

Australian Credit Forum

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**PLEASE ADDRESS ALL
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22nd May 2008

CAMAC
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Dear Sir

Current Discussion Paper – Issues in External Administration

This Forum wishes to make a submission to your body regarding the current discussion paper – “Issues in External Administration”.

The Australian Credit Forum is a not for profit organisation formed in the 1970's by a group of credit professionals who in addition to wanting to build and strengthen existing credit standards, reviewed and discussed legislation, suggesting changes that may affect the credit industry.

Since its inception, one of the major strengths of the Forum has been its dedication to select the membership of individuals from as many industries as possible ensuring a cross section of knowledge and experience in all credit related areas.

This has been combined with the granting of membership to individuals within various service providing roles including debt collections firms, insolvency practitioners, legal firms, accountancy, insurance and business information providers.

Please refer to the attached website for further information:

<http://www.australiancreditForum.com.au/>

In respect of the 16 issues identified in your discussion paper, we wish to express our opinion on your proposals and, if they are material, make comments as to the reasons for those opinions.

As a general comment, we support any initiative that provides additional or better information to the creditors of an insolvent company. However, we are mindful of the costs of receiving that information, both by way of disbursements and by way of additional obligations upon Administrators (and therefore time cost charges of the Administrator).

Advisory Committee provisional position PP1

To assist creditors in their collective decision-making in a voluntary administration, an administrator should publish on a designated website the name, contact details and estimated amount due in relation to each creditor of a company in voluntary administration no later than the time of distribution to creditors of the notice of the first meeting. The concept of a designated website is discussed at Section 6.1.2.

In respect of PP1, the Forum notes that in all insolvency appointments the director must prepare, sign and file a Report as to Affairs which contains a list of creditors. Therefore there shall be information on the public register as to the existence and entitlement of creditors. This information includes the name, address and amount owed.

The Forum queries the benefit from enacting laws that force an Administrator to, immediately upon their appointment, supply to all of the creditors a list of the creditors. The IPAA Draft Code of Professional Practice No.2, which seeks to incorporate the previous Best Practice Statements, requires the following to occur:

21.4.1 List of Creditors

Apart from the statutory requirements to provide a list of creditors⁴, a schedule of creditors 590 (name and amount) should also be made available on the request of any creditor. The information is publicly available from the Report as to Affairs lodged with ASIC or Statement of Affairs filed with ITSA.

To minimise costs, where possible the schedule should be provided electronically (PDF recommended). Hard copy should be provided only where the creditor does not have electronic access.

The Forum recognizes that there needs to be a cost benefit analysis in respect of this issue. The benefit of obtaining the information on a statutory basis within the time frame nominated, needs to be balanced against the cost imposed upon an administrator in supplying that information.

In line with our previous comment regarding the provision of additional better information to creditors, the Forum supports any move which requires the maximum amount of information being disclosed.

PP2

An administrator issuing a s 443B notice should be required to disclose in the notice the location of the relevant equipment to the extent that this information is reasonably available to the administrator. In addition, the administrator should have a general obligation to facilitate efforts by owners to locate property that the administrator will not be using.

It is not proposed that there be a specific penalty or other sanction on the administrator for failure to comply with either requirement. Rather, the intent is that ASIC or any other interested party could take judicial proceedings to enforce either requirement.

In respect of PP2, the Forum notes that this issue relates to a section 443(B) notice, which in itself is restricted to special circumstances. The Forum queries how workable the proposal may be, having regard to the difficulty that may be encountered by an Administrator in locating some equipment which is the subject of the notice. However, the intention of the proposal is positive and as long as it does not result in significant administrative burden upon the Administrator, then the Forum is supportive of the proposal.

PP3

The general expectation should be that the administrator will chair the major meeting of creditors, given that it decides the future course of action for the company. However, an administrator should have a discretion to nominate another person to chair the major meeting of creditors where:

- the administrator cannot attend that meeting because of illness or some other good reason, and

- the creditors have resolved that the nominee should chair the meeting.

The administrator should be required to provide to the meeting a statement of the reason for his or her inability to attend.

Any nominee should be a registered liquidator. Also, before creditors vote on whether the nominee should chair the meeting, the administrator should:

- disclose relevant information concerning the nominee's experience and knowledge of the administration, and
- certify to creditors that the nominee is in a position to answer questions about the administration.

The meeting should be automatically adjourned for a short period (no more than a week) if the creditors do not approve the nominee presiding.

In respect of PP3, it is the opinion of the Forum that it is unreasonable for an administrator to have to personally and physically chair every major meeting of creditors. There will be instances where there is no proposed Deed of Company Arrangement and the future of the company has already somewhat been determined. Also, there will be unforeseen circumstances which detain the Administrator, and by virtue of their definition, the Administrator will not be able to plan for those unforeseen circumstances.

The Forum suggests that an Administrator should be entitled to attend and Chair the meeting using an electronic means such as video link or loud speaker telephone. The present legislation allows creditors to attend a meeting by telephone and in those exceptional

circumstances where an Administrator can not physically attend, an Administrator should be entitled to chair the meeting in that same electronic manner. Apart from the above suggestion of allowing the administrator to chair the meeting using electronic means, the Forum supports the proposal.

