University of Pretoria

FACULTY OF LAW
CENTRE FOR ADVANCED CORPORATE AND INSOLVENCY LAW

FINAL REPORT CONTAINING PROPOSALS ON A UNIFIED INSOLVENCY ACT

PART 1
FINAL REPORT AND EXPLANATORY MEMORANDUM
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## PART 1

EXPLANATORY MEMORANDUM TO AMENDMENTS AND ADDITIONS TO THE DRAFT BILL

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PREFACE

The proposals contained in this document (which reflects information accumulated up to the end of December 1999) has been prepared for the Standing Advisory Committee on Company Law (SACCL) and the Insolvency Project Committee of the S A Law Commission by the Centre for Advanced Corporate and Insolvency Law (SACIL) at the University of Pretoria. The views, conclusions and recommendations in this document should not, therefore, be seen as the final views of either the SACCL or the Project Committee of the Law Commission.

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INTRODUCTION

1. BACKGROUND

1.1 In paragraph 5.1.2 of the “INTRODUCTION AND SUMMARY OF RECOMMENDED CHANGES” contained in Discussion Paper 66 (Project 63) of the Law Commission’s revision of Insolvency Law, the following statement is made:

“The Standing Advisory Committee on Company Law agreed to investigate the under-mentioned subjects. The Project committee will take into account the results of the research by the Standing Advisory Committee in so far as it relates to insolvency:

* Disqualification and personal liability of directors
* Judicial management
* Compromises and arrangements
* The position of related companies
* Dissolution and deregistration of companies
* Provisions in respect of close corporations
* Provisions in respect of other legal persons”

1.2 In April 1998 the Standing Advisory Committee on Company Law agreed that the Centre for Advanced Corporate and Insolvency Law at the University of Pretoria could undertake a project aimed at merging the liquidation provisions of the Companies Act 61 of 1973 (hereinafter referred to as the Companies Act), and the Close Corporations Act 69 of 1984 (hereinafter referred to as the Close Corporations Act), into the Draft Insolvency Bill drafted by the South African Law Commission.

1.3 A working document, in the form of a Draft Bankruptcy Bill, was drafted and submitted for discussion at a symposium held at Procforum (Transvaal Law Society) on 23 October 1998.

1.4 The symposium was attended by well over 200 delegates from all disciplines of insolvency law, including a number of international speakers and delegates. A clear,
unanimous signal emanated from the symposium - South Africa needs, and wants, a unified system of insolvency law which is contained in one consolidated piece of legislation.

1.5 In consequence of a proposal made by Judge R Zulman at the symposium,\(^1\) a series of workshops, dealing with the technical intricacies of the Bill, were held at the University of Pretoria from 7 to 10 December 1998.\(^2\)

1.6 Two working documents, one by the S A Law Commission and the other by the Centre for Advanced Corporate and Insolvency Law at the University of Pretoria, were discussed at the conference held on 6 October 1999. The document by the University of Pretoria was compiled as a result of the symposium held in October 1998 and the workshops held in Pretoria from 7 to 10 December 1998.

1.7 This document reflects the input received from all participants at the symposium held on 23 October 1998, the workshops held from 7 to 10 December 1998 and the conference held at Eskom Conference Centre on 6 October 1999. This document also reflects input and submissions received from interested parties in writing before, during and after the conference held on 6 October 1999.

1.8 It is also important to note that when this document was drafted, the latest draft of the Law Commission’s Draft Insolvency Bill was taken as basis, which has been approved by the Insolvency Project Committee of the S A Law Commission.

1.9 In preparing this document great care was taken to reflect the various Insolvency Bill clauses as approved by the Law Commission up to the end of December 1999. Where proposals in conflict with those made by the Law Commission have been included in this document, these have been clearly marked and an explanation provided.

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\(^1\) See pages 51 to 52 of the Symposium Transcription (Volume 2 of this Report).

\(^2\) The Workshop Transcriptions can be found in Volume 2 of this report.
1.10 Certain clauses are original in the context of the Insolvency Review being conducted by the Law Commission. These clauses and/or chapters have been clearly marked.

1.11 It is important to point out that wide consultation has taken place before finalising this report, and it would not be out of place to state that this document reflects the views of the majority of the role players in insolvency law in South Africa. Approximately 210 delegates registered for the symposium held on 23 October 1998, approximately 60 in total attended the workshops held from 7 to 10 December 1998, and 230 persons registered for the conference held on 6 October 1999. In addition to the symposium, workshops and conference, which were all open for anyone to attend, wide consultation took place by personal contact with individuals and institutions.

1.12 At the conference held on 6 October 1999, Prof Michael Katz and Judge Ralph Zulman suggested, with the approval of the delegates present at the conference, that a combined report be lodged with the Law Commission to ensure the consideration of a unified Insolvency Act by the Law Commission at its meeting on 13 February 2000. Due to time constraints (the Insolvency Project Committee only finalised its proposals contained in the draft Insolvency Bill on Friday 14 January 2000, while the joint report would have to have been ready for distribution by 28 January 2000), it was decided that the only way in which a joint report of sorts could be presented to the Law Commission, would be by including references, in these unified proposals, to the Law Commission’s working papers. This has been done by placing footnotes in the unified Bill, which refer to the Law Commission’s Draft Bill and explanatory memorandum.

2. BASIS OF PROPOSALS AND APPROACH TAKEN WHEN MERGING THE PROVISIONS OF THE DIFFERENT ACTS

2.1 As stated above, the latest draft of the S A Law Commission’s Insolvency Bill has been used as basis for these proposals. The work done by the Law Commission (presently contained in Discussion Paper 86, Project 63) as well as copyright therein, is acknowledged. The tireless contributions and comments of Mr MB Cronje of the Law
Commission is also acknowledged.

2.2 The proposals contained in this document are based on the premise that it is possible to have one Act dealing with all insolvency provisions, despite obvious and not so obvious differences between individuals, partnerships, trusts, companies, close corporations and other legal entities. One of the most surprising discoveries made when finalising these proposals, is that many of the differences between these entities are artificial and, in many cases, unnecessary. These and other differences have been pointed out in the discussion of the relevant provisions contained in the Bill.

3. CHANGE IN PHILOSOPHY OF TRADITIONAL SOUTH AFRICAN INSOLVENCY LAW

3.1 This report deals with proposals for unified insolvency legislation which could possibly be introduced in South Africa.³ The first question which should possibly be asked is: why do we need to unify our insolvency legislation at all? After all, the current Insolvency Act has been in operation for over sixty years and the winding-up provisions in the Companies Act⁴ and Close Corporations Act⁵ since 1973 and 1984 respectively.

3.2 The problem is exactly the fact that our insolvency legislation is interspersed between a number of Acts. The Insolvency Act forms the basis of our insolvency legislation and contains the main provisions relating to the administration process of an insolvent estate. But the Insolvency Act only finds application to individuals and partnerships⁶ and specifically excludes bodies corporate or companies which are wound up under the laws relating to companies.

3.3 Where a company or close corporation is being wound up one has to turn to the

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³ See pages 32 to 53 of the Symposium Transcriptions (Volume 2 of this report), where the necessity of unified insolvency legislation was discussed.
⁵ Act 69 of 1984.
⁶ See the definition of “debtor” contained in s 2 of the Insolvency Act 24 of 1936.
Companies Act or Close Corporations Act in order to find the provisions relating to these entities. To make matters worse, the provisions in the Companies Act and the Close Corporations Act haphazardly make provision for certain procedural matters and some matters of administration, such as the appointment of liquidators, certain provisions relating to meetings and so on. Section 339 of the Companies Act then refers one back to the Insolvency Act for the main part of the actual administration process, the rights of creditors, distribution, contribution and the like.

3.4 The scenario in the case of a close corporation is even more problematic. Provisions relating to the winding-up of a close corporation which cannot be found in the Close Corporations Act must be searched for in the Companies Act. If no provision appears in the Companies Act, one then has to refer to the Insolvency Act for the relevant provision.\(^7\)

3.5 Cross-referencing between Acts, and on the other hand the interpretation of provisions which are contained in the Companies Act or Close Corporations Act and which are similar, if not identical, to provisions contained in the Insolvency Act, gives rise to problems in practice. It certainly seems nonsensical to have incomplete provisions relating to winding-up in for example the Companies Act, if the same Act is in any event going to refer back to the principal Act for the majority of the provisions.

3.6 There is also no sound philosophical reason for divorcing the provisions relating to the winding-up of juristic persons from those relating to individuals. Although there are certain material differences between an individual and juristic persons, it is submitted that these differences are not paramount to the extent that the liquidation (of what in both cases amounts to the administration of an insolvent estate) should be governed by separate provisions.\(^8\)

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\(^7\) See s 66 of the Close Corporations Act 69 of 1984.

\(^8\) See Keay, *To unify or not to unify insolvency law: international experience and the latest South African proposals*, which has been reproduced in its entirety in Volume 2 of this report, for a list of the advantages and disadvantages of unification, and which has since been published in 1999 *De Jure* 62.
3.7 The bottom line is that it would be both practical and good administration to have one set of provisions relating to the administration of all insolvent estates, be it the estate of an individual or that of a juristic person. It is further submitted that, in the long term, unified legislation will do away with uncertainty and ambiguity in the practice of the administration of insolvent estates.

3.8 Creating unified insolvency legislation has meant a review of the whole philosophy behind traditional South African Insolvency Law. South African Insolvency Law has traditionally been classified as a pro-creditor system, mostly due to the fact that our insolvency law is aimed at protecting creditors and not assisting a struggling debtor. The requirement of “advantage to creditors” contained in section 4 of the current Insolvency Act, is proof of this.

3.9 From the proposals and submissions received at the symposium, and more particularly the workshops, it is clear that an Act containing unified insolvency legislation will lean more toward a pro-debtor system than before, but still with the requisite protection for creditors. The reason for this is the relief that will sought to be obtained for debtors in the attached draft Bill. Detailed provisions dealing with rehabilitation, compromises and compositions (both pre- and post-liquidation) and judicial management, are contained in the attached draft Bill.

3.10 The attached draft Bill reflects a definite shift in philosophy also in respect of the type of debtor that will be assisted in the proposed unified legislation. Historically our insolvency law has been structured around the individual, unlike other systems of insolvency which

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According to PR Wood, Principles of International Insolvency, Sweet & Maxwell, 1995, South Africa is a pro-creditor country, leaning towards pro-debtor (Wood scores South Africa at 6 on a scale where 1 is extremely pro-creditor and 10 is extremely pro-debtor). Wood’s classification is based on certain premises (which are not important for the purposes of these proposals), but it is clear that due to our provisions relating to rehabilitation and the writing-off of debt, that we are seen by most as leaning toward a pro-debtor system.

According to Wood’s scale, this would probably mean that South Africa would move up the ladder a rung or two towards a more pro-debtor system (perhaps 4 or 5 instead of 6 on the scale. See the previous footnote.)
are structured around corporate insolvency, with individual provisions taking a back seat.\textsuperscript{11} In terms of the attached proposals all debtors, be they juristic, natural or other entities, will be dealt with in the same legislation.

3.11 Other more subtle shifts in philosophy can be traced in the draft Bill. These can be ascribed to the major issues which were considered when framing the proposals contained in the attached draft Bill, and which are discussed in the next paragraph.

4. **MAIN ISSUES AND SUMMARY OF CHANGES PROPOSED IN THE BILL**

4.1 In the original Draft Bankruptcy Bill (the working document which precipitated these proposals) the Bill was divided into chapters in order to facilitate understanding of the different provisions, and to make necessary distinctions between the different types of entities (or debtors). These were briefly the following:

- **Chapter I:** Definitions
- **Chapter II:** Liquidation by the Court
- **Chapter III:** Rehabilitation of natural persons
- **Chapter IV:** Voluntary liquidation by resolution
- **Chapter V:** Special provisions relating to companies and close corporations in liquidation
- **Chapter VI:** Compositions, compromises and arrangements
- **Chapter VII:** Judicial management
- **Chapter VIII:** General provisions

4.2 From the discussions at the workshops, it became evident that delegates were not in favour of this classification, but preferred that the Bill should be divided into chapters which deal with each of the stages of the insolvency process in sequence. For example, voluntary liquidation by resolution should not be dealt with in a separate chapter on voluntary liquidations, but as a manner of liquidation under the provisions relating to

\textsuperscript{11} For example the United Kingdom and the United States.
compulsory and voluntary liquidation in clauses 2, 3 and 4.

4.3 The division of the Bill into Chapters is evident from the Draft Bill which appears in Part 2 of this Volume of the report. This division has facilitated the drafting of the new, unified provisions, and will also be adopted by the Law Commission in their review of the Insolvency Act.

4.4 The other question which receives serious consideration in these proposals, is to which debtors the Bill should apply. Here the key issue to be decided is whether or not there should be one Act which deals with the liquidation of all legal entities. Besides the Companies Act 61 of 1973 and the Close Corporations Act 69 of 1984, there are a number of other legislative provisions dealing with the liquidation of specific types of institutions, or the placing under curatorship of such institutions. These are Part VI of the Long Term Insurance Act 52 of 1988; Part VI of the Short Term Insurance Act 53 of 1988; section 29 of the Pension Funds Act 24 of 1956; section 35 of the Friendly Societies Act 25 of 1956; section 18C of the Medical Schemes Act 72 of 1967; sections 27, 28 and 39 of the Unit Trusts Control Act 54 of 1981; Chapter X of the Co-Operatives Act 91 of 1981; section 33 of the Financial Markets Control Act 55 of 1989; section 68 of the Banks Act 94 of 1990; and Chapter VIII of the Mutual Banks Act 124 of 1993.12

4.5 However, it is ludicrous to talk of unification if such “unification” is not going to be complete. The problem here is that there are currently certain institutions, such as banks and insurance companies,13 which are not governed by the provisions contained in the Insolvency Act, Companies Act or Close Corporations Act, even though such institution is, for example, a company. These specific types of institutions have provisions in their governing legislation which regulate their winding-up or judicial management.14

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12 See paragraph 5.1.2 of the INTRODUCTION AND SUMMARY OF RECOMMENDED CHANGES, Discussion Paper 66, Project 63 by the South African Law Commission.

