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## Insolvency – latest news from the courts and legislators

### Insolvency Law Reform Bill

In the last days of 2005, the Insolvency Law Reform Bill was introduced to Parliament. The path to its arrival has been a long one. The Government-initiated insolvency law review began back in 1999, resulting in the release for consultation of a draft bill in 2004.

#### Key features

The main aspects of the proposed new legislation, already extensively commented on, include:

- Introduction of a voluntary administration regime (VA regime) for companies, similar to that which exists in Australia.
- Changes to the voidable transaction and preferential payments provisions of the Companies Act 1993 (the CA).
- Introduction of new phoenix company provisions to deal with companies that carry on using a similar name to that of a failed company.
- Adoption of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency.
- Introduction of a no asset procedure (NAP) as a one-off reprieve from bankruptcy for the small time individual debtor who has got out of financial depth.

Further information, in particular on the significance of the VA regime, can be found on our website at:  
[www.bellgully.com/resources/resource\\_00031.asp](http://www.bellgully.com/resources/resource_00031.asp)

### Amendments to the Bill

A number of changes have been made to the Bill after feedback on its draft. The key changes are:

#### *The NAP*

Criteria for entry into the NAP includes a previously clean financial record. The Bill has been amended to exclude from the NAP both debtors who have previously been admitted to the NAP, and former bankrupts. Other changes to the NAP provisions include:

- A debtor who has applied for entry to the NAP is prohibited from obtaining credit of more than \$100 without first informing the credit provider that the debtor has applied for entry to the NAP.
- A list of debtors subject to the NAP is to be published.

#### *Official Assignee Powers*

Several issues concerning the Official Assignee's powers and the flexibility of those powers in administering bankruptcy



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arose in the draft and have resulted in amendments.

Among them are changes to provide:

- Clarification that all after acquired property of the bankrupt vests in the Official Assignee without the Official Assignee intervening or taking other steps.
- That the Official Assignee may apply to the Court for an order that the bankrupt contribute to payment of debts.
- For the Official Assignee to require production of and examine any document or information including records of any trust for which the bankrupt is a trustee or settlor and which relate to the bankrupt's property or dealings.
- That the Official Assignee does not have to examine proofs of debt if no dividends are likely to be paid to creditors.

#### *Consistency with the Companies Act 1993*

Minor technical amendments have been made to provide consistency with the CA where necessary. For example, the Bill has been amended so that the Official Assignee may, but is not required to, carry out any duty or exercise any power in relation to property that is subject to security, except where the security is surrendered for the general benefit of all creditors.

#### *Priority Debts*

Amendments to these provisions include:

Clarification that creditors who assist in recovery and preservation of the assets for the general benefit of all creditors must preserve the value of that asset.

Amending the Receiverships Act 1993 to provide preferential status to redundancy claims arising on the termination of employment by a receiver after the commencement of the receivership.

Clarification that only perfected purchase money security interests fall outside the preferential claims of creditors.

#### *Voidable Transactions*

In the draft there was confusion over whether payments made by a receiver to an unsecured creditor to satisfy a debt fell within the voidable transaction provisions of the CA. The Bill has been amended so that provided a receiver is not personally liable for payments made pursuant to a pre or post receivership contract, those payments will be subject to the voidable transaction provisions.

#### *VA Regime*

Several technical amendments to the VA provisions have been made, including the adoption of a pooling procedure for administration of companies similar to the Australian CAMAC recommendations, but incorporating the test for pooling applied in New Zealand under the CA.

#### *Phoenix companies*

The definition of phoenix companies has been broadened to include companies that change their names within 12 months prior to the start of liquidation, where the new company is incorporated with the same or substantially the same name as the original company.

## **Regulation of practitioners**

One of the ongoing criticisms of the proposed new legislation is that no provision is made to regulate insolvency practitioners. In response, the Ministry of Economic Development is developing a policy on regulating such practitioners and it is anticipated that regulatory provisions will be introduced to the Bill at select committee. Targeted consultation on the proposed policy is planned.

## **Next steps**

The Bill is expected to receive its first reading in Parliament in the first half of this year. Assuming it is passed, a relatively short period of time will then be given for submissions once it has gone to select committee.

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### Court rulings

*Two recently released decisions from the Court of Appeal confirm some critical points of law when it comes to security interests.*

### Court confirms security interests can override ownership

The Court of Appeal has backed the approach taken by the High Court in two previous cases under the Personal Properties Securities Act 1999 (the PPSA).

In a break from pre-PPSA law, the Court has confirmed in *New Zealand Bloodstock v Waller* that a person who leases goods from another can give security over those goods to a third party. If that third party subsequently enforces its security interest in the goods, ownership in them can effectively pass to the third party, notwithstanding the rights of the original owner.

### Critical to register

The case once again highlights the critical need to ensure that owners of goods which are leased out for a term of more than a year need to protect their position by registering their security interest on the PPSR.

For further details of the decision visit the Bell Gully website:  
[www.bellgully.com/newsletters/10financial/courts.asp](http://www.bellgully.com/newsletters/10financial/courts.asp)

### Subsequent security holder retains priority

Last year, a High Court decision cast doubt on the rights of subordinate ranking security holders where a receiver sells a debtor's personal property. The subordinate security holder's rights in that case were found to be automatically extinguished by the sale. The Court of Appeal has now overturned the High Court decision and confirmed the priority rights of subsequent security holders in this situation.

For further details about the decision and its implications visit the Bell Gully website at: [www.bellgully.com/resources/resource\\_00584.asp](http://www.bellgully.com/resources/resource_00584.asp)