary Administration.¹⁹

¹⁵ Mokal, above note 14, 26.

¹⁶ Mokal, above note 14, 26.

¹⁷ Mokal, above note 14, 26.

¹⁸ S556 *Corporations Act 2001* (Cth) sets out which creditors claims must be paid in priority to all other unsecured debts and claims on the winding up of the company.

¹⁹ S433(3) *Corporations Act 2001* (Cth).

Depending upon the category of employee entitlement, including unpaid wages and superannuation contributions and superannuation guarantee charge (see below discussion) ; amounts due in respect of injury compensation ; accrued annual leave and accrued long service leave; or retrenchment payments such entitlements rank highly in the statutory order of payment.²⁰ Except for administration costs, employee entitlements have priority over the claims of a floating chargee,²¹ and all other unsecured creditors.

The existence of such preferential rights to payment enjoyed by employees appears to be a historical one²² based on public interest in protecting employees under insolvency law²³. Such preferential rights are in contradiction to the fundamental principle of *pari passu*,²⁴ however, support for the need to protect employee entitlements through priority of payment exists at an international level.²⁵ In the majority of international jurisdictions priority creditor status is conferred on employees in the event of corporate insolvency.²⁶

Recognition is given that employees lack the ability to diversify their risk, unlike other unsecured creditors and stakeholders. Other unsecured creditors may diversify their risk by having a large customer base, or seek additional security such as a personal guarantee. Shareholders may diversify their investment portfolio to hedge against risk. Employees generally have one employer and are therefore exposed to potential loss of all unpaid wages, super, leave or redundancy payments on the employer's insolvency. Thus employees are considered to be in a more vulnerable position unable to influence the terms of lending and lacking the ability to monitor

²⁰ S556 *Corporations Act 2001* (Cth).

²¹ S561 *Corporations Act 2001* (Cth).

²² Based on Australia's adaption of England's principle of priority for employees which can be traced back to 1825 when priority for wages owed to clerks and servants existed.

²³ Andrew Keay & Peter Walton 'The Preferential Debts Regime in Liquidation law: in the Public Interest?' *Company Financial and Insolvency Law Review* 1999, 3, 90.

²⁴ The principle of *pari passu* requires under insolvency law that unsecured creditors should rank equally and where insufficient assets exist to cover all liabilities such unsecured creditors should share equally then in a proportionate distribution of the available assets.

²⁵ See <http://www.austlii.edu.au/Australian Treaty Series 1995 No 13> Australia is a signatory to the International Labour Organization Convention concerning the *Protection of Workers' Claims in the Event of the Insolvency of their Employer*.

²⁶ Justice Simon Whelan & Leon Zierer *Employee Entitlements & Corporate Insolvency & Reconstruction* < http://cclsr.law.unimelb.edu.au/research-papers/Protection%20of%20employee%20entitlements%20_final_1.pdf > at 21st December 2007

their employer-debtor's prospects, such that they require greater protection than those unsecured creditors better able to deal with their loss.

CREDITOR PROTECTION OVER EFFICIENCY

(i) Mandatory Priority Rule for Employee Entitlements

By virtue of the latest amendments embodied in the *Corporations Amendment (Insolvency) Act 2007* this mandatory priority repayment of employee entitlements is included in every deed of company arrangement (DOCA) unless the eligible employee creditors pass a resolution agreeing to the non-inclusion of such a provision or the Court makes an order approving the non-inclusion of such a provision.

Coupled with the mandatory priority rule for employee entitlements is the General Employee Entitlements & Redundancy Scheme (GEERS) which is a taxpayer-funded safety-net scheme for employee entitlements, such that the government to a limited extent is guarantor of employee entitlements. This scheme is regulated by the Department of Employment & Workplace Relations (DEWR). Employees of insolvent corporations can claim their entitlements²⁷ within twelve months of employees' employment being terminated. The DEWR makes a payment directly to the insolvency practitioner who forwards to employees. The DEWR is then subrogated to the rights of employee for the amount advanced.²⁸ Of importance, under GEERS employees are not entitled to benefits if the DOCA does not include the employee entitlement priorities specified in the Corporations Act to be paid on liquidation.²⁹

Giving employee entitlements priority has the effect of depriving other unsecured creditors of their claim to a share of available assets. To be efficient the loss to other unsecured creditors must be less than the benefit derived by employees.

However, employees' interests are to a large extent protected by the ongoing operation and enhancements to the GEERS,³⁰ although only if the government retains

²⁷ Entitlements include all unpaid wages, all unpaid annual leave, all unpaid pay in lieu of notice, up to 16 weeks redundancy pay, all long service leave, superannuation up to capped amounts.

²⁸ S560 *Corporations Act 2001* (Cth).

²⁹ S556 *Corporations Act 2001*(Cth).

³⁰ By virtue of the newly amended s560 *Corporations Act 2001* (Cth) GEERS then becomes a subrogated creditor with the same priority of payment entitlements whether the administration of the estate is one of receivership, deed of company arrangement or liquidation.

priority as a preferential creditor. Even though, the government has not been successful in recouping its entitlements as a subrogated creditor.³¹

If the priority given to employee entitlements can be considered part of the substantive goal of providing for creditor protection, then the question to consider is whether the imposition of a mandatory rule granting such priority is the most efficient means of ensuring this equity. The benefits of the mandatory provision are that it is not a significant departure from previous current practice; increases the voice of employees interests in negotiating a DOCA ; without such a mandatory provision it is possible that the DOCA may alter the employee entitlements leaving employees with no access to GEERS, their only avenue then being to initiate court action for recovery of outstanding entitlements, at a considerable burden and cost.³²

The cost of the mandatory provision, an example of ‘command and control regulation, is the reduction in flexibility afforded to the voluntary administrator as it is unlikely that employees would waive their priority.³³ Thus to a large extent, the administrator’s hands are tied with respect to the priority of payments to creditors under the DOCA. In this regard, the adoption of the mandatory provision is to some extent short-sighted as it favours the competing public policy of protecting employee entitlements over the desirability of encouraging business rescues, which in the long term would possibly mean the protection of employee entitlements in any case.

However, it may be considered that the administrator is in a better position to challenge the priority of employee entitlements in those rare cases where the re-organization or restructure of the business should proceed at the cost of employee entitlements.³⁴ ‘The proposed approach is for the administrator to first secure the agreement of a majority (by number and value) of eligible employee creditors where the DOCA does not observe the priority. Creditors as a whole would then conduct a

³¹ Whelan & Zirer, above note 26 ,23 ‘the government, virogously pursuing employees’claims, has been, it seems, only able to recoup 6.56% of the entitlements it has provided as a safety net (except Ansett)

³² Explanatory Memorandum to *Corporations Amendment (Insolvency) Bill 2007*(Cth), 11-12.

³³ Explanatory Memorandum above note 32,12.