PP4

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

In respect of PP4, the Forum sees some difficulties with the proposal, in that the definition of a breach will become important in determining compliance with the legislation. Furthermore, the Forum would not like to see the administrator burdened with onerous tasks, such as monitoring the minutia of conduct, if that is going to result in additional costs being imposed on the creditors.

The Forum also queries the need for this proposal if a properly drafted Deed of Company Arrangement, possibly in response to the requests of creditors, requires the Deed Administrator to call a meeting of creditors immediately upon the company breaching the deed.

Regardless of the foregoing, the Forum supports anything that provides creditors with additional information and this proposal is another example of extra information for the creditors.

PP5

There should be no change to the current position under which all creditors, including creditors who are directors or related parties of those directors, have the right to vote on a resolution to appoint a different person as liquidator when a company proceeds from administration into liquidation.

In respect of PP5, the Forum supports the recommendation that there be no change to the current voting arrangements. The Forum accepts that there is some entitlement of related parties who have

genuinely advanced funds to the company to exercise a vote on this issue.

PP6

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

In respect of PP6, the Forum supports this proposal and accepts that as a matter of equity and fairness the remuneration of the Administrator, who has an obligation to maximize the benefit to creditors generally, should have a priority over the remuneration of the liquidator. The Forum queries whether the law currently acts in that manner anyway.

PP7

Creditors, in addition to the court, should have the power to approve the remuneration of a provisional liquidator when a company proceeds from provisional liquidation into liquidation. To assist them in making this decision, creditors should be given similar information to that provided to creditors in other forms of external administration.

The court should have the power to confirm, increase or reduce the remuneration determined by the creditors.

The Forum supports proposal PP7.

PP8

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

The Forum has some concern with this proposal.

The Forum agrees with any method of communication that efficiently resolves matters. The use of a postal vote (subject to a threshold objection level) is an efficient way of resolving matters.

However, the Forum is concerned that the matters be limited to those noted in proposal 8, being remuneration, the compromise of debts, and the acceptance of agreements lasting more than 3 months.

Issues arising from PP8

- Should postal voting, if introduced, be permitted beyond the three matters set out in the Referred Proposal?
- Should electronic voting be permitted in addition to postal voting?⁶⁸

As noted above, the Forum is against any introduction of additional matters for resolution by creditors by way of a postal vote.

The Forum is in favor of electronic voting or any other efficient means of communication.

PP9

The assumed solvency defence should remain for transactions entered into by officers of a company while a company is under a deed of company arrangement.

The Forum agrees with proposal PP9, albeit one of a technical nature.

PP10

It is unnecessary to give ASIC a statutory right to apply to a court to replace a liquidator if the liquidator dies or is no longer registered.

The Forum agrees with proposal PP10, but is of the opinion that it is not a significant issue.

PP11

Any interested party should have the right to apply to the court for directions about the temporary holding of books.

The Forum agrees with proposal PP11, particularly as it relates to a temporary state of affairs and gives the court the overriding discretion to make appropriate orders.

PP12

There should be no amendment to exempt from the definition of controller a person enforcing a security over a single asset or an asset with a value of less than \$100,000.

The Forum agrees that there should be no amendment to exempt controllers in the circumstances noted above.

PP13

Transactions conducted under the authority of a receiver or other controller should be exempted from the voidable transaction provisions.

The Forum agrees with proposal PP13 and strongly supports the notion that a creditor should be able to transact with a Receiver without any threat or concern that the transaction may be "attacked" by a liquidator as being a voidable transaction.

PP14

There should be a staged move from print media to Internet disclosure of all public notices on a designated website to be operated by ASIC.

The Forum debated this proposal in great detail.

It concluded that PP14 had substantial merit.

However, at least for the foreseeable future, initial communication from the appointed External Administrator to the creditors should remain in hard copy. This includes the advertisement which is currently placed in the newspaper.

We agree that all subsequent notices and reports may be issued via electronic form, such as posting on a secure web-site, unless a creditor formally requested the receipt of hard copy notices. In other words, the creditors would have to make a positive election to obtain hard copy notices after at least one notice has been given in writing and by newspaper advertisement.

PP15

Administrators, receivers and other controllers and liquidators, as well as deed administrators, should have the right to apply to the court for an exemption from the rule requiring a company to publish its former name on public documents. In exercising its discretion whether to grant an application, the court could take into account the possible prejudice to relevant parties, including past creditors and persons who may have to deal with the company in the future.

The Forum agrees with Proposal PP15, particularly on the basis that the court has an overriding discretion to make the decision.

PP16

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

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

- to receive an electronic notification that new material has appeared on the website(s), or
- to receive by mail, free of charge, a printed copy of these further notices and other documents.

Creditors who so register will continue to receive information in the specified manner unless they subsequently notify the company that they no longer wish to do so.

The Forum agrees with Proposal PP16

We trust this information is of assistance to your Committee.

Yours sincerely

Roger Bates
Chairman

A large, stylized handwritten signature in black ink is written over the text 'Yours sincerely' and 'Roger Bates'. The signature is highly cursive and loops around the text.