13 See pages 1 to 31 of the Symposium Transcriptions and pages 1 to 74 of the Workshop transcriptions (Volume 2 of this Report) for a complete discussion of this issue.

14 See paragraph 4.4 above.
4.6 One of the questions which is addressed in this report is whether it is possible, or even desirable, to also include these specific institutions under proposals for unified insolvency legislation? While it is understandable that the authorities which are responsible for the administration of these institutions would like to retain control over the manner in which they are wound up or placed under judicial management, there is no real reason why this should be the case.  

4.7 The protection of the public interest is the basis for the current provisions in the Acts referred to. To this end the authority governing such institutions has an important role to play. For example, when an application is brought in order to place a bank in liquidation, the Registrar of Banks has the right to oppose such application. In the same vein the registrar has the right to apply to court to have a bank wound up. The Master of the High Court may also not appoint any person as liquidator or judicial manager of a bank other than a person recommended by the Registrar of Banks.

4.8 These are laudable provisions which are aimed at protecting the interests of the bank’s clients, ie the public. The same principle applies to the interests of policy holders in the case of insurance companies.

4.9 Laudable as these provisions are, there is no reason why the same provisions, which currently protect the public interest, cannot be included in proposals for unified insolvency legislation. These provisions are aimed at preventing any person from simply bringing an application to wind up, for example, a bank or insurance company which

15 It is evident that the Reserve Bank is still opposed to this idea. See pages 16 to 67 of the Conference Transcriptions (Volume 4 of this Report), and especially the comments made by Grobler (commencing on page 28).

16 S 68(1)(a) of the Banks Act 94 of 1990.

17 S 68(1)(a) of the Banks Act 94 of 1990.

18 S 68(1)(b) of the Banks Act 94 of 1990.

19 See for example Part VI of the Long-Term Insurance Act 52 of 1998.
would, obviously, result in potential chaos. However, once the checks and balances have been complied with and the Registrar consulted and notified of the winding-up, it does not mean that he cannot still exercise his powers just because the provisions are contained in a unified piece of insolvency legislation.

4.10 The unification process is not intended to take away the powers of any governing authority over its charge, but merely to provide for uniform procedures once the institution in question has in fact been placed under liquidation. After all, an insolvent bank is still insolvent and the provisions relating to insolvency must be applied to it.²⁰

4.11 To summarise it can be said that the powers which have currently been conferred on the governing authorities in respect of specialised institutions, will have to be (and have been) retained in proposals for unified insolvency legislation. This is not only necessary in order to protect the public interest, but also for the purposes of good administration. However, the same objectives can be achieved by including these provisions in one consolidated piece of legislation.²¹

4.12 In determining the issue of whom the Bill applies to, the definition of “debtor” contained in the Bill plays a crucial role. If the purpose of unified insolvency legislation is to be all-encompassing, a major difficulty arises in defining a “debtor” for the purposes of applying the legislation to all types of entities. Boraine and Van der Linde²² point out that a correct and exact definition of “debtor” is one of the key issues in the review of our

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²⁰ It is conceded that the provisions relating to the appointment as co-liquidator someone who is knowledgeable about the banking industry (s 68(1)(c) of the Banks Act 94 of 1990) are important, and this has been addressed in the proposals contained in this report.

²¹ The problem of amendment to the unified piece of insolvency legislation has also been addressed. For example, unified insolvency legislation will probably fall under the control of the Ministry of Justice while the Banks Act, for example, falls under the auspices of the Ministry of Finance. The Finance Ministry would no doubt disapprove of the idea of the legislation being amended without first being consulted. This can effectively be addressed by building in a peremptory consultation clause before certain sections can be amended. This has been done very effectively in the new s 98A of the Insolvency Act 24 of 1936, which makes provision for peremptory consultation in the case of amendment to provisions relating to preferences payable to employees in an insolvent estate.

²² The draft Insolvency Bill - an exploration (part 1) 1998 4 De Jure 621 (at 626).
insolvency law. Keay\textsuperscript{23} confirms this viewpoint and states that the trick here is to find a way of defining debtor without being clumsy and long-winded in the drafting of the provisions.

4.13 The first attempt at defining “debtor” for the purposes of unified legislation, was submitted at the symposium which has already been referred to above. It was, to say the least, clumsy and awkward. In response to the suggestion made by Keay in his paper, the definition was substantially amended and proved to be easy to use in the proposals which appear in this report. In consequence of further suggestions made at the conference on 6 October 1999, the definition has now been refined even further.

4.14 \textit{Liquidation by the court:} Although the circumstances in which individuals and corporate entities are liquidated do differ, the process in order to bring about liquidation does not differ to any great extent. In those cases where there are differences (in terms of current provisions) the question has to be asked whether these differences are warranted. Where there are irreconcilable differences these have been made provision for in the Act.

4.15 In this respect the acts of insolvency and the grounds of liquidation have been revised. The result is more streamlined provisions in respect of the grounds of bringing an application to liquidate an estate.

4.16 \textit{General administration of liquidated estates:} Where a “debtor” has been liquidated by the court, whether it be an individual or a corporate entity, it can generally be stated that the administration procedure should be the same (in terms of the current legislative provisions these administration procedures are generally the same), especially since these individuals and corporate entities are normally insolvent or in a position where they are unable to pay their debts. There are of course certain provisions which only apply to individuals and some which only apply to corporate entities, but these exceptions have been dealt with by excluding the application of certain sections to the debtor concerned, or by dealing with them in a separate chapter where they are only applicable to specific

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\textsuperscript{23} See footnote 8 \textit{supra}.
types of debtors. In terms of these proposals, the general administration process is now the same for all debtors unable to pay their debts.

4.17 **Voluntary liquidation by resolution:**\(^{24}\) This issue is no longer dealt with in a separate chapter in the Bill, as was the case in the original working document (dubbed the “green paper”). The new proposals contained in the Bill now make provision for a “liquidation resolution” which is uniform for all entities which are capable of making use of it. There is no justification for a distinction between a voluntary liquidation by resolution of a company and a voluntary liquidation by resolution of a close corporation, or, as has been proposed in the Bill, the voluntary liquidation by resolution of any other entity which wishes to make use of this type of procedure.

4.18 **Compositions, compromises and arrangements and other business rescue provisions:**\(^{25}\) This was one of the main thrusts of the new proposals, and shows a definite shift towards saving businesses instead of liquidating them. Various proposals were made, but unfortunately no consensus could be reached in the time frames which applied when drafting these proposals. As a result, judicial management has been retained, and only slightly amended to make it more user friendly, for example making the provisions applicable to other types of entities such as close corporations and trusts as well.\(^{26}\) A major new approach is that the proposals relating to business rescue are not only aimed at companies, but at other business entities such as close corporations, trusts, partnerships and, as some have suggested,\(^{27}\) also to individuals.

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\(^{24}\) See pages 54 to 60 of the Symposium Transcriptions and pages 445 to 508 of the Workshop Transcriptions (Volume 2 of this report).

\(^{25}\) See pages 61 to 75 of the Symposium Transcriptions and pages 635 to 727 of the Workshop Transcriptions (Volume 2 of this report).

\(^{26}\) Currently judicial management only applies to companies.

\(^{27}\) At the workshops held at the University of Pretoria from 7 to 10 December 1998, it was suggested by a number of delegates that as many of the provisions in the unified legislation as possible, should be applicable to all debtors.
4.19 The proposals regarding business rescue provisions can be divided into three groups:

C provisions relating to debtors in the case where such debtor is not insolvent and there is no liquidation present;
C provisions relating to debtors in the case where such debtor is in fact insolvent but no liquidation is yet present;
C Provisions relating to debtors in the case where they are insolvent and there is a liquidation order.

4.20 South Africa does not have a culture of business rescue, although there are provisions in the Companies Act which provide for certain business rescue options. Rather it can be said that South Africa has a liquidation culture. However, in light of certain proposals being made in this report, it may become more difficult for a person or persons to simply liquidate a business and start a new one. There appears to be a global move towards business rescue and even South Africa has started to realise the need for effective business rescue provisions under new insolvency legislation. The “fresh-start” approach,

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28 For example, a company can enter into a compromise with its creditors in terms of s 311 of the Companies Act 61 of 1973. Judicial management is also provided for in Chapter XV of the Companies Act.

29 It would appear that it is far easier to liquidate a company and start a new one, than to try and save an existing business. See Smits Corporate administration: a proposed model which has been reproduced in its entirety in Volume 2 of this report (Smits’ paper has also since been published in 1999 De Jure 80.)

30 These proposals relate to the opening of a register of persons who were involved with failed businesses which are liquidated. This type of register has been mooted by the banking industry, in order to keep tabs on people who were involved in a business which has become insolvent and which is subsequently liquidated. This issue is discussed in more detail below.

31 For example, almost all the conferences organised under the auspices of Insol International, the international organisation catering for insolvency practitioners, have business rescue as one of its themes.

32 See for example the proposed insertion of s 74X into the Magistrate’s Court Act 32 of 1944 proposed by the South African Law Commission in Discussion Paper 66, Project 63. See also Roestoff and Jacobs Statutère akkoord voor likwidasie: ’n toereikende skuldenaarremedie 1997 2 De Jure 189. Overseas commentators have also had their say on the possibility of introducing business rescue provisions into South African legislation - see Rochelle Lowering the penalties for failure: using the insolvency law as a tool for spurring economic growth; the American experience, and possible uses for South Africa 1996 2 TSAR 315 and Smits, footnote 29 supra.
which is proving so popular in the United States and Europe, is also starting to gain momentum here.\textsuperscript{33}

4.21 One of the problems which will be encountered in introducing business rescue provisions in South Africa, is that the South African economy is vastly different from the countries which presently have effective business rescue regimes.\textsuperscript{34} For this reason it is doubtful whether another country’s business rescue provisions can merely be imported into our legal system.\textsuperscript{35} If one is to introduce a business rescue regime in South Africa, such provisions would have to be tailor-made for the local circumstances.

4.22 Another problem is getting major creditors, such as banks, to catch on to the idea of business rescue. More often than not, a business rescue regime means that some creditors somewhere are going to lose out on the immediate payment of their claims, and it is going to take a concerted effort to get these creditors to catch on to the idea.\textsuperscript{36} No business rescue regime can hope to be successful in South Africa without the active participation of big business.

4.23 The only true business rescue regime which is currently provided for in South African legislation, is judicial management. However, this form of business rescue has proved to be a dismal failure in practice. It is submitted that one of the main reasons for this failure is that liquidators, and not so-called “trouble-shooting managers” or “business doctors”, have been used to try and resuscitate the businesses in question. Another problem is that

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\textsuperscript{33} See for example Roestoff \textit{Die belang van schuldsanering vir die Suid-Afrikaanse insolvensiereg 1996} \textit{De Jure} 209.

\textsuperscript{34} See Smits, footnote 29 \textit{supra}.

\textsuperscript{35} One example is the floating charge which is a popular form of security in the United Kingdom. The United Kingdom’s business rescue provisions acknowledge the floating charge and special provisions relating to these creditors form a major part of such a rescue. South Africa does not have the floating charge, and it would therefore not make sense to try and import such a system. However, it must be noted that general notarial bonds under South African law may in some cases have a similar effect to the floating charge, especially in cases where the bond has been perfected by the bondholder.

\textsuperscript{36} An option which is currently being mooted by the University of Pretoria and the University of the Orange Free State, is to hold a series of awareness lectures which will primarily be aimed at informing the business community as to the purpose and function of a business rescue regime.
the judicial management orders are applied for at the stage when the business can probably no longer be saved.

4.24 Also, in order to obtain an order for judicial management, the applicant has to prove that there is a “reasonable probability” that the company will once again become a successful concern if it is placed under judicial management. This burden of proof is, with respect, too high and should be changed to “reasonable possibility” or “reasonable prospect”, as the proposals in this report indicate. Another drawback of the current legislation is that judicial management can only be applied to companies. It is not possible, for example, to place a close corporation or a trust under judicial management. In these proposals judicial management has now been made applicable also to these entities, and can be used in appropriate circumstances.

4.25 Initially the business rescue proposals were dealt with under several chapters, with different provisions for each. In some cases more than one proposal had been made, the choice being left to public debate to decide which system is preferable. The current provisions of section 311 of the Companies Act have been adapted and included under its own chapter. The provisions relating to individual compositions have also been included under a separate chapter.

4.26 At the conference held on 6 October 1999, it became apparent that no unanimity on a new business rescue regime would be reached within the time frames laid down for the completion of a project on a unified insolvency statute. Consequently the three proposals made have been removed from these proposals and replaced by the existing judicial management. It is proposed that a new business rescue regime be considered separately at future conferences which are to be held on this new and controversial subject area, with

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37 See s 427(1) of the Companies Act 61 of 1973.