³⁴See *Lam Soon Australia Pty Ltd v Molit (No 55) Pty Ltd* (1996) 14 ACLC 1,737 as an example of a DOCA which provided that claims of creditors of the viable portion of a company’s business were to be paid in full, but the majority creditor of the discontinued division was paid only a proportionate amount.

vote on whether the deed should be executed at a s439A meeting.’³⁵ The court may approve on the application by the administrator³⁶ an alteration of employee priorities in a DOCA if satisfied that the alteration is ‘likely to result in the same or a better outcome for eligible employee creditors than would result from an immediate winding up of the company’.³⁷

(ii) The inclusion of Superannuation Guarantee Charge as a Priority Payment

Another example of the balancing of conflicting goals of creditor protection and procedural efficiency arises with the inclusion of the superannuation guarantee charge as a priority payment.

The statutory priority of employee entitlements has been amended³⁸ so as to include the superannuation guarantee charge where it has accrued because of the non-payment by the employer of the required superannuation guarantee payment relating to services rendered by employees prior to the relevant date.³⁹ With the accompanying changes to the *Superannuation Guarantee (Administration) Act 1992* (Cth) consistency of treatment is achieved such that superannuation guarantee charges are thereby given employee entitlement priority status whether the company’s external administration is a liquidation, receivership, voluntary administration or deed of company arrangement.

Where the superannuation guarantee charge has accrued because of the non-payment by the employer of the required superannuation guarantee payment relating to services rendered by employees after the relevant date it is to be treated as an expense of preserving, realising or getting in property of the company, or in carrying on the company’s business under s556(1)(a) *Corporations Act 2001* (Cth).⁴⁰

³⁵ Explanatory Memorandum to *Corporations Amendment (Insolvency) Bill 2007* (Cth), 13.

³⁶ Or eligible employee creditor or any interested person s444DA(6) *Corporations Act 2001* (Cth).

³⁷ S444DA(5) *Corporations Act 2001* (Cth).

³⁸ S556(1AB)-(1AF) *Corporations Act 2001* (Cth). The payments are apportioned on the basis of services rendered by employees before and after the appointment of the liquidator. Those payments relating to services rendered before the relevant date are given priority under s556(1)(e) and those payments relating to services rendered after the relevant date being given higher priority under s556(1)(a).

³⁹ Relevant date is defined in s9 *Corporations Act 2001* (Cth) to mean in relation to a winding up, the day on which the winding up is taken to have begun under Division 1A of Part 5.6.

⁴⁰ S556(1AC)(f); s556(1AD); s556(1AE)(g); s556(1AF)(g) *Corporations Act 2001* (Cth).

As well the compulsory maximum amount to be paid to directors as a priority employee entitlement includes the superannuation guarantee charge and is now recognized in the *Superannuation Guarantee (Administration) Act 1992*.⁴¹

These changes address a problem first identified in *Ansett Australia Ground Staff Superannuation plan Pty ltd and Anor v Ansett Australia Ltd and Ors* (2002) VSC 576 where the court held that superannuation contributions made by Ansett during the course of its administration did not attract priority under s556(1) of the *Corporations Act 2001* (Cth) and instead constituted a debt provable in the administration of Ansett.

Justice Warren was bound by the words of s556(1) and specifically s556(1)(e) which limited the ambit of the priority conferred on superannuation contributions such that ‘there was no legislative command to indicate that superannuation contribution obligations incurred after the relevant date (generally the date of the commencement of the liquidation) fell within the subsection’.⁴²

The latest amendments found in s556(1A) – s556(1AF) now give such legislative command. The giving of priority payment status to the payment of the superannuation charge as either an employee entitlement or cost of administration increases the security of this particular employee entitlement. Unlike other employee entitlements, superannuation and the superannuation charge are not included under GEERS and therefore there is a stronger case for these amounts to be protected for the benefit of employees as a substantive goal.

Part II Improving Information for Creditors

(i) Declarations of Independence

The *Corporations Act 2001*(Cth) has been amended by a number of provisions to ensure the independence and objectivity of the relevant administrator. Efficiency concerns arise here as the costs of external administrations are treated as a priority

⁴¹ S556(1A) *Corporations Act 2001*(Cth) of \$2000 per ‘excluded employee’ and S64B(3A) *Superannuation Guarantee (Administration) Act 1992* (Cth).

⁴² *Ansett Australia Ground Staff Superannuation Plan Pty Ltd and Another v Ansett Australia Ltd and Others* {2002} VSC 576,649

payment.⁴³ Thus the administrator's remuneration and expenses are paid from the unsecured assets of the company. Unsecured creditors are concerned that the administrator does not favour any particular creditor and that the remuneration paid is a reasonable charge for the work performed. The external administrator, as an officer⁴⁴ of the company has fiduciary obligations to act in the interests of the company. Where the company is insolvent the interests of the company reflect the interests of the creditors as a whole such that where an administrator acts or favours a particular creditor then this fiduciary duty is breached.

Possible conflicts of interest may be detected by creditors when reviewing the "declaration of relevant relationships" required to be submitted by an administrator, or liquidator as soon as practicable after their appointment.⁴⁵

*For example, there may be a perception of a lack of independence where the administrator earlier acted as an adviser to the appointing board of directors, particularly where the administrator is subsequently required to consider the possibility of offences, negligence or breaches of duty or trust by the current and former directors.*⁴⁶

The obligation is a continuing one requiring updated declarations to be made where relevant.⁴⁷ If potential conflicts of interest are highlighted early then potential costs may be saved by replacing the administrator earlier in the life of his or her appointment.

The information to be provided in the declarations differs between an administrator and a liquidator and is defined respectively within ss9 and s60 *Corporations Act 2001*(Cth).

Although, there is a time limit set of 2 years both definitions are widely drafted such that prima facie all relationships regardless of whether it be a continuing professional one or of a trivial nature are to be disclosed. However the explanatory memorandum

⁴³ S556(1) *Corporations Act 2001* (Cth).

⁴⁴ S9 *Corporations Act 2001*(Cth).

⁴⁵ S 436DA *Corporations Act 2001* (Cth) requires both a declaration of relevant relationships and indemnities to be submitted by an administrator howsoever appointed. S449CA *Corporations Act 2001* (Cth) imposes the same obligations on a replacement administrator and s506A *Corporations Act 2001* (Cth) requires a declaration by the liquidator of relevant relationships under a creditors voluntary winding up.

⁴⁶ Explanatory memorandum to *Corporations Amendment (Insolvency) Bill 2007*(Cth), 38.

