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Insolvency law and practice with Ferrier Hodgson Corporate Recovery

## A blueprint for better restructuring

The introduction of the Voluntary Administration (VA) process in June 1993 was the most significant reform of Australian corporate law in many years, allowing Australia to boast one of the world's most effective corporate rescue regimes.

Now, 14 years later, we are witnessing the introduction of wide-reaching reforms to that regime via the Corporations Amendment (Insolvency) Act 2007 which will keep Australia's VA regime as a model for others to follow.

Taking effect on December 31, 2007, the reforms aim to:

- Improve outcomes for creditors
- Fine tune the VA process
- Deter company officer misconduct
- Improve the regulation of insolvency practitioners

At their core, the reforms seek to reduce costs and improve the flexibility for restructuring within the VA process by allowing Administrators to:

### 1. Transfer shares or alter a member's status

- Old: Members with no commercial interest had the ability to prevent a transfer of shares that could be fundamental to a corporate restructure. Also, Deed Administrators had no power to compulsorily sell a member's shares
- New: A transfer of shares or alteration of a member's status can take place with the Administrator's consent or by order of the court. Even without the member's consent, if the court approves, a Deed Administrator can compulsorily sell a member's shares.

### 2. Raise funds

- Old: A debt-for-equity swap proposal from an Administrator requires compliance with the fundraising provisions of the Corporations Act. This adds complexity and cost.
- New: The fund-raising provisions of the Act will not apply to debt-for-equity swaps under a DOCA when creditors do not have to provide further consideration.

### 3. Borrow funds with the backing of a statutory indemnity and lien

- Old: An Administrator's borrowings do not fall within the definition of outgoings for which an Administrator has a statutory indemnity and lien.
- New: The existing statutory indemnity and lien extends to borrowings of an Administrator and any liabilities incurred in good faith and without negligence.

*Overall, these reforms will provide a regulatory framework offering greater integrity, transparency and trust – a gain for all stakeholders*

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### 4. Change a company name without a special resolution from members

- Old: The difficulty of convening meetings and gaining consensus amongst members made it hard for an Administrator to change a company name, particularly a public company name, as part of a rescue plan. Also, disclosing a company's former name could result in reputational damage.
- New: Administrator can apply to ASIC to change a company's name without member approval. A Deed Administrator can gain court exemption from disclosing a company's former name.

### 5. Gain exemption from the disclosure "Subject to Deed of Company Arrangement" on public documents

- Old: Disclosure of "Subject to Deed of Company Arrangement" on all public documents could have an adverse affect on business.
- New: The court has a specific power to grant an exemption from making the public disclosure.

### 6. Deal with property that is subject to a lien or pledge

- Old: Uncertainty as to an Administrator's ability to deal with property subject to a lien or pledge.
- New: An Administrator can sell property under certain circumstances. Security holders will have protections.

### 7. Have more time to restructure a company

The reforms provide the following timetable:

First Meeting	Old	New
Notice of meeting	2 business days	5 business days
Timing of meeting	Within 5 business days after appointment	Within 8 business days after appointment
Second Meeting		
Notice of meeting	21 or 28 days	20 or 25 <b>business</b> days
Timing of meeting	Within 5 business days after the end of the convening period	Within 5 business days <b>before or after</b> the end of the convening period
Adjournment period	60 days	45 <b>business</b> days

The reforms also allow:

- Communication with creditors electronically
- Streamlining of statutory advertising requirements
- The conversion of 'days' to 'business days' thereby ensuring consistency and clarity in terminology
- Creditors to terminate a DOCA only where there has been a fundamental breach which is not rectified

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Finally, the reforms also assist in improving outcomes for creditors and the regulatory environment in which external Administrators operate. Specifically, the reforms include:

- A widening of the prohibition on inducements to insolvency practitioners for work referral
- Addressing conflicts of interest via the requirement for a declaration of relationships by Administrators to creditors
- Reporting to creditors all matters material to their decision regarding a company's future at the second creditors meeting
- Changes in the remuneration approval process
- Enhanced protection of employee entitlements through preserving their statutory priority of payment under a DOCA unless they agree otherwise
- Facilitating 'pooling' in a liquidation scenario
- Changes to the education and experience requirements for liquidators
- More specific and timely reporting requirements to ASIC
- Updating professional indemnity and fidelity insurance requirements to reflect common practise
- ASIC's ability to investigate a liquidator and cancel a liquidator's registration
- Clarification of the arrest-warrant provisions applying in a winding up
- Abrogation of privilege in proceedings for banning orders, disqualification and cancellation of licenses
- Streamlining the creditors voluntary winding-up provisions

Overall, these reforms will provide a regulatory framework offering greater integrity, transparency and trust – a gain for all stakeholders

As Australasia's premier corporate advisory, forensics and corporate recovery practice, Ferrier Hodgson has assisted many companies in restructuring their affairs under the VA regime. Our experience comes from handling hundreds of SMEs and some of the biggest turnaround success stories in Australian corporate history, such as the restructuring of the mining giant Pasminco and the resulting IPO which gave birth to Zinifex Ltd.

In addition, Ferrier Hodgson partners played a key role in the instigation of these changes to the Voluntary Administration process. If you have any questions about how the changes could affect you, don't hesitate to contact us.

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