38 For example: Smits, an Attorney from Hebb & Gitlin in the United States, has made proposals in the same vein as Chapter 11 of the United States Bankruptcy Code. The provisions have been adapted to South African conditions (see footnote 29 supra). On the other hand, Kloppers from the University of Stellenbosch has made proposals similar to the old provisions of section 427 et seq of the Companies Act, which deal with judicial management.
a view to later inclusion in a unified insolvency statute, or even as a separate piece of legislation.

4.27 *Liability of directors and others.*\(^{39}\) One of the outstanding issues which still has to be dealt with by the Standing Advisory Committee on Company Law relates to the disqualification and personal liability of directors. For the purposes of the initial working document (the Draft Bankruptcy Bill) the current provisions of section 424 of the Companies Act were adapted to include all debtors and then inserted into the Bill. However, after the completion of the workshops, it was clear that delegates were in favour of adopting additional new proposals which would not only be all-inclusive, but which is more in line with modern trends elsewhere in the world.

4.28 The personal liability of directors and others evoked quite a debate at not only the symposium, but also at the subsequent workshops. The main thrust of the contributions towards amending the provisions of section 424 of the Companies Act,\(^{40}\) seemed to be whether or not mere negligence, as opposed to gross negligence or intent, should be the basis for liability.\(^{41}\) This issue was examined in light of the consequences which would flow from changing the basis of this liability. A cursory examination of using mere negligence as a basis, leads one to the conclusion that this may lead to inequitable results. Consequently, the provisions dealing with this aspect in Chapter 24, have more or less retained the current approach taken in section 424 of the Companies Act. In addition, a new proposal in respect of *insolvent trading*, has been included in the attached draft Bill. This new proposal was supported by most at the conference held on 6 October 1999.\(^{42}\)

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\(^{39}\) See pages 76 to 81 of the Symposium Transcriptions and pages 530 to 634 of the Workshop Transcriptions (Volume 2 of this report).

\(^{40}\) Section 424 contains the provisions relating to the personal liability of directors for fraudulent conduct of business.

\(^{41}\) See pages 76 to 81 of the Symposium Transcriptions (Volume 2 of this report) where it is clear that mere negligence will never be accepted as a ground for liability.

\(^{42}\) See pages 100 to 134 of the Conference Transcriptions (contained in Volume 4 of this report).
4.29 What is important for the purposes of unified insolvency legislation, is the ambit of these provisions in a consolidated piece of legislation. It has been suggested that not only directors and other officers involved in the management of a company should be subjected to these provisions, but also others, such as the trustees of a trust or the members of a close corporation.43

4.30 In addition to new provisions relating to personal liability, a wider form of sanction was mooted by many parties who have made contributions to the unified proposals. This innovation of sorts has been proposed in the form of a register, which could contain the names of all directors (and other appropriate officers of a company), members of close corporations and trustees of a trust, who were involved in the company, close corporation or trust if it goes into liquidation. In effect it means that these persons will be black-listed, since the banks and other credit-granting organisations will have access to the register and could then protect themselves from once again being involved in businesses or transactions which could pose a business risk. The introduction of such a register would not only be costly, but the introduction thereof could be objected to on the basis of it being unconstitutional.44 This aspect is reported on in more detail in Part 1 of this document.

5. **IN CONCLUSION**

5.1 While the report contained in Part 1 of this document, which precedes the Draft Bill in Part 2, is important in highlighting some of the more important proposals contained in this document, the most important part of this report is in fact the Draft Bill. The Draft Bill represents, in its totality, an attempt at the complete unification of South African insolvency legislation.

5.2 Even though improvements to the Bill have been made a number of times since the

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43 There are separate provisions in the Close Corporations Act 69 of 1984 dealing with the liability of members. See sections 70, 71 and 73 of the Close Corporations Act 69 of 1984. These have been included in the draft Bill in clauses 116 and 117.

44 As was in fact done in writing by some commentators after the conference held on 6 October 1999.
symposium held in October 1998, there are bound to be parts of the proposals contained in this report which can be improved upon yet, and these proposals in no way make claim to being perfect. These proposals do however reflect current majority sentiment of the role-players in South African insolvency law.

5.3 It is hoped that these proposals will see the light of day, especially since they have already been subjected to rigorous public debate at the symposium on 23 October 1998 and at the conference on 6 October 1999. There can be no doubt that both the legal and business fraternity are ready for large-scale changes in this field of the law.

IMPORTANT NOTE:
In the attached Bill contained in Part 2 of this Volume of the report, words and phrases marked like this denote additions or amendments made to the draft Bill of the Law Commission.

Words or phrases which have been struck out denote deletions in the draft of the Law Commission, or deletions from existing legislation which has been incorporated in these proposals.
PART 1

EXPLANATORY MEMORANDUM TO THE DRAFT BILL
(IN CHAPTER SEQUENCE)
CHAPTER 1

DEFINITIONS

1.1 Due to the merging of the provisions of the Companies Act, Close Corporations Act and other legislation, it has become necessary to import a number of new definitions into the Draft Bill. The introduction of new concepts altogether, has also meant the introduction of new definitions. Only the definitions which have been added or amended are discussed here.

Definition of “contributory”

1.2 Due to the existence of contributories in the case of a company limited by guarantee, it became necessary to include this definition to avoid confusion with contributions which are payable where there is a shortfall in the free residue of an insolvent estate. These creditors are also referred to as contributories, and without this definition it could create a great deal of uncertainty. The definition is an amended version of the current section 337 of the Companies Act 61 of 1973.

Definition of “date of liquidation”

1.3 Due to the inclusion of voluntary liquidation by creditors (by way of resolution) it was necessary to amend the definition of “date of liquidation” to make provision for liquidations by way of a resolution. After initially making the date of liquidation in the case of a voluntary liquidation by resolution the date on which the resolution is adopted, it has now been changed to the actual date of registration of the resolution.

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47 See the discussion of clause 8 of the Draft Bill below.
48 This aspect is discussed in more detail under the discussion of clause 8 below.
49 See pages 54 and 55 of the Conference Transcriptions (Volume 4 of this report) where Van Loggerenberg pointed out the possible problems which could be encountered when the date of liquidation is the date of adoption of the resolution.
Definition of “debtor”

1.4 The addition of the definition of “debtor” to the Bill is one of the most important proposals contained in this document. Up to now South African insolvency law has been centred around the individual, with the liquidation of companies, close corporations and the like being dealt with in separate provisions in the respective Acts. The proposals contained in this Bill envisage one Act which will regulate the administration of the estates of all types of debtors, and not only that of the individual or partnerships.

1.5 The definition of “debtor” is therefore the fulcrum around which the whole Act will turn. In defining a debtor in such a way as to include all types of natural, juristic and other types of debtors, one has to have regard to the specific types of problems which occur in this regard. For example, a church is an association of persons, but has not been created by legislation or law of general application. In the proposals for a Draft Bankruptcy Bill which preceded this report, a church would not have qualified for liquidation in terms of the definition of debtor included there.

1.6 The definition as it appears above is an attempt at being all-encompassing in respect of the type of debtor which can be liquidated under these proposals. It is also far less cumbersome than the previous attempt in the Draft Bankruptcy Bill which preceded this report.

1.7 Van der Linde (Unisa) suggested at the workshops that the references to a “debtor” in the Bill could be further assisted by grouping the different kinds of debtor into two main groups, namely “corporate debtors” and “non-corporate debtors”. While initially this seemed like a workable proposal, problems were encountered when it came to association debtors. Association debtors could for example be both corporate and non-corporate debtors. No real problems were encountered when drafting the provisions by actually naming the different types of debtor, and

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50 See pages 1 to 74 of the Workshop Transcriptions (Volume 2 of this report).

51 This problem was pointed out by Torre from PricewaterhouseCoopers. See page 12 of the Workshop Transcriptions and the ensuing discussion (Volume 2 of this report).

52 See page 9 of the Workshop Transcriptions and the ensuing discussion (Volume 2 of this report).
in light of this van der Linde’s suggestion was not implemented. It does however remain a good suggestion and the drafters of the final Bill may wish to consider this option.

1.8 Paragraph (a) of the definition of ‘debtor’ refers to natural persons, as is the case under the present Insolvency Act. For ease of reference this type of debtor is referred to as a “natural person debtor” throughout the Bill, due to the fact that certain provisions of the Bill can only be applicable to natural persons.

1.9 Paragraph (b) of the definition of “debtor” refers to partnerships, as is the case under the present Insolvency Act. For ease of reference this type of debtor is referred to as a “partnership debtor” throughout the Bill.

1.10 Paragraph (c) of the definition refers to trusts as defined in section 1 of the Trust Property Control Act. This is a new addition to the traditional definition of debtor, although debtors are presently sequestrated in terms of the Insolvency Act. The reason for this is that a trust does not have juristic personality and cannot therefore be wound up under the provisions of the Insolvency Act.

1.11 The definition of “trust” in section 1 of the Trust Property Control Act, draws a distinction between an ownership trust and the so-called “bewind” trust. Essentially the difference lies in the fact that in the former ownership of the trust assets vest in the trustee of the trust and in the latter the ownership vests in the beneficiaries of the trust, with the trustee merely administering the trust assets on behalf of the trust beneficiaries. For the purposes of insolvency the distinction is not an important one.

See the paper delivered by Keay at the symposium held on 23 October 1998, in Volume 2 of this report, where this suggestion was made. Keay’s suggestion was followed with great success in drafting these proposals. Keay’s paper has since been published in 1999 De Jure 62.)

See Magnum Financial Holdings (Pty) Ltd (In Liquidation) v Summerly and Another NNO 1984 (1) SA 160 (W).

The distinction is important in order to determine whether vesting has taken place in a certain instance, but in both cases the trust would be one which could be liquidated.
1.12 The specific inclusion of trusts in the definition of “debtor” is an important one, not because trusts were previously omitted from the definition, but because the important new proposals contained in this report can also now apply to trusts generally. For example, there is no reason why a trust cannot be subjected to a business rescue regime.\(^5\) Just as companies and close corporations suffer financially due to mismanagement, so too do trusts. By replacing the trustees with persons having the proper skills, many trusts could be turned around to show a profit or real growth, thereby protecting the trust beneficiaries, who are in many cases minors.

1.13 Paragraph (d) of the definition refers to companies incorporated in terms of the Companies Act.\(^5\) The inclusion of companies in the definition of debtor is a major shift away from present South African legislation, as companies are presently wound up in terms of the provisions of the Companies Act. This part of the definition is one of the major changes which has to be made in order to have truly unified legislation.\(^5\) The definition includes external companies which are incorporated under the Companies Act. For ease of reference this type of debtor is referred to as a “company debtor” throughout these proposals.

1.14 Paragraph (e) of the definition refers to close corporations incorporated under the provisions of the Close Corporations Act.\(^6\) As is the case with companies, this is a major shift away from current South African insolvency law, where close corporations are wound up in terms of the provisions of the Close Corporations Act. For ease of reference this type of debtor is referred to as a “close corporation debtor” throughout the proposals contained in this document.

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\(^5\) This idea was mooted by Ailola (Unisa) at the workshops. It is often happens in practice that trustees maladminister the trust which they are administering. With proper management such a trust could conceivably be turned around to be profitable. Considering that many trusts have minors as beneficiaries, subjecting a trust to possible business rescue regimes may just be the best protection of the interests of such beneficiaries.


\(^5\) Something which the Cork Report could not achieve. Although the English Insolvency Act has one Act, the liquidation of each type of debtor is dealt with separately, in the main repeating the provisions relating to each type of debtor. See the paper by Prof Andrew Keay which was presented at the symposium held on 23 October 1998 (Volume 2 of this report. This paper has since been published in 1999 \textit{De Jure} 62).

\(^6\) Act 69 of 1984.
1.15 Paragraph (f) of the definition has proved to be the most problematic. The idea with this paragraph was to include any possible type of debtor which is not included under the previous paragraphs. For example, a university which is created by statute would not be covered by one of the paragraphs above, but is an entity which takes part in commercial intercourse and which should, ideally, be able to be liquidated should the circumstances warrant this.

1.16 Initially, the closest blanket clause which could be formulated referred to this type of debtor as any association of persons, for example clubs,\(^6\) which has been created by, or which owes its existence to, legislation or law of general application. However, as Van der Linde correctly pointed out at the workshops,\(^6\) and who was supported in this view by inter alia Ailola, there are many associations of persons, in whatever form, which have assets and liabilities which would not be created by statute or any law of general application. Churches were cited as an example of this type of debtor. Van Wyk also mentioned an Appeal Court decision\(^6\) where it was held that an organisation that promoted the interests of a shopping centre had no legal existence, and could conceivably also be cited as an example of such a debtor.\(^6\)

1.17 Ailola also raised at the workshops what he perceives to be a problem in respect of city councils (or presumably any local council or municipality).\(^6\) There is no apparent reason why a municipality or other local authority should be excluded from the definition of debtor.\(^6\) The exact aim is to define debtor to be as all-inclusive as possible, with as few exceptions as possible.

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\(^6\) Which would also not fall under any of the previous paragraphs in the definition of debtor, but which is an economic entity which should be able to be liquidated.

\(^6\) Page 1 to 18 of the Workshop Transcriptions (Volume 2 of this report).

\(^6\) Due to lack of details given, this case could not be traced.

\(^6\) See page 16 of the Workshop Transcriptions and the ensuing discussion. (Volume 2 of this report).