⁴⁷ S436DA(5) *Corporations Act 2001*(Cth) .

to the recent amendments narrows the potential categories of relationships that an administrator is required to declare by targeting ‘those parties that have the power to initially appoint an administrator’⁴⁸ and specifically ‘states the provisions do not require the disclosure of trivial interpersonal connections.’⁴⁹ The onus rests on the administrator or liquidator to state why in regard to each relationship there is no conflict of interest or duty. Failure to disclose, amounts to an offence.⁵⁰ Although, it is a defence for the administrator or liquidator to prove that he or she made reasonable enquiries, and on the basis thereof had no reasonable grounds for believing that the matter should have been disclosed.

It is not considered that these latest amendments will result in over exuberant, liability conscious, liquidators and administrators inundating creditors with information, most of which is meaningless. Rather the explanatory memorandum to the latest amendments reinforces that the declarations should be expressed in simple language and be no more than two pages in length.⁵¹

The brevity of information disclosed in the declaration may also result from the time given to the administrator to notify creditors of the declaration.

The administrator must give a copy of each declaration to as many of the company’s creditors as is reasonably practicable at the same time as he or she gives notice of the 1st meeting of creditors.⁵² This equates to within three business days of the administrator’s appointment,⁵³ which may to some extent limit the amount of information disclosed to creditors.

A liquidator’s obligation to make a declaration of relevant relationships also arises in relation to a creditor’s voluntary winding up. The timeframe given to liquidators is still quite stringent, it amounts to four days.⁵⁴

⁴⁸ Explanatory Memorandum above note 46, 38.

⁴⁹ Explanatory Memorandum above note 46, 39.

⁵⁰ S1311(1) *Corporations Act 2001* (Cth).

⁵¹ Explanatory Memorandum above note 46, 39.

⁵² S436DA(3) *Corporations Act 2001* (Cth).

⁵³ Combined effect of s436E(2) and (3) *Corporations Act 2001* (Cth) which requires the 1st creditors meeting to be held within 8 business days after the administrator is appointed and at least 5 business days notice of 1st creditors meeting to be given.

⁵⁴ Combined effect of s497(1) *Corporations Act 2001* (Cth) which requires the liquidator to convene a meeting of the company’s creditors within 11 days after the day of the company meeting where the resolution for voluntary winding up was passed, and s497(2) *Corporations Act 2001* (Cth) which requires the liquidator to give creditors at least 7 days notice of the meeting .S506A(2) &

Are the making of declarations an efficient motivation cost?

The shortness of time and emphasis on those relationships between the administrator and his or her initial appointers may lead practitioners to fulfil their obligations by no more than complying with their existing professional requirements as outlined in either The Institute of Chartered Accountants' ICA APS7 or the Insolvency Practitioner's Association of Australia (IPAA) Code of Conduct and thereby limit their disclosure obligations to 'continuing professional relationships'. If this be the case, then the making of such Declarations are an ineffective attempt to increase disclosure to company creditors and an inefficient means of reducing potential conflicts of interest. Especially when it is considered that the making of the declaration does not prevent the conflict of interest arising even if the creditors approve the appointment after the declaration is made.

A liquidator, in a voluntary liquidation has a further obligation to keep creditors informed by virtue of s508 (1)(b) *Corporations Act 2001*. However recognition of the expense of fulfilling this obligation, especially where the creditors are few in number has resulted in the liquidator being given a choice in a creditors' voluntary winding up to disclose to creditors directly by convening a general meeting of the company and a meeting of the creditors or by preparing a report and lodging a copy thereof with ASIC.⁵⁵ Notice of such a report and the liquidator's decision not to convene a meeting of creditors may be electronically notified to creditors.⁵⁶ A creditor can then request a copy of the report free of charge from the liquidator who must comply as soon as practicable.⁵⁷ Significant savings in administrative and postage costs can thereby be achieved and will be discussed in more detail in Part III Streamlining external administration.

(3)*Corporations Act 2001* (Cth) then requires the liquidator to make the declaration of relevant relationships and to include a copy of it with the notice of the meeting to as many of the company's creditors as is reasonably practicable.

⁵⁵ The ambit of the report is outlined in s508(3) *Corporations Act 2001*(Cth). A copy of the report is to be lodged with ASIC and written notice of its existence and lodgement with ASIC as well as the non-convening of a creditors' meeting is to be given to creditors by written notice.

⁵⁶ S508(4) *Corporations Act 2001*(Cth).

⁵⁷ S508(5) *Corporations Act 2001*(Cth).

(ii) Remuneration of External Administrators

An external administrator's potential abuse of their position is most readily achievable by overcharging his or her remuneration. Amendment to the Corporations Act did not include prescribed remuneration levels. Rather the Act considers prima facie the market to be the best instrument for establishing efficient levels of remuneration. Hence, the Corporations Act contemplates the administrators remuneration being decided by agreement between the committee of creditors (if any) or committee of inspection (if any) and the administrator; or by single resolution of company's creditors or by the Court whether or not there was prior meeting of committee of creditors, committee of inspection or creditors of the company.⁵⁸ A liquidator's remuneration is determined on similar lines, although priority is given to agreement between the liquidator and the committee of inspection, failing that a resolution of creditors. If the resolution of creditors fails because of a lack of quorum then the creditors are taken to have passed a resolution entitling the liquidator to \$5000 or such lesser amount if the liquidator so determines.⁵⁹ Ultimately the court has the power to determine the liquidator's remuneration if no such resolution is passed.⁶⁰ A privately appointed receiver's remuneration is prima facie determined by agreement between the receiver and the appointing party, although the Court has the power to fix the receiver's remuneration.⁶¹

So that creditors are in a position to make an informed decision upon the external administrator's level of remuneration, there are now obligations upon the administrator and liquidator to prepare a report outlining the major tasks to be performed and the costs associated with each task.⁶² This report is to be sent to

⁵⁸ S449E(1) *Corporations Act 2001* (Cth) applies to an administrator of a company under administration; s449E(1A) *Corporations Act 2001*(Cth) to an administrator under a deed of company arrangement; s449(1C) & (1D) *Corporations Act 2001* (Cth) do not require the Court's power to be conditional on the holding of meetings of committee of creditors, committee of inspection of company creditors.

⁵⁹ S473(4A) *Corporations Act 2001*(Cth) court appointed liquidator; s499(3) and (3A) *Corporations Act 2001* (Cth).

⁶⁰ S473(3) *Corporations Act 2001*(Cth) No such power exists where a liquidator is appointed under creditors voluntary winding up. S 499(3) *Corporations Act 2001*(Cth).

⁶¹ S425 *Corporations Act 2001*(Cth).

⁶² S473(11) *Corporations Act 2001* (Cth) Court appointed liquidators; S449E(5)-(7) *Corporations Act 2001* (Cth) Administrators S495(5) *Corporations Act 2001* (Cth) Liquidator in members voluntary winding up – report is then tabled at members meeting. S499(6) *Corporations Act 2001* (Cth) Liquidator in creditor's voluntary winding up.

creditors at the same time as the creditor is notified of the relevant meeting⁶³ and therefore provides more timely disclosure to the creditors.⁶⁴ This amendment recognizes that the ‘usual method for determining remuneration is based on practitioners charging an hourly rate for time spent on the administration (time-costing methods)’⁶⁵ and the IPAA Guidelines which ‘state that fees should reflect the quality and quantity of work performed, ensuring that the staff mix and average rate is commensurate with the nature and complexity of work done’.⁶⁶ ‘The report is to be expressed in simple language, no more than two pages in length for routine matters.’⁶⁷

Certainly the Court has an overriding supervisory role as it may review, and then confirm, increase, or reduce the administrator’s remuneration under a deed of company arrangement or otherwise on the application of the administrator, ASIC, or officer, member or creditor of the company.⁶⁸ This same power applies to a court appointed liquidator,⁶⁹ and as previously noted the Court also has wide power to set and vary a receiver’s remuneration.⁷⁰ To assist the court in this function the Corporations Act now requires the court to consider whether the administrator’s remuneration is reasonable.⁷¹ To do so the court may consider any or all of the matters outlined,⁷² encompassing such factors as the time taken to complete the work, the complexity of the work; the risk and responsibility undertaken by the administrator; whether the remuneration is capped.

Is The Dissemination of a Remuneration Report an Efficient Co-Ordination Cost?

Reliance on the market to set an efficient external administration fee may be difficult to justify given what appears to be a failure of the market to determine a competitive

⁶³ Ss449E(5)-(7) *Corporations Act 2001*(Cth).

⁶⁴ Accords with the view of the Parliamentary Joint Committee (PJC) on Corporations and Finance Services *Corporate Insolvency Laws: a Stocktake*, June 2004, 121, that work in progress reports should be available to creditors before the meeting at which they will be asked to approve the fees.

⁶⁵ PJC Report above note 64, 118 referring to the 1997 *Report of the Working Party on the Regulation of Insolvency Practitioners*.

⁶⁶ PJC Report above note 64, 119.

⁶⁷ Explanatory Memorandum above note 46, 43.

⁶⁸ S449E(2) *Corporations Act 2001*(Cth).

⁶⁹ S473(5) and (6) *Corporations Act 2001*(Cth).

⁷⁰ S425(1) *Corporations Act 2001*(Cth).

⁷¹ S449E(4) Administrator ;s473 (11) Court appointed Liquidator ; s504(2) Liquidator in voluntary winding up; s425(8) *Corporations Act 2001*(Cth).

⁷² S449E(4) (a)-(1); s473(11)(a)-(1); s504(2)(a)-(1); S425(8)(a)-(1) *Corporations Act 2001*(Cth).

fee for insolvency work. Lack of a competitive fee may result from the market being a restricted one, with significant entry barriers in existence. Many of the submissions made to the PJC Committee on Corporate Insolvency Laws ‘supported a scale of fees as a means of controlling fee. Supporters recognized that although creditors generally fix the remuneration, often creditors are not in a position to effectively argue or understand the quality or quantity of work that Insolvency Practitioner’s perform.’⁷³ Mandatory disclosure of the work to be undertaken, may address this ignorance to some extent. However, expanding the level of report – making inevitably increases the administrator’s costs, leaving less funds available to unsecured creditors.

Competitiveness of fees may be achieved by alternatively linking ‘reimbursement to the percentage of funds distributed,⁷⁴ encouraging quality of service to be maintained.

Part IV Facilitating Pooling in External Administration

‘Prior to the latest amendments to the *Corporations Act* 2001 there was no direct power in the court to authorise the pooling of assets in an external administration.’⁷⁵

‘Attempts have been made by insolvency practitioners to utilise existing *Corporations Act* provisions to achieve aggregation or “pooling” of the assets of companies in either liquidation or under Part 5.3A.’⁷⁶ The court was and still is empowered to sanction situations where effectively the creditors agree⁷⁷ to have a pooling

⁷³ PJC Report above note 65, 118.

⁷⁴ PJC Report above note 65, 119.

⁷⁵ *Re the Black Stump Enterprises Pty Ltd and Associated Companies* (2005) 228 ALR 591 at [16] per Young CJ. However in the same case Bryson JA was less certain of the position when he stated “*It is not clear to me that the court has any such power. I do not have a clear view to the contrary effect, that is, there is no such power*” at [41]. The views of Young CJ were referred to with approval by Barrett J in *Whittingham re Hunter Valley Gravel Supplies Ltd & Ors* [2006] NSWSC 1070 at [20] as quoted in J.Dickfos, C.Anderson & D. Morrison ‘The Insolvency Implications for Corporate Groups in Australia – Recent Events & Initiatives’ *International Insolvency Review*, 2007, Vol 16, 103,106

⁷⁶ “Pooling” is the term commonly used to identify the aggregation of the assets of a corporate group such that they would in total be available to meet all of the corporate group’s obligations as quoted in J.Dickfos, C.Anderson & D. Morrison ‘The Insolvency Implications for Corporate Groups in Australia – Recent Events & Initiatives’ *International Insolvency Review*, 2007, Vol 16, 103,106..

⁷⁷ Or at least the requisite majority agree.

arrangement put in place.⁷⁸ The majority of such methods, however, involve substantive procedural costs being incurred by the external administrator.

Division 8 of Part 5.6 of *Corporations Act 2001* now provides for two separate methods of pooling, voluntary pooling and court ordered pooling. Both methods are only available in a liquidation.

(i) Voluntary Pooling by the Liquidator

Section 571 sets out the general consequences of a pooling determination and grants the liquidator/s the power to make a pooling determination⁷⁹ which comes into force on approval by the eligible unsecured creditors of each company in the group.⁸⁰

Approval is gained by the passing of a resolution at each company's meeting of eligible unsecured creditors. The resolution must be passed by a majority of creditors in number and 75% in value of the total amount of the debts and claims of the eligible unsecured creditors present and voting in person or by proxy at each meeting.⁸¹

Without the necessary approval the pooling determination is cancelled.⁸² Prima facie, eligible unsecured creditors are the external unsecured creditors (excludes intra-group companies) of the companies within the group.⁸³ However, the regulations provide for the exclusion or inclusion of a specific creditor within the definition.⁸⁴

The general effect of a pooling determination is :

- (i) Each company in the group is taken to be jointly and severally liable for each provable debt payable by and each provable claim against, each other company in the group.
- (ii) Inter-group company debts and claims are extinguished

⁷⁸ For a discussion of the six existing statutory procedural means by which consolidation of a corporate group in insolvency might be effected see J. Dickfos, C. Anderson & D. Morrison 'The Insolvency Implications for Corporate Groups in Australia – Recent Events and Initiatives' *International Insolvency Review*, 2007, Vol 16, 103, 106-108 and Jason Harris, 'Corporate group insolvencies: Charting the past, present and future of pooling arrangements' *Insolvency Law Journal* 2007 Vol 15, No 2 78, 81-91.