\(^6\) See page 14 of the Workshop Transcriptions and the ensuing discussion (Volume 2 of this report).

\(^6\) What may well be problematic here is the impact it will have if a municipality is in fact liquidated. As far as could be ascertained, it will only be possible to have a municipality liquidated with the consent of Parliament. A number of municipalities are currently considered to be insolvent, but it would be chaotic if any person were simply allowed to liquidate such a municipality. The public interest would probably be best served if other legislation limited the capability of any person to liquidate a municipality.
1.18 The inclusion of the words “or by agreement, whether such agreement is express or tacit” was intended to solve the problems raised by Ailola, Van Wyk and Van der Linde. However, at the end of the discussion Van der Linde suggested that it would perhaps be better not to mention in the definition how the “debtor” had come into existence, but merely to state that such a debtor is “any association of persons or body corporate, with or without legal personality”. This suggestion has now been implemented, and an association debtor is merely defined as any other entity which is a debtor in the normal sense of the word. For ease of reference this type of debtor has been referred to as an “association debtor” throughout these proposals.

1.19 When initially introducing the definition of “debtor”, I failed to see that the context in which I was using the word was inconsistent, in that a debtor would be a debtor before liquidation as well as a debtor after liquidation. This led to confusion and in fact did not actually give an indication beforehand who could actually be liquidated in terms of the Bill. This has been rectified by indicating clearly, in the first definition of “debtor”, that it refers to who may be liquidated in terms of the Bill. An additional definition of “debtor”, when used as a noun, has been inserted and defines a debtor as someone who has been liquidated in terms of the Bill, and includes the debtor’s estate also before liquidation.

1.20 It is important to note that one of the main purposes of these proposals is to include all possible types of legal and non-legal entities in the definition of debtor. Probably the most controversial debate which was held regarding these proposals was whether or not to include

67 See page 18 of the Workshop Transcriptions (Volume 2 of this report).

68 Steyn points out this problem on page 25 of the Conference Transcriptions (Volume 4 of this report):

“And so I find the wording here a little bit confusing that the debtor, when used in the context of this Act, means these persons which have been liquidated in terms of the Act. Don’t we need to have some indication beforehand of who would be liquidated in terms of this Act?”

69 See for example page 18 of the Workshop Transcriptions and the ensuing discussion (Volume 2 of this report).
certain types of institutions which have traditionally been dealt with in separate legislation, for example banks and insurance companies.\textsuperscript{70}

1.21 The general attitude in other countries seems to be to shy away from including (specifically) banks and insurance companies, especially in light of the fact that they are “already regulated by statute”.\textsuperscript{71} In my view, and in the view of those who attended the symposium on 23 October 1998, the subsequent workshops in December 1998 and the conference on 6 October 1999, it is possible and desirable to include these types of debtors under the ambit of the unified proposals. Representatives from the Reserve Bank expressed their reservations in regard to the unified provisions being applicable to banks.\textsuperscript{72} While their reservations are well founded, I believe these reservations can be sufficiently addressed in the unified proposals. The manner in which these concerns have been addressed can be found in Chapter 3 of these proposals.

\textit{Definition of “estate affairs”}

1.22 In trying to combat the problems encountered when investigating the affairs of an insolvent, Edeling has commented by suggesting the inclusion of a new definition. The definition in question is “estate affairs”, and Edeling makes the following comments in respect of his suggestion:

\textit{“The Law Commission has made various important improvements, by recognising that special rules should apply to associates.}

\textit{It would seem to follow that liquidators must investigate the affairs not only of the debtor, but also of associates as far as may be necessary.}

\textsuperscript{70} Currently the provisions relating to these types of institutions are dealt with in section 68 of the Banks Act 94 of 1990 and Part VI of the Long Term Insurance Act 52 of 1998 and Part VI of the Short Term Insurance Act 53 of 1998 respectively.

\textsuperscript{71} See for example paragraphs 2.12 to 2.19 of the Hong Kong Report.

\textsuperscript{72} Their reservations related mainly to the protection of the public interest and the problem of administration. See page 19 of the Workshop Transcriptions and the ensuing discussion, as initiated by Garner of the SA Reserve Bank (Volume 2 of this report).
Affairs of associates cannot ordinarily be investigated without an express authority in the Act. The present and approved provisions in regard to investigation, subpoenas and so forth provide for investigating the business and affairs of the debtor, but are silent in regard to associates.

Unless this is addressed, associates under investigation would be able to frustrate enquiry by refusing to answer questions about their affairs and refusing to produce documents. Disputes arise as to relevance, and the presiding officer must know whether to allow the question or not. Whatever he decides, he may be taken on review and the whole process would be frustrated.

The suggested definition addresses these problems and should ensure a smoother and more effective investigation."

**Definition of “liquidation resolution”**

1.23 At the workshops a lot of discussion went into the possible amendment of the provisions relating to voluntary liquidation by resolution (which includes a voluntary liquidation by creditors as well as a voluntary liquidation by the court). It was agreed that voluntary liquidation by creditors should be included in the draft Bill, but should be converted into workable proposals within the framework of a new unified Act. The following basic principles were agreed upon:

1.23.1 that the provisions should be incorporated under the chapter dealing with the manners in which a debtor may be liquidated, and not as a separate chapter;

1.23.2 that the provisions relating to voluntary liquidation by resolution should only be retained (in the unified proposals) for the purposes of liquidating insolvent debtors (ie voluntary liquidation by creditors);

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73 Page 445 to 508 of the Workshop Transcriptions (Volume 2 of this report).
74 Page 445 to 508 of the Workshop Transcriptions (Volume 2 of this report).
75 Page 446 to 462 of the Workshop Transcriptions (Volume 2 of this report).
1.23.3 that the provisions relating to the voluntary liquidation of solvent debtors (i.e., voluntary liquidation by members) remain in the legislation which currently governs such an eventuality,\textsuperscript{76}

1.23.4 that the provisions relating to voluntary liquidation by creditors be amended to provide for inter alia notice to creditors and other procedural provisions;\textsuperscript{77}

1.23.5 that a set of definitions relating to voluntary liquidations be drafted and incorporated under Chapter 1;\textsuperscript{78}

1.23.6 that the application of voluntary liquidation by creditors be extended to include not only companies and close corporations, but also other debtors such as trusts and association debtors.\textsuperscript{79}

With this in mind new provisions have been drafted and can be found under the discussion of clause 8 of this draft Bill.

1.24 The insertion of the definition of “liquidation resolution” became necessary in order to facilitate drafting. One would as far as possible like to keep the status quo as far as resolutions for companies and close corporations\textsuperscript{80} are concerned, and on the other hand create a type of liquidation resolution for entities which cannot currently be liquidated in this manner.

\textsuperscript{76} Page 446 to 462 of the Workshop Transcriptions (Volume 2 of this report).

\textsuperscript{77} Page 466 to 508 of the Workshop Transcriptions (Volume 2 of this report).

\textsuperscript{78} Page 463 to 466 of the Workshop Transcriptions (Volume 2 of this report).

\textsuperscript{79} Page 509 \textit{et seq} of the Workshop Transcriptions (Volume 2 of this report).

\textsuperscript{80} Van Loggerenberg (see page 41 of the Conference Transcriptions, to be found in Volume 4 of this report) suggests that in the case of a close corporation the resolution should be amended from all the members consenting, to 75% of all the members’ interest, due to the fact that it proves to be “troublesome in practice” to obtain the consent of all the members. It is submitted that this is not an issue to be decided upon in these proposals, and certainly not on the grounds that it is troublesome in practice to obtain the consent of all the members.
1.25 These comments on the definition of “liquidation resolution” must be read with the discussion on clause 8 below.

1.26 Paragraph (a) of the definition makes provision for a liquidation resolution by the trustees of a trust. Up to now it has not been possible for a trust to enter into a voluntary liquidation by creditors, and this is therefore a new insertion. The definition makes provision for the trustees to pass a resolution for the voluntary liquidation of a trust in accordance with the provisions of the trust deed. If no such provisions exist, which is often the case in a mortis causa trust, all the trustees must pass a liquidation resolution.

1.27 This definition has however been amended to include trustees which were not issued with letters of authority due to the fact that their powers were bestowed upon them by a trust deed which was registered prior to the coming into operation of the Trust Property Control Act 57 of 1988.\(^{81}\)

1.28 Paragraph (b) of the definition retains the status quo in respect of the voluntary liquidation by creditors of a company.\(^{82}\)

1.29 Paragraph (c) of the definition retains the status quo in respect of the voluntary liquidation by creditors of a close corporation.\(^{83}\)

1.30 Paragraph (d) is a new insertion and makes provision for the passing of a resolution in the case of an association debtor which wishes to enter into a voluntary liquidation by creditors. The passing of the resolution is then done in accordance with the enabling legislation, the constitution or agreement which forms the basis of the association debtor.

\(^{81}\) With acknowledgement to Olivier, who pointed out this shortcoming at the conference on 6 October 1999 (see pages 36 and 37 of the Conference Transcription, to be found in Volume 4 of this report).

\(^{82}\) Section 344 of the Companies Act 61 of 1973.

\(^{83}\) Section 67 of the Close Corporations Act 69 of 1984.
Definition of “management of a debtor”

1.31 There are various clauses in the Bill which inter alia require certain persons to be present at meetings, submit themselves to questioning or to which the provisions relating to offences find application. In a lot of cases these persons would be the directors of a company, the trustees of a trust or the members of a close corporation. In order to facilitate drafting, this definition has been included to refer to these persons without naming each type of official in every relevant clause of the Bill. In the relevant clauses the “management of a debtor” is referred to instead of each individual official. The relevant paragraphs of this definition are self-explanatory and merit no further discussion.

1.32 De la Rey’s suggestion that this definition be extended to specifically include administrators which may be appointed to manage a pension fund. In my view paragraph (e) of this definition adequately covers this eventuality, and consequently no further amendments have been made.

1.33 This definition was also amended to include a reference (in paragraph (a)) to trustees which were acting as such before the coming into operation of the Trust Property Control Act 57 of 1988.

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84 See page 26 of the Conference Transcriptions (Volume 4 of this report).

85 See also paragraph 1.27 above.
CHAPTER 2

ACTS OF INSOLVENCY AND MANNERS IN WHICH DEBTORS MAY BE LIQUIDATED

General comments

2.1 Due to the fact that the definition of debtor now also includes debtors other than natural persons and partnerships, it has been necessary to substantially amend the clauses under this chapter of the Bill. It was agreed by all present at the workshops that, if the archaic acts of insolvency are to be retained, then they should also be made applicable to other debtors such as companies and close corporations.

2.2 In addition, the grounds for liquidation which are currently contained in the Companies Act and the Close Corporations Act, should be trimmed to those which are most commonly experienced in practice, and also be made applicable to other types of debtors which are not companies or close corporations. It was submitted that the remaining grounds for liquidation currently contained in the Companies Act, if they are to be retained at all, should remain in the Companies Act.

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86 See pages 109 to 169 of the Workshop Transcriptions (Volume 2 of this report).
87 See page 109 et seq of the Workshop Transcriptions. This suggestion was initially made by Cronje (SA Law Commission) in his submissions after the symposium held on 23 October 1998.
88 The grounds of liquidation which have been omitted are the following: i) commencement of business without certification from the Registrar (section 344(b) of the Companies Act); ii) non-commencement of business within a year of incorporation (section 344(c) of the Companies Act and section 68(b) of the Close Corporations Act); iii) in the case of a public company where the number of members has been reduced below seven (section 344(d) of the Companies Act); iv) in the case of a company where seventy-five per cent of the share capital has been lost or become useless for the business of the company (section 344(e) of the Companies Act); v) where an external company has been dissolved in the country of its incorporation, or has ceased to carry on business or is carrying on business only for the purposes of winding-up its affairs (section 344(g) of the Companies Act).
89 See page 109 et seq and pages 445 to 508 of the Workshop transcriptions (Volume 2 of this report).
Clause 2 - Acts of insolvency and circumstances in which certain debtors may be liquidated

2.3 Due to the contents of clause 2(1)(a), it has been made applicable only to natural person debtors and partnership debtors.

2.4 Clauses 2(1)(b) to (g) have been amended to make provision for all types of debtors.

2.5 Clause 2(2) has been inserted into the proposals in order to make provision for the current provisions, contained in the Companies Act and Close Corporations Act, relating to the grounds of liquidation. It was felt by almost all present at the workshops\(^\text{90}\) that these provisions should be made applicable to all types of debtors.\(^\text{91}\)

2.6 Clause 2(2)(a) replaces the current provisions in the Companies Act and Close Corporations Act which provides for a company or close corporation to be wound up by the court after a resolution to this effect has been passed by the members of the company or close corporation concerned.\(^\text{92}\)

2.7 In order to bring about uniform provisions relating to all types of debtors, it has been decided to make provision for a special type of resolution, namely a “liquidation resolution”,\(^\text{93}\) whereby a debtor may resolve to be liquidated by the court.\(^\text{94}\) After considering submissions

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\(^{90}\) See page 109 et seq of the Workshop Transcriptions (Volume 2 of this report).

\(^{91}\) Obviously not all the acts of insolvency can be applicable to corporate debtors and, conversely, not all the grounds for liquidation can be made applicable to natural persons. Only the applicable acts of insolvency or grounds of liquidation have been included.