⁷⁹ S571(1) *Corporations Act 2001*(Cth).

⁸⁰ S578 (1) *Corporations Act 2001*(Cth).

⁸¹ S577 *Corporations Act 2001*(Cth).

⁸² S577(3) *Corporations Act 2001*(Cth).

⁸³ S579Q(1)(a) *Corporations Act 2001*(Cth).

⁸⁴ S579Q(1)(b) *Corporations Act 2001*(Cth).

- (iii) The pooling determination does not alter the order of priority under ss556, 560 and 561 for each company in the group.
- (iv) The pooling determination does not affect a secured creditor's interest as long as the secured debt is not an inter-group debt.⁸⁵

A balancing of creditor protection and efficiency (in terms of the liquidator's flexibility in making pooling arrangements) is evident in that although the liquidator has a wide discretion in determining the manner of pooling proposed,⁸⁶ certain priorities are maintained, such as employee entitlements⁸⁷ and secured debts⁸⁸. The liquidator may modify the above general consequences of a pooling determination on fairness grounds based on what is "just and equitable" between the various creditors of the group companies. The pooling determinations are aimed to be flexible and reflect the specific circumstances of the companies in the particular pooling group.⁸⁹

Before unsecured creditors vote on the pooling determination, the liquidator must give them his or her written report setting out the extent to which particular eligible unsecured creditors and particular companies in the group are likely to be disadvantaged by the determination as well as the likely return to eligible unsecured creditors if the determination comes into force as well as if it does not.⁹⁰ If eligible unsecured creditors are disadvantaged, the liquidator must also give his or her reasons, why they should vote for a resolution approving the determination.⁹¹ In making his or her determination the Corporations Act recognizes that the liquidator is acting for the benefit of the creditors of the companies in the group as a whole and

⁸⁵ S571(2)-(9) *Corporations Act 2001*(Cth) (pooling determination), S579E(2)-(9) *Corporations Act 2001* (Cth) (pooling order)

⁸⁶ S571(1)(d) *Corporations Act 2001* (Cth).

⁸⁷ S556, 560 and s561 *Corporations Act 2001*(Cth).

⁸⁸ S571(2) & (9) *Corporations Act 2001*(Cth) external secured creditors' rights are unaffected by the proposed pooling determinations unless the secured creditor surrenders their security to the administrator for the benefit of creditors of the companies in the group generally. The debt is then no longer secured and is recoverable jointly and severally from all companies within the group.

⁸⁹ Explanatory Memorandum to Part 4 – Facilitating Pooling in External Administration *Corporations Amendment (Insolvency) Bill 2001*(Cth), 4.251

⁹⁰ S574(3) & (4) *Corporations Act 2001*(Cth). Where there is a members' voluntary winding up s575 *Corporations Act 2001*(Cth) requires a copy of this statement is to be given to each member of the company, excluding group company members within 5 business days after convening the meeting .

⁹¹ S574(3)(b) *Corporations Act 2001*(Cth).

therefore gives the liquidator immunity from a possible breach of statutory or fiduciary duties owed by the liquidator to individual group companies.⁹²

The Court has the power to vary or terminate the pooling determination on the application of a group creditor, group member where a members' voluntary winding up exists (excluding a company group member) or any other interested person such as a group company director or ASIC⁹³. The grounds for such variation or termination are not couched as "just and equitable". Rather, a listing of the various grounds is given in the provision,⁹⁴ including on the application of an unsecured creditor, if the pooling determination would materially disadvantage such applicant⁹⁵, or the pooling determination would be oppressive or unfairly discriminatory or unfairly prejudicial to the eligible unsecured creditor applicant,⁹⁶ or the pooling determination would be contrary to the interests of the creditors of the companies in the group, considered as a whole.

These provisions seek to protect smaller creditors who might otherwise be disadvantaged by the 75% majority over the 25% minority. However, such protection of smaller creditors may not be efficient. Applications by creditors to vary or terminate the pooling determination inevitably delay the liquidation of the company, with the incurrence of ongoing procedural costs. However, it is at the Court's discretion whether the pooling order is varied or terminated. The Court also has the power to cancel or confirm the variation as well as make void or validate the pooling determination.⁹⁷

The granting of the power to vary or terminate the pooling determination on the grounds of "contrary to the interests of creditors of the group considered as a whole" on the application of a group creditor means that a secured creditor with a fixed or floating charge over intercompany debts may seek the variation or termination of the pooling determination which extinguishes intercompany debts.

⁹² S579 (2) *Corporations Act 2001*(Cth).

⁹³ S579A(2) *Corporations Act 2001*(Cth).

⁹⁴ S579A(1) (a) – (h) *Corporations Act 2001*(Cth).

⁹⁵ S579A(e) *Corporations Act 2001*(Cth).

⁹⁶ S579A(1)(f) *Corporations Act 2001*(Cth).

⁹⁷ S579B and s579C *Corporations Act 2001*(Cth).

(ii) Court Ordered Pooling

The court also has the power to make pooling orders on the application of the liquidator/s where it is satisfied that it is just and equitable to do so.⁹⁸ The matters which the Court must take into consideration in making the order are open-ended and include those factors originally identified by the Harmer Report as justification for court ordered pooling⁹⁹ as:

- (1) The extent to which a company in the group and its officers or employees were involved in the management or operations of any of the other companies in the group;
- (2) The conduct of a company and its officers or employees within the group towards the creditors of any of the other companies in the group;
- (3) The extent to which the circumstances giving 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 their officers or employees;
- (4) The extent to which the activities and business of the companies in the group have been intermingled;
- (5) The extent to which creditors of any of the companies in the group may be advantaged or disadvantaged by the making of the order; and
- (6) Any other relevant matters

Savings in transaction costs are not specifically identified as one of the relevant factors for obtaining a pooling order. However, it has been suggested that such savings are included in “any other relevant matters” as similarities can be drawn between the Australian and New Zealand pooling provisions.¹⁰⁰

New Zealand case law suggests in relation to the corresponding provision in that jurisdiction that costs savings are indirectly taken into account, as “other relevant matters”. The argument being that if no pooling orders are made and

⁹⁸ S579E(1) and s579E(11) *Corporations Act 2001*

⁹⁹ The Law Reform Commission Report No 45 General Insolvency Inquiry known as Harmer Report 855

¹⁰⁰ See s271(1)(b) *Companies Act 1993 (New Zealand)* However the application for pooling in New Zealand can be lodged by not only the liquidator but a creditor or shareholder and the New Zealand provision does not include factor (5) above .

*separate legal proceedings are pursued the cost and length of the liquidation may considerably increase and thereby deplete funds otherwise available for creditors.*¹⁰¹

Cost savings alone are not sufficient justification for the granting of a pooling order by the court. Rather the use of the expression “just and equitable” as opposed to “just and beneficial” ensures that the need for creditor protection is also to be taken into consideration.¹⁰²

*‘In contrast whether it is “just and equitable” to make a pooling order takes into account the relative positions of the unsecured creditors within the group of companies vis-à-vis themselves, (as outlined in factor (5) above), and the respective shareholders of those companies given the management practices of those companies; the degree of intermingling of business and management between companies; and the creditors knowledge thereof. The term just and equitable is used in the corresponding New Zealand provisions and Farrar has suggested that the term provides the court with the “widest discretion to affect a result which accords with common notions of fairness in all the circumstances”’.*¹⁰³

As illustrated above, the divergence between the goals of creditor protection and procedural efficiency are also clearly evident in the mandatory obligation on the court not to make a pooling order in two situations:

¹⁰¹ See *Re Dalhoff and King Holdings Ltd* (1991) 5 NZCLC 66,959 and *Re Pacific Syndicates (NA) Limited* (1989) 4 NZCLC 64,757 at 64,768 as quoted in J. Dickfos, C.Anderson & D. Morrison, ‘The Insolvency Implications for Corporate Groups in Australia – Recent Events and Initiatives’ *International Insolvency Review*, 16, 103,116.

¹⁰² The expression “just and beneficial”, used in s511 *Corporations Act 2001* (Cth) which allows the Court to determine a particular question or exercise all or any of the Court’s winding up powers if satisfied to do so would be “just and beneficial” appears to take into consideration elements of cost and efficiency of function. Justice Young in *Dean Willcocks v Soluble Solution Hydroponics Pty Ltd* (1997) 24 ACSR 79 at 81 considered that if “*the court can summarily solve the difficulty that has arisen in the liquidation by an order under the section in a cheap and efficient manner ... It is “just and beneficial to exercise the power”*” as quoted in J. Dickfos, C.Anderson & D. Morrison, ‘The Insolvency Implications for Corporate Groups in Australia – Recent Events and Initiatives’ *International Insolvency Review*, 16, 103,116.

¹⁰³ J. Farrar *Corporate Governance: Theories, Principles and Practice* 2005 at 264 referring to Casey J., in *Re Home Loans Funds (NZ) Ltd* (1983) 1 NZCLC 95073 as quoted in J. Dickfos, C.Anderson & D. Morrison, ‘The Insolvency Implications for Corporate Groups in Australia – Recent Events and Initiatives’ *International Insolvency Review*, 16, 103,116.

- (i) if it is satisfied that the order would materially disadvantage an eligible unsecured creditor who has not consented to the making of the order¹⁰⁴ or
- (ii) If one of the companies in the group is being wound up under a members' voluntary winding up and the court is satisfied the order would materially disadvantage a non-company group member who has not consented to the making of the order¹⁰⁵

Thus the amendments have adopted the Harmer Report's proposal to balance administrative efficiency with an equitable distribution of the insolvent companies, pooled property.

The consequences of a court pooling order are the same as those of a liquidator's pooling determination. Once a pooling order has been made then the liquidator/s of the companies in the group must give notice thereof to each eligible unsecured creditor directly or make a copy available for viewing through an internet site and advise the eligible unsecured creditor of its presence.¹⁰⁶ The Court may vary a pooling order on the application of a group company liquidator, group company creditor, or group company member (as long as not a group company) where the Court is of the opinion that it is just and equitable to do so. Ancillary orders and directions may be made by the Court on just and equitable grounds so as to exempt certain debts or claims from the order or transfer property or liabilities from one company to another within the group, as well as provide for different returns for different classes of creditors or the subordination of the debts and claims of specified creditors.¹⁰⁷

Procedural Cost Savings

The pooling determination process will obviate the need in some cases for liquidators to apply to the court for directions under s479(3) or s511 *Corporations Act 2001*

¹⁰⁴ S579E(10)(a) *Corporations Act 2001*(Cth) .

¹⁰⁵ S579E(10) (b) *Corporations Act 2001*(Cth) .

¹⁰⁶ S579K (1) *Corporations Act 2001*(Cth). In regard to a members voluntary winding up s579K(2) requires the liquidator to have the same obligation to each member of the company excluding any members who are group companies.

¹⁰⁷ S579G and s579H *Corporations Act 2001*(Cth).

(Cth). *In Re Charter Travel Co Ltd*¹⁰⁸ the court made orders on the application of the liquidators under s479 that a combined meeting of known creditors of each of the companies within the group be convened together with the relevant administrative directions for conducting such a meeting. By virtue of s579L *Corporations Act* 2001(Cth) once a pooling determination or pooling order is in force consolidated meetings of creditors are to be convened by the liquidators unless the Court orders otherwise. Similarly the regulations will then provide for specific procedural matters in relation to the convening of a consolidated meeting including the sending of notices, quorum requirements, and manner of voting.¹⁰⁹ Streamlining of procedural meeting matters however is only available once the pooling order or pooling determination is in effect. Until then separate meetings of group companies' creditors are to be held which may result in logistical difficulties for those who are creditors of more than one group company.

The restriction of pooling determinations or pooling orders to companies in liquidation may be recognition that the existing voluntary administration and deed of company arrangement procedures enable creditors to efficiently determine whether or not to pool.¹¹⁰ The IPAA has stated,

*'Currently administrators can seek to pool a group of companies in a Voluntary Administration by taking a vote of creditors at the second meeting in respect of proposed "Pooling Deeds". These resolutions are passed by a simple majority. Some administrators seek the approval of the Court for the pooling arrangement under s447A, some choose not to.'*¹¹¹

Certainly administrators may still need to apply to the court for directions under s447D. For example in *Mentha v GE Capital Ltd (1998) 16 ACLC 1032* the administrators sought a direction that it was proper for them to execute and give effect to three deeds, the effect of which was to transfer their assets to one company, and for

¹⁰⁸ (1997) 25 ACSR 337

¹⁰⁹ S579L(2) *Corporations Act* 2001(Cth).

¹¹⁰ Australian Bankers' Association (ABA) Submission on Exposure Draft Corporations Amendment (Insolvency) Bill 2007 (Cth), 2. The ABA considers the existing Deed of company Arrangement procedure contains sufficient flexibility to deal with substantive matters such as which debts and claims are pooled, which assets are available to meet those claims; procedural matters such as creditor meeting procedures and the submission and adjudication of proofs of debts in a pooled company scenario; and a right of recourse to the Courts.

¹¹¹ Insolvency Practitioners Association of Australia (IPAA) Submission on Exposure Draft to *Corporations Amendment (Insolvency) Bill* 2007 (Cth), 11.

that company to assume all the liabilities of the other companies within the group. Where such court applications continue there are still valid arguments for regulating a pooling procedure within a voluntary administration, deed of company arrangement scenario.