\(^{92}\) This also amounts to a voluntary liquidation by resolution, but should not be confused with a voluntary liquidation by creditors as provided for in clause 8. In this case the members resolve to approach the court in order to be liquidated. Due to this fact there will be a court order liquidating the debtor, which would not be the case when clause 8 is applied.

\(^{93}\) See also the discussion of the definition of “liquidation resolution” above.

\(^{94}\) This special “liquidation resolution” has been included due to the current provisions of the Companies Act, which makes provision for a special resolution, and the Close Corporations Act, which makes provision for a written resolution, in cases where a company or close corporation wishes to pass a resolution to be liquidated by the court. In order to avoid references to the Companies Act and Close Corporations Act, it was decided to make provision for a new type of resolution, namely a “liquidation resolution”, which has a special meaning in the context of these unified proposals. In addition, this “liquidation resolution”
made at the workshops, it has been decided to make this paragraph applicable to all types of debtors except natural person debtors and partnership debtors. 95

2.8 Including natural person debtors and partnership debtors under this paragraph would nullify the requirement of advantage to creditors contained in clause 10(1)(b). Despite a suggestion to the contrary at the workshops, it was felt by the majority of delegates present at the workshops that these provisions should find no application in the case of natural person debtors and partnership debtors.

2.9 By extending the provisions of this paragraph also to trusts and other entities, where control over the assets or business of the debtor is exercised by some person or persons in a representative capacity, it now becomes possible for these entities to approach the court for liquidation based on a resolution passed by the persons authorised to pass such resolution. For example, the trustees of a trust may, in terms of this provision, pass a resolution in terms of which the trust may be liquidated by the court, should the circumstances warrant such application. The proviso to this clause is intended to prevent a resolution for liquidation being passed in circumstances where the persons involved are prohibited from doing so, for example in the trust deed of a trust.

2.10 Clauses 2(2)(b) and (c) represent the two grounds of liquidation which have been retained from the current grounds of liquidation set out in the Companies Act and the Close Corporations Act. It was felt by delegates at the workshops that the other grounds of liquidation are rarely, if ever, utilised in practice. 96 The suggestion was made that these grounds can be retained in the Companies Act or Close Corporations Act for use by the Registrar of Companies and Close Corporations, should he wish to make use of them. 97

95 See page 445 to 509 of the Workshop Transcriptions (Volume 2 of this report). The requirement that the liquidation of an individual must be to the advantage of creditors must not be lost sight of here. By allowing an individual to liquidate by means of a resolution, one would negate this requirement.

96 See page 109 et seq of the Workshop Transcriptions (Volume 2 of this report).

97 Ibid.
2.11 In addition, the suggestion was made that these two grounds should also be made applicable to natural person debtors and partnership debtors, in other words to all debtors as defined in clause 1 of these proposals.\(^98\) No objection to this proposal could be found and the clause has been drafted accordingly.\(^99\)

2.12 Clause 2(3) is a duplication of the current provisions of section 345 of the Companies Act and section 69 of the Close Corporations Act.\(^100\) The clause has however been adapted to make provision for entities other than companies and close corporations.

2.13 In consequence of a suggestion made by Cronje (SA Law Commission)\(^101\) clause 2(3)(a)(i) has been adapted to make provision for a statutory demand in a prescribed form, which prescribed form will be included as a form in one of the schedules to the Bill. The demand is based on the demand used in the English Insolvency Act and takes the following form:

PRESCRIBED FORM
STATUTORY DEMAND IN TERMS OF SECTION 2(3)(a)(i) OF THE INSOLVENCY AND BUSINESS RESCUE ACT

WARNING
This is an important document. If you should fail to respond to the document within twenty-one days after service thereof your estate may be liquidated and your assets taken away from you.

DEMAND

To: _________________________________________________________________

Address: _________________________________________________________________

_________________________________________________________________

98 Ibid.

99 In fact, in most cases natural person debtors are sequestrated too late. Applying this clause also to natural person debtors should have as a result “earlier catches” in respect of the estates of individuals.

100 It would appear that this is a duplication of the provisions contained in clause 1(b). However, no apparent problem seems to arise from this duplication as clause 2(b) has a more detailed provision regarding when a debtor is deemed unable to pay his debts.

101 In his submissions dated 20 November 1998. This form has almost entirely been taken from his suggestion in the said submission.
The creditor claims that you are indebted to him or her for the following amount which is now due and payable and that he holds no security for the amount claimed.

<table>
<thead>
<tr>
<th>When incurred</th>
<th>Type of debt (cause of action)</th>
<th>Amount due as at the date of the demand</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The creditor demands that you pay the amount due within three weeks after the service of this demand or give security to the reasonable satisfaction of the creditor therefor, or enter into a compromise in respect thereof.

Should you fail to comply with this demand, this does not preclude you from opposing an application for the liquidation of your estate. If you deny indebtedness wholly or in part, you should contact the creditor without delay.

SIGNATURE: _________________________________________________________

NAME OF CREDITOR: _____________________________________________________ (PRINT)

DATE: ________________________________________________________________

CAPACITY: ____________________________________________________________ (IF NOT CREDITOR PERSONALLY)

ADDRESS: ____________________________________________________________

TEL NO: ______________________________________________________________

PERSON YOU MAY CONTACT IF NOT CREDITOR PERSONALLY:

NAME: ________________________________________________________________

ADDRESS: ____________________________________________________________
If debt obtained by cession or otherwise:

<table>
<thead>
<tr>
<th>Original creditor</th>
<th>Name</th>
<th>Date of cession or other act</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

| Cessionaries            |      |                              |
|                         |      |                              |

Clauses 3 and 4 - application by debtor for the liquidation of his estate, and application for liquidation of certain debtors

2.14 Due to the fundamental differences between natural persons and other debtors such as companies and close corporations, it was suggested at the workshops that the applications for liquidation by natural persons should be kept separate from applications for liquidation by other debtors. The application for liquidation by a natural person debtor is therefore dealt with in clause 3, and applications for liquidation by other debtors in clause 4.

2.15 Generally clause 4 is a re-enactment of sections 346 and 347 of the Companies Act, making an in-depth discussion of the provisions unnecessary. However, one very important amendment has been made to clause 4(1)(a), which deals with the power of a debtor to bring an application.

2.16 There has been some controversy under South African law as to whether a director, or the directors of a company by means of a directors’ resolution, may bring an application for the winding-up of a company under section 344 of the Companies Act.\(^{102}\) Section 346(1)(a) of the Companies Act merely states that a company may bring such an application. In order to avoid problems of this nature from occurring again in future, it was suggested at the workshops that

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\(^{102}\) See Ex parte Voorligter Drukkery Beperkt 1922 EDL 315; Ex parte Edenvale Wholesalers and General Suppliers (Pty) Ltd 1959 (2) SA 477 (W); Ex parte Umtentweni Motels (Pty) Ltd 1968 (1) SA 144 (D); Ex parte Russlyn Construction (Pty) Ltd 1987 (1) SA 33 (D); Ex parte Screen Media Ltd 1991 (3) SA 462 (W) and Ex parte Tangent Sheeting (Pty) Ltd 1993 (3) SA 488 (W). See also JS McLennan 1987 SALJ 232 and MP Larkin 1987 BML 165.
a director or the directors as an organ of the company should be able to bring an application. The amendment to this clause reflects these submissions.

**Clause 5 - Application by creditors for liquidation of debtor’s estate**

2.17 Clause 5 deals with applications for liquidation by creditors, as opposed to clauses 3 and 4, which deal with applications for liquidation by the debtor itself. The amendments made to this clause relate mainly to the inclusion of other types of debtors, as well as the insertion of new grounds for liquidation.

2.18 Clause 5(1) has been amended to include a reference to a debtor who is unable to pay his or its debts in accordance with clause 2(3).

2.19 Clause 5(3) has been amended in two respects, namely:

2.19.1 to distinguish between the types of information required by natural persons as opposed to juristic persons or other types of debtors, and

2.19.2 to include, in addition to the acts of insolvency, also the other grounds for liquidation.

**Voluntary liquidation by resolution**

2.20 The insertion of clause 8 brings about a drastic deviation from the current provisions contained in the Companies Act and Close Corporations Act, relating to the voluntary liquidation of companies and close corporations.

2.21 The first of these deviations relates to the field of application of voluntary liquidation.

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103 See page 104 *et seq* of the Workshop Transcriptions (Volume 2 of this report), where Van der Linde and Edeling discussed the issue.

104 For a general discussion of this topic see pages 54 to 60 of the Symposium Transcriptions and pages 445 to 508 of the Workshop Transcriptions (Volume 2 of this report).
One of the great debates on the unified proposals has been whether or not liquidations relating to debtors which are not insolvent should be included in the unified proposals. The main view seems to be that only insolvent debtors should be dealt with in the unified proposals. This means that voluntary liquidations by members is something which should be dealt with in the Companies Act or Close Corporations Act, and not in an Act dealing with the liquidation of insolvent estates. There were certain individuals, including myself, who felt that all provisions relating to liquidation should be included in the unified proposals. However, after thorough consideration of these issues it is submitted that the provisions relating to the voluntary liquidation (or winding-up as the provisions are currently referred to) by members should remain in the Companies Act and Close Corporations Act respectively. Companies and close corporations which are wound up as voluntary winding-up by members, are essentially solvent and the procedures liquidating them are completely different to the insolvency procedures contemplated in the unified proposals, which deal with insolvent companies and close corporations. To this end, instead of including the voluntary liquidation provisions in a separate chapter as was the case in the initial unified proposals made, they have now been included in the chapter of the current unified proposals which deals with the manner in which a debtor may be liquidated. This seems to be the obvious thing to do, since the liquidation process of an insolvent debtor which is liquidated voluntarily by creditors, is essentially the same as any other insolvent debtor which is being liquidated.

2.22 The second deviation relates to the actual procedure which must be followed in the event

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105 See page 445 to 508 of the Workshop Transcriptions (Volume 2 of this report).

106 This view was expressed by delegates at the symposium held on 23 October 1998 as well as by delegates who attended the workshops. See the transcriptions of both these meetings in Volume 2 of this report.

107 In his letter dated 18 November 1999, Nel of PriceWaterhouseCoopers once again calls for the inclusion of members’ voluntary winding-up in the unified Bill. Although Nel has made some valid points, especially in regard to the administration process being overseen by the Master of the High Court, majority of opinion still dictates that members’ voluntary winding-up be retained in the legislation in which it is currently contained. A provision for the conversion of a voluntary winding-up by members to a liquidation by the court, or to a voluntary liquidation by resolution, will however be made provision for. (See Nel’s comments in Volume 4 of this report.) See also page 74 of the Conference Transcriptions (Volume 4 of this report) where Galloway of KPMG states that there should be a conversion mechanism from a voluntary liquidation by members to a voluntary liquidation by creditors (by resolution).

108 There are also various other Acts which contain provisions relating to voluntary winding-up. To include all these provisions in one Act would, to say the least, be cumbersome and impractical.
of a voluntary liquidation by creditors. In terms of the current provisions of the Companies Act and Close Corporations Act, the procedure is relatively simple, with the members merely passing a resolution (special or written, depending on whether is a company or close corporation which is being wound up) in order to bring about a voluntary winding-up. Due to the fact that the members need not give notice\textsuperscript{109} of their intention to wind up, and due to the fact that there is no court application where notice can be given to creditors of the impending liquidation, this process has often in the past led to abuse. At the Workshops the view was held by most delegates that the whole procedure should be revamped in order to make provision for the protection of creditors. The insertion of clause 8 reflects this rethink on the whole subject of voluntary liquidation by creditors.\textsuperscript{110}

2.23 The third deviation relates to the types of debtor who can make use of this procedure. Up to now it has only been possible for a company or a close corporation to be wound up voluntarily either by members or by creditors. At the workshops the question was asked why it should only be possible for a company or close corporation to be wound up voluntarily by creditors. Why could these provisions not also be made applicable to, for example, a trust or other association of persons such as the members of a club. No good reason could be found, and consequently these provisions have been made applicable also to trust debtors and association debtors.

2.24 The fourth deviation relates to the role played by the members of the debtor after the debtor has been placed in liquidation. In terms of the present provisions of the Companies Act and the Close Corporations Act, it is clear that the members are deemed to have a vested interest in the affairs of the company or close corporation even after liquidation. This is borne out by the fact that meetings of members are held and that the members may nominate a liquidator of their own choice. Most delegates at the Workshops were of the opinion that where a debtor has become insolvent, it is unnecessary to acknowledge the vested interest of the members by

\textsuperscript{109} Mileman, attorney, states at page 99 of the Conference Transcriptions (Volume 4 of this report) that he can see no point in giving the creditors notice if they cannot do anything about the debtor passing the resolution. The point is not whether the creditors can stop the passing of the resolution, but whether or not creditors can take appropriate steps to protect their interests once they become aware of the fact that a liquidation resolution is going to be passed by the debtor.

\textsuperscript{110} See the discussion of clause 8 which appears below.
conferring on them the power to give instructions to the liquidator and to appoint a liquidator of their own choice. With this in mind, the role that members have traditionally played in the liquidation process has been omitted by curtailing their rights in the new clause which has been drafted.

2.25 Initially a fifth deviation existed which related to the commencement of liquidation. Currently a voluntary winding-up commences at the time the resolution is registered with the Registrar of Companies or Close Corporations, and lapses if not registered within a specified period, currently 90 days. In order to prevent prejudice to creditors, and to prevent the management of a debtor from entering into potentially prejudicial acts, the new provisions initially contained in clause 8, provided that a voluntary liquidation commences at the time the liquidation resolution is adopted.\textsuperscript{111} For the purposes of setting aside certain transactions, the time of commencement is the day on which notice is given for the adoption of such resolution.