To reduce administrative duplication and associated transaction costs a liquidator may open a single bank account, known as Liquidator's General Account for the pooled group, for the deposit of monies received on the liquidation of the pooled companies.¹¹² The liquidator can then make payments out of this general account by cheque or electronic transfer.¹¹³ Electronic transfer being preferable in relation to bulk transactions as it is 'less costly, provides a computerised record of the transaction and reduces the chance of conversion or misappropriation.'¹¹⁴

Increasing The Pool Of Available Funds

One of the three objectives of pooling orders recognized by CASAC was enhancing returns to unsecured creditors.¹¹⁵ Although, it is apparent from the above discussion that pooling can mean substantial savings in transaction costs the ability to generate greater resources to insolvent group members is limited because of the manner of defining the companies to be included in the pool and the denial of contribution orders among corporate group members.

The legislation places limits on when companies may be placed in the pool¹¹⁶ but provides no formal definition of a corporate group. It has been contended that the failure of the Australian provisions to define a corporate group as arising when the separate business of each company is not readily identifiable (as exists within the New Zealand legislation) will result in potential pooling circumstances being overlooked.

'In the New Zealand legislation the circumstances of being a related company include where the activity is carried on in a way that the separate business of each company is not readily identifiable. In contrast the Australian provision sets out more

¹¹² Subregulation 5.6.06(2) and 5.6.07 *Corporations Amendment Regulations 2007 (No 13)*

¹¹³ Subregulation 5.6.10(1) *Corporations Amendment Regulations 2007 (no 13)*

¹¹⁴ Explanatory Statement to *Corporations Amendment Regulations 2007 (No 13)*, 4.

¹¹⁵ Companies & Securities Advisory Committee *Corporate Groups Final Report 2000*, para 6.93.

¹¹⁶ S571(1) *Corporations Act 2001* (pooling determinations) and s579E *Corporations Act 2001* (pooling orders)

*specific requirements relating to owning or operating property that is used in a joint undertaking. Whilst the specific requirements may cover a wide variety of situations, particular unanticipated circumstances may cause difficulty and result in the pooling provisions not being able to be utilised. For example, if a company in the “group” has only a contractual link to the others so it owns no “property” or if the records are such that it is not possible to find which company actually owned or operated the property, doubts may arise as to whether the provisions apply’.*¹¹⁷

In addition, the ‘*fact that only companies in liquidation are able to be part of the pooling process suggests that creditors could potentially be disadvantaged where (to the extent that it is commercially possible) assets are available in a solvent company that is part of the group.*’¹¹⁸ Division 8 of Part 5.6 *Corporations Act 2001* (Cth) excludes solvent companies. CAMAC’s recommendation 41 that “solvent group companies should be permitted to enter into an administration with other group companies where at least one of those companies satisfies the voluntary administration prerequisite”¹¹⁹ was not adopted. Giving the example of where a solvent group company relies on information technology or other logistical or financial support from an insolvent group company, CAMAC identified the circumstances where the affairs of the solvent group company are so intertwined with those of other group companies that pooling within the voluntary administration may be beneficial. Despite this recommendation the draft Bill’s explanatory memorandum argued that this potential benefit is outweighed by the need to protect the interests of the solvent company’s shareholders¹²⁰ and the solvent company’s unsecured creditors.

¹¹⁷ Dickfos, Anderson & Morrison, as above note 78, 122.

¹¹⁸ Dickfos, Anderson & Morrison, as above note 78, 121.

¹¹⁹ Corporations and Markets Advisory Committee (CAMAC Report) *Rehabilitating large and complex enterprises in financial difficulties* 2004, 6.4.2

¹²⁰ Explanatory Memorandum to Part 4 Facilitating Pooling in External Administration *Corporations Amendment (Insolvency) Bill 2007(Cth)*, 53.

ACHIEVEMENT OF PROCEDURAL EFFICIENCY

Part III Streamlining External Administration

Recognition of the importance of e-commerce and electronic communications in insolvency administration can be found in three recommendations made by the PJC Report on Corporate Insolvency to reduce the cost of external administrations and thereby increase the potential funds available for the payment of unsecured creditors.

Those recommendations were:

1. *Government consider alternatives to the current advertising and gazettal requirements for external administrations (Recommendation 19)*
2. *Government consider making technology and e-commerce options more widely available (Recommendation 20)*
3. *Provisions of Chapter 5 be amended with a view to permitting alternative methods of conducting minor procedural meetings (Recommendation 21).*

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The most recent amendments to the *Corporations Act 2001*(Cth) have adopted these recommendations.

(i) Current Advertising and Gazettal Requirements

The *Corporations Act 2001* (Cth) has reduced the number of notices required to be given by external administrators by either eliminating them entirely or allowing for a number of notices to be combined. However, where it is considered in the interests of creditor protection (and the general public), notification through the public notices in national or local newspapers will continue. For example, ‘the requirement to publish notices in newspapers will be retained in circumstances where creditors and the public have not been alerted about important facts, such as the commencement of an insolvency proceeding or where there is a need for notifying the broader community of an event.’¹²² Otherwise, where the external administration process is in its later stages, with creditors largely identified there is no need to require communications with creditors to be published.¹²³

¹²¹ PJC Report above note 64, 111-113.

¹²² Explanatory Memorandum, above note 46,49.

¹²³ Explanatory Memorandum , above note 46,48.

Sections 436E(3A) and s450A(1) allow for the combining of the notices of the appointment of the administrator¹²⁴ and 1st creditors meeting¹²⁵. By doing so, significant amounts of funds can be saved rather than expended in providing notifications to creditors.

For example, 'in the Ansett Administration the administrators estimated it would cost approximately \$28 million to send the notice of the second meeting (*of creditors*) and accompanying documentation to the approximately four million creditors'.¹²⁶ Prima facie, if the amount of notices can be reduced or eliminated whilst still meeting the disclosure requirements to creditors then such changes are efficient.

In practice, however, given the mandatory timing restrictions on when the notices are to be given it is only possible to satisfy the requirements of both abovementioned provisions if the notice is sent on one particular day, namely the third business day after the administrator is appointed.¹²⁷

An administrator is no longer required to advertise the meeting of creditors to consider a proposed variation or termination of deed of arrangement;¹²⁸ or advertise the execution;¹²⁹ or non-execution of the deed of company arrangement.¹³⁰ Rather it is sufficient if notice is given to the company's creditors. Such notice may be by electronic means to be discussed below.

(ii) Wider application of Technology and E-commerce Applications

The passing of s600G *Corporations Act 2001* (Cth) authorising the electronic methods of giving or sending certain notices means the corporations legislation has to some extent caught up with accepted insolvency practice. In *Ansett Australia Ltd v Mentha* 200 FCA 2 the court ordered that while written notice of the meeting be posted to as many of the creditors as reasonably practical and that notice of the

¹²⁴ S436E(3)(b) *Corporations Act 2001*(Cth).