2.26 Due to the problem which was raised at the Conference\textsuperscript{112} in respect of the date of liquidation, the date of commencement of a voluntary liquidation by resolution has now been changed to the date of registration of the resolution and not the date of adoption, as was provided in the initial two drafts of the unified proposals.

\textbf{Clause 8 - voluntary liquidation by resolution}

2.27 Clause 8(1) merely recognises the fact that a liquidation resolution may be passed or adopted by a trust debtor, company debtor, close corporation debtor or association debtor, as the case may be. There is a cross-reference to the definition of “liquidation resolution” in clause 1 of the unified proposals. This definition merely defines a liquidation resolution bearing in mind

\begin{footnotesize}
\begin{enumerate}
\item See paragraph 666 to 670 of the Report of the Review Committee, chaired by Sir Kenneth Cork (the Cork Report), where this is also stated as being the position under English law.
\item See the discussion in paragraph 1.3 \textit{supra}.
\end{enumerate}
\end{footnotesize}
the definition is discussed in Chapter 1 above.

2.28 Clause 8(2) lays down the requirements which must be met in order for the liquidation resolution to be valid and enforceable. These two requirements are that the resolution must in the first instance be registered before it will have any effect, and in the second place that all creditors, and the Master, must receive prior notice of the meeting at which the liquidation resolution is going to be tabled for adoption.

2.29 The purpose of the second requirement is to prevent creditors from being prejudiced by only obtaining notice of the liquidation of the debtor long after having been placed in liquidation. This will enable creditors to take appropriate steps in order to protect their interests should it be necessary. The notice to creditors must also comply with certain other requirements. These are dealt with in other subsections and are discussed below.

2.30 Clause 8(3) allows the Master to appoint a liquidator once he has received a copy of the notice of the meeting at which a liquidation resolution is to be passed. In terms of paragraph (a) of sub-clause (2), the Master must also be given notice of the meeting which is to be held for the passing of a liquidation resolution. The reason why the Master must also be given notice of the meeting is to enable him to immediately appoint a liquidator or liquidators upon receipt of such notice. It is conceivable that creditors may suffer prejudice in the seven day period provided for in the notice. The immediate appointment of a liquidator by the Master, if circumstances

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113 The definition is discussed in Chapter 1 above.

114 Initially a period of twenty-one days notice had been provided for, but after a suggestion by Edeling, the period was changed to seven days. Seven days would appear to be sufficient in light of the definition of personal notice in Chapter 1 of the Bill.

115 Van Wijk of the Master of the High Court, Pietermaritzburg, posed the question why the Master must receive a copy of the notice, stating that it creates unnecessary paperwork for the Master’s Office. With respect, this is not a very good reason for not sending the notice to the Master. The Master needs to have notice of such a meeting if he is to be in a position to appoint a liquidator in appropriate circumstances. If the resolution is not adopted at the ensuing meeting, this would become apparent in due course and the Master could then destroy the notices which do not lead to a resolution being adopted. This could be done after a period of say 90 days, and can be regulated by an internal directive. (See page 80 of the Conference Transcriptions, Volume 4 of this report, in respect of the comments made by Van Wijk.)
warrant such an appointment, can safeguard the creditors’ interests in the meantime.\footnote{116}

2.31 Clause 8(4) requires the notice to creditors to contain certain information, enabling the creditors to gain access to the contemplated meeting, should it be required. This requirement really focuses on the publicity principle which is so important for third parties who have dealings with economic entities. This subsection provides that the liquidation resolution shall be null and void if these requirements are not met.

2.32 Clause 8(5) provides for certain documents to accompany the notice which is sent to the creditor. The purpose of the documentation is to ensure that the creditor is properly informed of the circumstances surrounding the adoption of the liquidation resolution. The two documents which must accompany the notice is the statement of affairs and a copy of the liquidation resolution which is to be adopted at the meeting. These documents, especially the statement of affairs, should enable the creditor to make an informed decision in respect of whether to oppose the adoption of resolution, either before or after it has been adopted. Sub-clause (6) makes provision for the opposition of such a resolution by approaching the court in appropriate circumstances. Clause 8(5)(c) has been inserted in consequence of a suggestion made by Galloway,\footnote{117} and which relates to the provision of security by the members passing a liquidation resolution. It could easily happen in a voluntary liquidation by resolution that the debtor is so insolvent that no creditors prove claims against the estate. Due to there being no applicant creditor, it is conceivable that there will be nobody to pay the contribution in the event of a shortfall in the estate. By providing security the estate will be assured of payment of the costs of liquidation. This will also ensure that members think twice before liquidating the debtor voluntarily by resolution, as they will ultimately be held liable for the costs of liquidation should there be insufficient funds.\footnote{118}

\footnote{116}{This is also the case under the English Insolvency Act. See the proposals made in the Cork Report, paragraphs 666 to 670.}

\footnote{117}{See page 75 of the Conference Transcriptions (Volume 4 of this report).}

\footnote{118}{On the other hand it may be very difficult, or even impossible, for the members to obtain a security bond to cover these costs. This would then render useless the process of voluntary liquidation by resolution. An alternative would be to amend the clause dealing with contribution (clause 99) to include the members as persons liable for contribution in appropriate circumstances.}
2.33 Clause 8(6): A creditor or other person having an interest in the affairs of the debtor, who wishes to oppose the passing of a liquidation resolution of which he or she has received notice may, in terms of this sub-clause, approach the court in order to prevent the members of the debtor from adopting the resolution in question. Due to the fact that the creditors or other interested persons cannot prevent the members from passing the resolution merely by being present at the meeting, there has to be a safeguard for them by being able to approach the court for assistance in circumstances where they are of the opinion that the voluntary liquidation would not be in their interest.

2.34 This right is afforded all creditors, even if such creditor has not received notice of the meeting at which the liquidation resolution is to be adopted. This is to safeguard the interests of creditors who have perhaps not received notice of the meeting.

2.35 Provision is made for the application to be brought by a creditor before or after the resolution has been adopted, since circumstances may vary before and after the adoption of the resolution, which changed circumstances could motivate a creditor to bring such an application. A creditor who wishes to bring an application opposing or setting aside the adoption of the resolution, must give notice to the debtor in order that the members may defend the action if it so wishes. Sufficient notice has not been defined in this section. The circumstances in which such an application could be brought can vary, and it is suggested that the court should decide whether or not “sufficient notice” has been given to the debtor in each case.

2.36 Clause 8(7): When an application is brought by a creditor to prevent or set aside the adoption of a liquidation resolution, the court has the power to either set aside or confirm the resolution. Where the court is of the opinion that a different remedy should be granted to either the creditor or the debtor, the court may make any order it deems appropriate in the

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119 Edeling has criticised this sub-clause on the grounds that the clause does not make provision for the grounds on which creditors or other interested parties may oppose the passing of the resolution. He is further of the opinion that nobody will in fact have the right, or the grounds, to prevent the resolution from being passed.
This period differs from the period currently specified in the Companies Act and Close Corporations Act, which is 90 days. Due to the serious financial implications of passing a resolution of this kind, there is no reason why this period should be 90 days. A period of 30 days should be sufficient, especially in light of modern technology and communications systems which are readily available.

Van Loggerenberg (page 54 and 55 of the Conference Transcriptions, Volume 4 of this report) mentions the problem of registration of the resolution by the registrar concerned. Considering the backlog currently experienced by the Registrar of Companies and Close Corporations, it is conceivable that the resolution might not be registered within the 30 day period. For this reason provision has been made for the resolution to be lodged for registration within a 30 day period. See also the discussion in paragraph 1.3 supra.

This has however not been included as an option in the current proposals.

See paragraphs 1.3, 2.25 and 2.26 above.
members who pass the winding-up resolution may also nominate a liquidator. This issue has already been discussed above. Due to the limitation of the members’ participation in a liquidation as envisaged by this Act, this right has now been taken away from the members. Consequently, the Master will ignore any such nomination and appoint a liquidator or liquidators in accordance with the provisions of the Act.

2.41 Clause 8(12) merely makes provision for firstly a copy of the registered resolution to be lodged with the Master within a specified period by the debtor concerned, and secondly that notice be given in the Gazette of the voluntary liquidation.

2.42 At the conference held on 6 October 1999 the following further issues were raised:

2.42.1 De la Rey mentioned that voluntary liquidation by resolution should be renamed “voluntary winding-up under creditor supervision”. In my opinion this is not necessary as the term voluntary liquidation by resolution no longer creates the misunderstanding which was created by the previous terms “voluntary winding-up by members” and “voluntary winding-up by creditors”.

2.42.2 De la Rey also pointed out that the use of the term “which is insolvent” in clause 8 would create problems and lead to uncertainty. She suggests that the term be defined to create certainty. However, the same term is used elsewhere in the Bill, and does not lead to problems. In my view the term should be given its usual meaning (also as used in clause 2 of the Bill, when referring to natural person debtors) and need not be defined for the purposes of clause 8.

2.42.3 Boshoff of the Reserve Bank poses the question as to whether the Registrar of Banks

124 See paragraph 2.24 above.
125 See page 82 of the Conference Transcriptions (Volume 4 of this report).
126 See page 83 of the Conference Transcriptions (Volume 4 of this report).
127 See page 92 of the Conference Transcriptions (Volume 4 of this report).
should not also have **locus standi** to apply for the setting aside of a liquidation resolution in terms of clause 6 of the unified proposals. In my opinion clause 6 makes provision for such an eventuality by the use of the words “… or any other person who has a financial, administrative or other interest in the affairs of such debtor, …”. It would therefore be unnecessary to make specific provision for the Registrar of banks.

2.42.4 Young, an attorney, raised a number of problems he has experienced with voluntary liquidations in practice.\(^{128}\) He is of the opinion that the process of voluntary liquidations is abused in practice and would appear to be in favour of scrapping voluntaries altogether (except in cases where the debtor is solvent). This is of course a matter of policy. If you are going to allow people to create an entity by common consent, so too should they be allowed to bring it to an end, no matter what the circumstances are. This was stated very succinctly by Edeling at the conference.\(^ {129}\)

> “Just as people can form a company by common consent, so they must have the absolute power to bring it to an end. .....On what basis can you deny these members the right to bring their corporate thing to an end?”

2.42.5 Young also points out\(^ {130}\) that there is a problem in that enquiries do not apply to voluntary liquidations. This is not the case under the new unified proposals, as enquiries (or questioning as it is now referred to) apply to all estates which are liquidated.

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\(^{128}\) See page 92 of the Conference Transcriptions (Volume 4 of this report).

\(^{129}\) See page 98 of the Conference Transcriptions (Volume 4 of this report).

\(^{130}\) See page 93 of the Conference Transcriptions (Volume 4 of this report).
CHAPTER 3

SPECIAL PROVISIONS APPLICABLE TO SPECIFIC DEBTORS

General comments

3.1 Not only did the subject of including banks, insurance companies and the like in the unified proposals spark a heated debate at the symposium and subsequent workshops, but it has also been one of the most problematic aspects of these proposals. In addition to striking at the very core of the philosophy relating to the liquidation of these types of entities, the problem is also a political one.

3.2 At the heart of the debate lies the question as to whether certain institutions, the liquidation and judicial management of which currently takes place under separate governing legislation, should be included under proposals for unified insolvency legislation. From the submissions made both at the symposium and at the subsequent workshops, the decision to exclude or include would appear to be one of policy.

3.3 Many objections were made in respect of including the provisions currently contained in separate legislation, for example in the Banks Act or the Long-Term Insurance Act, in a unified Bill. It has been argued that the institutions which currently enjoy protection in terms of special legislation require this protection in the public interest. From this one can only adduce that the protagonists for the retention of the special provisions believe this is the only way in which to protect the public interest.

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131 For a general discussion of this topic see pages 1 to 31 of the Symposium Transcriptions and pages 1 to 57 of the Workshop Transcriptions (Volume 2 of this report).

132 See pages 1 to 57 of the Workshops Transcriptions (Volume 2 of this report).

133 This was the case once again at the conference held on 6 October 1999. See for example the submissions made by Grobler of the Reserve Bank from pages 28 to 32 of the Conference Transcriptions (Volume 4 of this report).
3.4 After having studied the provisions concerned in the relevant Acts, the conclusion which is reached is that there can be no danger that the protection of the public interest will be compromised by including the liquidation of these institutions in the unified Bill. Most of the provisions in question relate to preventing any person from simply bringing an application to liquidate, for example, a bank or insurance company which would, quite obviously, result in potential chaos. However, the powers of the registrars concerned need not be compromised by including the (currently separate) provisions in a unified piece of legislation. In a nutshell, the unification process is not intended to take away the powers of any governing authority over its charge, but merely to provide for uniform procedures once the institution in question has in fact been placed in liquidation. It is clear that the powers which have currently been conferred on the governing authorities in respect of these specialised institutions will have to be retained, in whatever form, in proposals for unified insolvency legislation. This would be necessary not only in order to protect the public interest, but also for the purpose of good administration. It is, however, submitted that the same objectives can be attained by including these provisions in a unified piece of insolvency legislation. Separate provisions create uncertainty and suspicion, especially at a time when transparency is of paramount importance. The inclusion of these provisions in the unified proposals would create legal certainty for all concerned, and would facilitate the effective administration of (all) insolvent estates.

3.5 It should also be noted that the intention here is only to include the provisions relating to liquidation, and does not influence any other provisions contained in the governing legislation, for example where an institution is placed under curatorship.

3.6 With this as background, it was felt that an attempt should be made to include all types of institutions in the unified proposals. An initial attempt at incorporating the separate provisions as they currently appear in the governing legislation, was a dismal failure. The provisions are just too long and drafting separate provisions for each type of institution based on the current legislation, resulted in a clumsy and awkward chapter on special provisions.

3.7 This Chapter therefore reflects an attempt at drafting a blanket-clause which could apply in the case of all specialised institutions.
Clause 9 - Special provisions relating to the liquidation of certain debtors

3.8 Clause 9(1) merely identifies the institutions which are affected by the provisions contained in this Chapter, with reference to the relevant governing legislation.

3.9 Clause 9(2) includes the registrar of the institution concerned as one of the persons who may bring an application for the liquidation of a debtor in terms of clause 4.

3.10 Clause 9(3) is linked to clause 9(2), in that the relevant registrar may only bring such an application (in terms of clause 4) if he or she has been authorised to do so by the Minister responsible for the administration of the relevant institution.

3.11 Clause 9(4) has been included to ensure that the registrar of the relevant institution also receives notice of information which has to be supplied to the Master. This is necessary to ensure that the registrar concerned can also exercise other important powers which have been conferred upon him or her elsewhere in the clause.

3.12 Clause 9(5) is of paramount importance in the protection of the public interest. One of the greatest fears of the governing bodies of the institutions already referred to, is that someone other than the registrar would be able to bring an application for the liquidation of the debtor, without the registrar being aware of the application, or being powerless to do anything about preventing the application from being made, and subsequently granted.

3.13 Paragraph (a) ensures that the registrar concerned has in fact been notified, without which prior notification, the court may not grant the order. Paragraph (b) is intended to prevent an applicant who is bringing an application from making public the fact that an application is to be brought. Failure to comply with this requirement results in the commission of an offence. Paragraph (c) allows the registrar to join the application as a party and to file opposing affidavits in respect of the application. The governing bodies therefore retain control over the process leading up to the application being heard by the court.
3.14 Clause 9(6) prevents a relevant institution from entering into a voluntary liquidation by resolution without the prior knowledge of the registrar concerned. This is done by preventing the registration of the resolution unless notice of the resolution has also been given to the registrar, or if the registrar has informed such institution that the adoption of the resolution is prohibited.

3.15 Clause 9(7) makes judicial management\(^{134}\) applicable also to the institutions listed in clause 9(1). Paragraph (b) entitles the registrar of the relevant institution to make an application for the judicial management of the relevant institution.

3.16 Paragraph (c) makes provision for sufficient notice to be given to the relevant registrar in cases where the application for judicial management is brought by someone other than the registrar concerned. In this case also the registrar is entitled to join the application as a party and to file opposing affidavits.

3.17 Clause 9(8) has been inserted to ensure that a person with the necessary expertise will be appointed to co-liquidate the relevant specialised institution. The Master must therefore appoint as co-liquidator or co-judicial manager a person recommended by the relevant registrar. At the conference held on 6 October 1999, Calitz of the Master of the High Court (Pretoria) requested\(^{135}\) that this sub-clause be extensively formulated to exclude the possibility of misinterpretation in the appointment of liquidators. In my view the current provision sufficiently covers the appointment of liquidators and co-liquidators and is not open to misinterpretation.

3.18 Clause 9(9) is intended to address the problem of amendment to the provisions contained in a unified piece of insolvency legislation. The unified insolvency legislation will probably fall under the control of the Ministry of Justice, while the administration of the specialised institutions will fall under the auspices of a different ministry. By inserting a peremptory consultation clause, the Ministry of Justice is prevented from amending the legislation without prior consultation with other ministries. Of course this provision only applies to the amendment

\(^{134}\) See the discussion of Chapter 24 of this Bill below.

\(^{135}\) See page 20 of the Conference Transcriptions (Volume 4 of this report).
of section 9, and does not effect amendment to the remainder of the legislation.
CHAPTER 4

LIQUIDATION ORDERS AND COMMENCEMENT OF LIQUIDATION

Clause 10 - provisional liquidation order

4.1 The amendments made under clause 10 relate to the insertion of the grounds for liquidation in clause 2, and the fundamental differences between natural persons and the other types of debtors included in the Bill.

Clause 11 - final liquidation order

4.2 The amendments made under this clause relate to the insertion of the grounds for liquidation in clause 2, and the fundamental differences between natural persons and the other types of debtors included in the Bill.

Clause 13 - notice and commencement of liquidation

4.3 The amendments to clause 13 relate to the possibility of now also being liquidated by means of a liquidation resolution. In such a case the commencement of liquidation is the date of the registration of the resolution.\textsuperscript{136}

\textsuperscript{136} See the discussion of this issue under Chapter 2 above.
CHAPTER 5

EFFECT OF LIQUIDATION

Clause 14 - effect of liquidation on debtor and his or her property

5.1 Clause 14(1): The most important amendment to this clause relates to the vesting of the estate assets upon liquidation of the debtor’s estate. The Law Commission, in its draft Insolvency Bill, has elected to retain the current rule for individuals, which is that the estate vests first in the Master and then in the trustee upon appointment.

5.2 However, the position relating to juristic persons under the Companies Act differs. Section 361(1) of the Companies Act provides that the assets of a company remain vested in the company after liquidation. The liquidator only obtains control over such assets, and not ownership.

5.3 This fundamental difference is hard to explain, since there is no apparent reason for the distinction. Perhaps it can be argued that, in the case of the sequestration of an individual’s estate, the person undergoes a change of status and he no longer has the right to participate freely in commercial intercourse. Liquidation, on the other hand, is a process which precedes the dissolution of a company or close corporation, and the company or corporation does not lose its juristic personality as a result of the liquidation.

5.4 While delegates at the workshops indicated no real preference in respect of whether ownership or control and custody should pass to the Master and then the liquidator under the new provisions, all delegates were unanimous in stating that the provisions, whatever they may

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137 See pages 170 to 171 of the Workshop Transcriptions (Volume 2 of this report).
138 This is also the position in the case of close corporations.
139 However, see section 361 (3) of the Companies Act, which provides that the court may order that such property vests in the liquidator in his official capacity.
be, should be the same in respect of individuals and juristic persons. This view is shared by Boraine and Van der Linde.\(^\text{140}\)

5.5 Since the decision in *De Villiers v Delta Cables*,\(^\text{141}\) it has been largely accepted that ownership of the assets in an insolvent estate vest in the trustee. There is however a large body of opinion which believes that such vesting is unnecessary, and which criticise the *Delta Cables* decision.\(^\text{142}\)

5.6 According to Stander, the vesting rule in the case of individuals cannot be supported by Roman or Roman-Dutch law, and states that the transfer of ownership to the trustee is superfluous, and can remain vested in the debtor.\(^\text{143}\)

5.7 After having studied what the different authors have stated, it is submitted that the current rule that the assets vest in the trustee is an unnecessary one. In light of this it has been decided to amend clause 14 accordingly.\(^\text{144}\)

5.8 Clause 14 now provides that the property of a debtor is deemed to be in the custody and under the control of the Master upon liquidation, and passes to the liquidator upon his or her appointment.

5.9 Clause 14(2) has merely been amended to make provision for the amendment of the vesting rule discussed above, and to add a reference to voluntary liquidations.

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\(^\text{140}\) “The draft insolvency Bill - an exploration” (part1) 1998 4 *De Jure* 621, footnote 104.

\(^\text{141}\) 1992 (1) SA 9 (A).

\(^\text{142}\) See for example Joubert “Artikel 21 van die Insolvensiewet: tyd vir ‘n nuwe benadering” 1993 *TSAR* 699; Evans “Who owns the insolvent estate?” 1996 *TSAR* 719 and Stander “Die eienaar van die bates van die insolvente boedel” 1996 *THRHR* 388. See also Recommendation 3 in Working Paper 33 of the South African Law Commission, which proposed that the property should only be under the control and custody of the trustee also in the case of individuals.

\(^\text{143}\) See the reference in the previous footnote.

\(^\text{144}\) This was suggested by Cronje in his commentary on the draft Bill.
5.10 Clause 14(6) has been amended to give effect to a proposal by Galloway (KPMG), where he states that the stay of an execution judgment merely on the grounds that a liquidation resolution has been adopted. Galloway is of the opinion that “this clause would lead to misuse by a company just wanting to stay the sale in execution, passing the resolution and then not acting on it any further”. The clause has now been amended by inserting paragraph (b) of sub-clause (6), which makes provision for this eventuality. Should the members who pass such a resolution not act on it any further, the sheriff will be able to continue with the sale in execution.

Clause 15 - effect of liquidation on civil proceedings

5.11 Clause 15 has been amended to include a reference to voluntary liquidations (clause 8) and to change the reference to “insolvent” to read as a reference to “debtor”.

\[145\] See page 76 of the Conference Transcriptions (Volume 4 of this report).
CHAPTER 6

RIGHTS AND OBLIGATIONS OF DEBTOR DURING INSOLVENCY

Generally

6.1 Clause 16 has been amended to change the references to the different types of debtor in the appropriate circumstances. Due to the content of this clause, most amendments relate to amending the reference to “insolvent” to a reference to a natural person debtor.
CHAPTER 7

IMPEACHABLE DISPOSITIONS

Generally

7.1 The amendments to clauses 17 to 22 relate to making some clauses applicable only to natural person debtors, and due to the fact that the provisions relating to impeachable dispositions have now also been made applicable to juristic persons.

Clause 23 - application of sections 19, 21 and 22 to certain debtors

7.2 The insertion of clause 23 is to a large extent a re-enactment of section 340 of the Companies Act. However, section 340 of the Companies Act refers to the provisions of the Insolvency Act (relating to impeachable transactions) only in the case where the company is unable to pay its debts. The idea with this provision is that the provisions relating to impeachable transactions will not be applicable in the case of a company which is solvent, in which case there would obviously be no need for the use of the remedies concerned.

7.3 Due to the fact that these unified proposals will be applied to all types of debtors which are in fact insolvent, the wording of sub-clause (1) has been changed to indicate that the provisions relating to impeachable transactions will be applied to all types of debtors which are being liquidated in terms of the Act.

7.4 Due to the fact that clauses 19, 21 and 22 have been designed to cater for natural person debtors, sub-clause (2) makes provision for the alignment of these clauses with the corresponding event in the case where a debtor other than a natural person debtor has been liquidated. Sub-clause (3) is a re-enactment of section 340(3) of the Companies Act.
New proposals received in respect of impeachable transactions

7.5 In the main, two substantial proposals were received in respect of impeachable transactions. One of these relates to the codification of the **actio Pauliana**\(^{146}\) and the second to a complete overhaul of the provisions relating to impeachable transactions.\(^{147}\)

7.6 In respect of the codification of the **actio Pauliana**,\(^ {148}\) Boraine correctly points out that the S A Law Commission’s Draft Insolvency Bill does not provide for its statutory enactment. According to Boraine we are “clearly out of step with the rest of the modern world in this respect”.

7.7 Boraine lists the following reasons for the enactment or codification of the **actio Pauliana** in a unified Insolvency Act:

- \(\mathcal{C}\) It would bring our system in line with modern trends;
- \(\mathcal{C}\) The person who brings the action will enjoy the benefit of presumptions recommended for the new Insolvency Act;
- \(\mathcal{C}\) The requirements of this once termed “obscure” remedy will become clearer and user-friendly;
- \(\mathcal{C}\) Differences in terminology could be evened out;
- \(\mathcal{C}\) Procedures could, as far as possible, be unified;
- \(\mathcal{C}\) Clearly incorrect decisions, such as the one in *Commissioner of Customs and Excise v Bank of Lisbon*\(^ {149}\) can be avoided.

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\(^{146}\) These proposals were submitted by Boraine from the University of Pretoria. See Volume 3 of this report, where the full submission has been included.

\(^{147}\) These proposals were submitted by Edeling. See Volume 3 of this report, where the full submission has been included.

\(^{148}\) See also Boraine “Towards Codifying the Actio Pauliana” 1995 *SA Merc LJ* 213.

\(^{149}\) 1994 (1) SA 928 (N). For a critical discussion of this case see Malan and Pretorius ‘Money, Bank Accounts and Tracing’ 1994 *TSAR* 387; Thomas and Boraine ‘Ownership of Money and the actio Pauliana’ 1994 *THRHR* 678.
7.8 Boraine’s proposals have been submitted to the S A Law Commission before and have been considered by the Project Committee currently reviewing the Insolvency Act. From the silence which has met Boraine’s proposals, one can only assume that the Law Commission is not in favour of codifying the *actio Pauliana*, whatever their reasons may be.