¹²⁵ S450A(1)(b) *Corporations Act 2001*(Cth).

¹²⁶ PJC Report above note 64, 111.

¹²⁷ By sending the notice of both appointment of the administrator and the date of the 1st creditor's meeting on this day s436E(2) &(3) and s450A(1)(b) *Corporations Act 2001*(Cth) are satisfied.

¹²⁸ S445F(2) and s450D *Corporations Act 2001* (Cth).

¹²⁹ S450B(b) has been repealed *Corporations Act 2001*(Cth).

¹³⁰ S450CC(b) has been repealed *Corporations Act 2001*(Cth).

meeting be published in all major Australian newspapers, copies of the report, statements referred to in s439A(4) and the proxy form were not sent by post. Rather the report and accompanying statements and forms were posted on two websites provided by the administrators, to be downloaded by any person accessing the website.

Twenty –four different provisions, requiring the giving or sending of notices can now utilise these same electronic means.¹³¹

These provisions include sending notice of the 1st meeting of creditors to as many company creditors as reasonably practicable,¹³² giving notice of the lodgement of the Liquidator’s Account to every creditor and contributory of the company¹³³ and the sending of written notice of the meeting of eligible unsecured creditors to consider the approval or variation of a liquidator’s pooling determination.¹³⁴

The giving of such notices electronically may be satisfied by directly sending the particular notice or documents to the recipient’s email address¹³⁵ or by providing the particular report or document online and for the external administrator to notify the recipient by email of the availability for download of the online document/s.

To receive the notifications electronically the recipient must nominate a fax number, electronic address or any other electronic means, it is then left to the notifier’s discretion whether he or she makes use of the nominated notification means. In either case where a notice or document, or the availability and means to access a notice or document online is sent directly to an electronic address the notice or availability is taken to be given or sent on the business day after it is sent.¹³⁶

It is envisaged in practice that ‘external administrators will seek nominations by creditors at the outset of proceedings that would be effective for all notices during the

¹³¹ S600G *Corporations Act 2001*(Cth).

¹³² S436E(3)(a) *Corporations Act 2001*(Cth).

¹³³ S539(5) *Corporations Act 2001*(Cth).

¹³⁴ S574(2) *Corporations Act 2001*(Cth).

¹³⁵ Contemplated by s600G(2) & (3) *Corporations Act 2001*(Cth).

¹³⁶ S600G (5) & (6) *Corporations Act 2001*(Cth).

course of the proceeding’.¹³⁷ The nomination would be in a ‘form that could be substantiated later, in the event, a dispute occurs about its content.’¹³⁸

In this respect the Act provides for a faster and cheaper means of communication between the external administrator and creditors and contributories. The benefit of speed will ‘improve opportunities for creditor participation in the proceeding and maximise the time available for making potentially complex decisions.’¹³⁹ Thus these amendments are considered efficient. The choice to utilise this means of communication remains with the recipient such that the problem of access, or non-receipt of the communication is borne by the recipient.

(iii) Alternatives to the Conduct of Minor Procedural Meetings

Recognition of the expense¹⁴⁰ to the liquidator of convening a general meeting of the company and a meeting of the creditors when the company is insolvent and the winding up continues for more than 1 year can be found in the latest amendment to s508. The holding of such annual general meetings is inefficient particularly where the insolvency of the company means that members would not be entitled to a distribution. By virtue of s508(1)(b) in the case of a creditors’ voluntary winding up the liquidator is given the choice of convening a meeting of the creditors or preparing a report which summarises the acts and dealings of the liquidator to date; the conduct of the winding up; future actions of the liquidator and an estimate of when the liquidation will be complete.¹⁴¹ By satisfying the following: lodging the report with ASIC; sending written notice of its lodgement ; the non-convening of a creditors’ meeting within 14 days; and the requirement that the liquidator give a free copy of the report on request to each creditor of the company , then there is no requirement that a meeting of creditors be held. The requirement to hold a members’ meeting in respect of a creditors’ voluntary winding up has been abolished entirely.

Although the report under the newly amended s508 *Corporations Act 2007* (Cth) is larger in its ambit to that previously required (the report necessitates a consideration

¹³⁷ Explanatory Statement *Corporations Amendment Regulations 2007 (No 13)*(Cth) , 5.

¹³⁸ Explanatory Memorandum above note 46, 51.

¹³⁹ Explanatory Memorandum above note 46, 51.

¹⁴⁰ Explanatory Memorandum above note 46, 46. Expenses include advertising, meeting room hire, conduct of meeting, preparation and lodgement of minutes.

¹⁴¹ S508(3) *Corporations Act 2001* (Cth).

of the liquidator's future actions and time frame for termination of the liquidation) it is considered that this is an occasion where the additional costs of preparing the report are outweighed by the savings in costs in not holding a general meeting and creditors meeting and again is efficient.

CONCLUSION

The majority of the latest amendments to the *Corporations Act 2001*(Cth) found in Part 1-4 of *Corporations Amendment Insolvency Act 2007*(Cth) do achieve their stated aim of improving creditors' outcomes. To do so, means the external administration procedures must be efficient so as to maximize the proceeds from the reconstruction or winding up of the company and the distribution of its assets amongst creditors. At the same time the transaction costs of reconstructing or winding up and distributing the assets should be minimized. The result being greater returns to creditors with the resultant lowering of risk of investment and cost of credit.

The changes directed towards streamlining external administration in terms of reducing advertising, and notification requirements as well as the means of satisfying such requirements using e-commerce mean reductions in transaction costs and are an efficient means of improving creditor outcomes. So too the adoption of voluntary pooling and court ordered pooling in liquidation gives rise to savings in transaction costs.

With respect to the remaining measures, procedural efficiency runs counter to the substantive goal of creditor protection such that the mandatory priority rule applying to the payment of employee entitlements (including superannuation guarantee charge), regardless of the form of external administration while generating benefits for specific employee creditors, does not improve creditors' outcomes generally, but may have the opposite effect.

Similarly, limiting pooling to "insolvent companies" in specifically defined group relationships denies the availability of contribution orders from solvent companies where such orders may also be of benefit to unsecured creditors.

Where corporate insolvency regulation is achieved through the implementation of mandatory provisions, creditor protection is achieved but sometimes at a cost of the loss of procedural efficiency, where the external administrator is deprived flexibility in realising and distributing the available assets of the insolvent companies.

The measures outlined from the recent amendments to the *Corporations Act 2001* (Cth) are illustrative of the continual balancing of the substantive goal of creditor protection with the goal of achieving procedural efficiency in corporate insolvency. The achievement of both goals is necessary to ensure that creditors' maximise their outcomes in insolvency.