7.9 However, Boraine’s proposals do contain a great deal of merit, especially since the *actio Pauliana* can be employed outside the ambit of the Insolvency Act. He states it thus on the second page of his proposals:

“`The main difference between dispositions without value and collusion provided for in the Insolvency Act and the *actio Pauliana* of the common law respectively, is that the *actio Pauliana* can also apply if the debtor is not sequestrated, but found to be factually insolvent (unable to pay his debt in full) in the event of execution of a debt, and as a result of the alienation. The *actio Pauliana* can thus apply within the ambit of insolvency law as well as outside and as part of ordinary (individual) debt collecting procedures (the remedy of the so-called general law).`”

7.10 Edeling’s proposals were submitted under the heading “Recovery, Setting Aside and Personal Liability” and amounts to a complete revision of the current provisions relating to impeachable dispositions and the recovery of property in consequence thereof. Edeling’s proposals deals with this subject in the very widest sense, including such contentious issues as personal liability.\(^{150}\)

7.11 The value of Edeling’s proposals lie in the fact that they have been drafted by a practitioner who is very aware of the problems experienced by practitioners in practice, in trying to recover money and property for creditors. I found his submissions to be practical and analytical, taking into account not only modern trends regarding this problematic subject area, but also taking cognisance of South African case law on the subject. A further attraction is that Edeling has combined his proposals on impeachable dispositions with liability for wrongful trading and insolvent trading. In a nutshell, Edeling’s proposals look at the problem globally, suggesting changes based on the law in countries such as England, Swaziland, Australia, New Zealand and Ireland.

\(^{150}\) See the discussion of personal liability and insolvent trading under Chapter 24 of these proposals.
However, taking into consideration the response which met Boraine’s proposals for the codification of the actio Pauliana, I am hesitant to propose that Edeling’s submissions be incorporated into the unified proposals contained in this document. The inclusion of Edeling’s proposals in this Bill will mean that the whole issue of impeachable dispositions will have to be reconsidered by the Project Committee dealing with the revision of the Insolvency Act, and I am not sure if they would be prepared to do that, especially in light of the fact that the proposals drastically differ from the current provisions contained in their Draft Bill.

I do, however, believe that Edeling’s proposals contain a great deal of merit, and that the subjects covered by him need to be revisited at an appropriate time. My greatest concern is that proposals which drastically differ from the current provisions, should not be allowed to scupper this attempt at unifying our insolvency legislation. The haste shown by the Law Commission in pushing through the Insolvency Bill at its earliest opportunity, should act as a spur for the timeous lodgment of proposals which easily slot into the current review process already approved by the Project Committee. Once unified legislation has been achieved, outdated and contentious issues should be revisited with a view to amendment in line with modern trends.
CHAPTER 8

EFFECT OF LIQUIDATION UPON CERTAIN CONTRACTS

8.1 No substantial amendments were made to this Chapter of the Bill, and these provisions will apply to all types of debtors without any substantial amendments having to be made.
CHAPTER 9

APPOINTMENT OF LIQUIDATOR

Generally

9.1 This Chapter has been amended to make provision for the appointment of a liquidator also in the case of a voluntary liquidation by creditors, as now provided for in clause 8 of these proposals. Due to the fact that most debtors can now be liquidated voluntarily by resolution, the clause has to provide for the immediate appointment of a liquidator by the Master in these circumstances also.

9.2 Various submissions were made in respect of the appointment of liquidators. The problem which lies at the very heart of the issue is the discretion which the Master currently has to appoint liquidators and trustees. Commentators on this subject are all adamant that the Master’s discretion should be taken away, and replaced by a more equitous method of appointment.

9.3 In light of the fact that this issue has already been debated in detail, and decisions taken in this regard, by the Project Committee currently reviewing the Insolvency Act under the auspices of the S A Law Commission, I have decided not to comment on the issue in this report. However, in fairness to those individuals and institutions who made submissions in this regard, I have included some of their comments in Volume 3 of this report.
CHAPTER 10

RIGHTS AND OBLIGATIONS OF LIQUIDATORS

Generally

10.1 In general the amendments to this Chapter relate to the fact that the Law Commission’s draft Bill only provides for the estates of individuals. Since these provisions now also apply to other debtors which are not individuals or natural person debtors, it has been necessary to compensate for the fundamental differences between individuals and juristic persons. It was also necessary to make amendments which take cognisance of liquidations by the court and voluntary liquidations by resolution.

10.2 Due to a suggestion made by Cronje of the S A Law Commission, certain clauses have been moved to this chapter of the Bill. These clauses are: clause 44\textsuperscript{151} (remuneration of liquidator) and clause 45\textsuperscript{152} (general duties and powers of the liquidator). This has merely been done to improve the general layout of the Bill.

Clause 38 - serving of first liquidation order and attaching property belonging to estate

10.3 Sub-clause (7) has been amended to provide for the submission of information by the management of a debtor in cases where it is not the estate of a natural person debtor.\textsuperscript{153}

10.4 The insertion of sub-clause (12) is basically a re-enactment of section 362 of the Companies Act and makes provision for the submission of certain information or property by the management of a debtor. The provisions have been modified (from the current section 362

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\textsuperscript{151} Previously clause 61 of the Law Commission’s Bill.

\textsuperscript{152} Previously clause 62 of the Law Commission’s Bill.

\textsuperscript{153} See the discussion of the definition of “management of a debtor” under Chapter 1 of these proposals.
of the Companies Act) to make provision also for close corporations, trusts and association debtors.

Clause 39 - handing over of books to liquidator and submission of statement of affairs

10.5 Sub-paragraph (ii) of paragraph (b) of clause 39(1) has been amended to make provision for debtors other than natural person and partnership debtors, and amounts to a re-enactment of section 363(2) and (3) of the Companies Act.

Clause 42 - liquidator’s report

10.6 Generally this clause has been amended to make provision for information required about the operations of a company debtor, close corporation debtor or association debtor. Amendments have also been made in consequence of the fundamental differences between natural person debtors and other debtors.

10.7 Clause 42(1)(d) has been amended to make provision also for other types of debtors than a natural person debtor.

10.8 Clause 42(1)(e) is a re-enactment of section 402(g) of the Companies Act and section 79(g) of the Close Corporations Act.

10.9 Clause 42(1)(k) amounts to a re-enactment of section 400(1) of the Companies Act, and has been extended to include also other types of debtors to whom the provisions will be applicable.

10.10 Clause 42(1)(l) amounts to a re-enactment of section 402(d) of the Companies Act, and has been extended to include also other types of debtors to whom the provisions will be applicable.

10.11 Clause 42(1)(m) amounts to a re-enactment of section 402(f) of the Companies Act and
section 79(f) of the Close Corporations Act, and has been extended to include all types of debtors.
CHAPTER 11

MEETINGS

Generally

11.1 Clause 45(6) is a re-enactment of clause 46(2), which has been deleted. Due to submissions made at the workshops, clause 46, which makes provision for a special meeting only for the proof of claims, has been deleted. However, the inclusion of the current section 366(2) of the Companies Act under clause 46 has been retained by including it under clause 45 instead.

11.2 Clause 46(1) has been deleted due to submissions made at the workshops and by PriceWaterhouseCoopers. The submissions made in this regard argue that it is unnecessary to have a special meeting only for the proof of claims, when the previous clause already makes provision for the late proof of claims at a special meeting. This is regarded by most as an unnecessary duplication of provisions. Cronje from the Law Commission was present at the workshops when this issue was discussed, and agreed to look into the matter.

11.3 However, sub-clause (2) of the deleted clause is an important new provision, and has been inserted under the previous clause dealing with special meetings.

11.4 It was not necessary to insert sub-clause (3) under the previous clause, as it already provides for this matter in clause 45(3).

11.5 The amendments made to the remaining clauses relate to the inclusion of other debtors other than natural person debtors. The amendments also take cognisance of the insertion of clause 8, which deals with voluntary liquidations by resolution.

154 Bekker from PriceWaterhouseCoopers made submissions in this regard, both at the workshops and in subsequent written submissions.

155 See the discussion under paragraph 11.1 above.
11.6  Due to a suggestion made by Cronje of the S A Law Commission, certain clauses have been moved to this chapter of the Bill. These clauses are: clause 50\(^{156}\) (debtor and other persons shall attend meetings of creditors); clause 51\(^{157}\) (summons to attend meeting of creditors and notice to furnish information); clause 52\(^{158}\) (questioning of debtor and other persons); clause 53\(^{159}\) (questioning by commissioner); clause 54\(^{160}\) (liquidator may put written questions or call for accounts, books, documents, records or information); clause 55\(^{161}\) (questioning by or on behalf of the Master); clause 56\(^{162}\) (enforcing summonses and giving of evidence) and clause 57\(^{163}\) (suspected commission of offence shall be reported to Commercial Crime Unit) and clause 58\(^{164}\) (proof of record of proceedings of meetings of creditors). This has merely been done to improve the general layout of the Bill.

**Clause 50 - Debtor and other persons must attend meetings**

11.7  Due to the fact that this clause only dealt with the attendance of meetings by natural person debtors and partnerships, the clause has been amended to make provision for the attendance of meetings also by directors, members and the like. Instead of referring in each case to directors, members, trustees, etc, reference is merely made to the “management of a debtor.”\(^{165}\)
**Questioning generally**

11.8 In its Draft Insolvency Bill the Law Commission has already taken cognisance of the provisions of the Companies Act, and it was not therefore necessary to make any major changes to the provisions contained in this chapter.
CHAPTER 12

CLAIMS

12.1  There have been no substantial amendments to the provisions contained in this chapter.
CHAPTER 13

ELECTION, APPOINTMENT AND DISQUALIFICATION OF LIQUIDATORS

13.1 No substantial changes have been made to these provisions. See however what has been said under Chapter 9 above, in respect of submissions made by various individuals and institutions.
CHAPTER 14

RIGHTS AND DUTIES OF CREDITORS

14.1 No major amendments or additions to the provisions contained in this chapter were necessary.
CHAPTER 15

COSTS OF LIQUIDATION AND APPLICATION OF FREE RESIDUE

15.1 Due to the various comments made by Edeling on recoveries by liquidators, mainly in Chapters 7 and 21, he has suggested an amendment to the current provisions of the Law Commission’s Draft Bill.

Clause 85(1) - costs incurred in respect of legal services

15.2 Edeling has suggested the removal of the proviso to clause 85(1), which deals with contingency fees, on the following basis.¹⁶⁶

“The proviso to s85(1) is what the Law Commission has approved, but it is felt that it is practically unworkable in that it will be almost impossible to get 100% of creditors to actually sign a written approval.

The question is addressed as part of a proposed general provision in regard to Chapter 7 or 24 proceedings further below.”

15.3 Edeling’s main proposals in this regard (as well as a provision relating to contingency fees) are reflected in Chapter 27 below.

15.4 No other major amendments or additions to the provisions of this chapter were necessary.

¹⁶⁶ Please note that the references in this quote to sections and Chapters refer to the documentation that was prepared for the conference held on 6 October 1999, and not the sections or chapters used in this report.
16.1 No major amendments or additions to the provisions contained in this chapter were necessary.
CHAPTER 17

BANKING ACCOUNTS, INVESTMENTS AND MONEYS BELONGING TO THE INSOLVENT ESTATE

17.1 No major amendments or additions to the provisions contained in this chapter were necessary.
CHAPTER 18

ESTATE ACCOUNTS, DISTRIBUTION AND CONTRIBUTION

Clause 92 - estate accounts

18.1 Clause 92(1) has been amended to make provision for cases where, for example, a company has been liquidated. In such a case the surplus is not paid into the Guardian’s Fund to the credit of the insolvent (as is the case with a natural person debtor), but must be distributed among the shareholders in accordance with their shareholding in the company.

Clause 98 - Surplus to be paid into Guardian’s Fund

18.2 This clause has been amended to make provision for the different persons who would be entitled to receive the surplus from the estate, should there be such a surplus

18.3 A surplus in the estate of a partnership must be dealt with in the manner provided for in the Bill, which is to apply the surplus in the estate of the partnership or a partner, as the case may be. A surplus in the estate of a natural person is paid into the Guardian’s Fund, and can be claimed after the natural person has been rehabilitated. In the case of trusts the money is either paid to the trustees or to the Master, depending on the circumstances. In the case of companies the surplus is paid to the shareholders and to members in the case of a close corporation.
CHAPTER 19

REHABILITATION OF NATURAL PERSONS

19.1 None of the provisions contained in this chapter were amended or added to in any way.
CHAPTER 20

SPECIAL PROVISIONS RELATING TO TRUST DEBTORS, COMPANY DEBTORS, CLOSE CORPORATION DEBTORS AND ASSOCIATION DEBTORS IN LIQUIDATION

Generally

20.1 Due to the fundamental differences between juristic and natural persons, there are various provisions, such as those currently contained in the Companies Act and Close Corporations Act, which only apply to juristic persons. These provisions have been grouped together under one chapter.

Clause 106 - provisions relating to contributories in the case of a company limited by guarantee

20.2 The insertion of this clause amounts to the re-enactment of sections 395 to 399 of the Companies Act, and is only applicable to companies incorporated in terms of the Companies Act 61 of 1973, and applies only to companies limited by guarantee.\(^{167}\)

Clause 107 - Attorney-General may make application to court for disqualification of director

20.3 Clause 107 is merely a re-enactment of section 401 of the Companies Act.

Clause 108 - Dissolution of company debtors, close corporation debtors and association debtors

20.4 Clause 108 is a re-enactment of section 419 of the Companies Act, but has been extended to make provision also for other juristic persons such as close corporations.

\(^{167}\) See also the definition of “contributory”, which is discussed under Chapter 1 of these proposals.
Clause 109 - court may declare dissolution void

20.5 Clause 109 amounts to a re-enactment of section 420 of the Companies Act, and has been extended to include juristic persons other than companies.

Clause 110 - Registrar of Companies and Close Corporations to keep a register of directors of dissolved companies and members of other bodies corporate

20.6 Clause 110 is a re-enactment of section 421 of the Companies Act, but has been extended to include not only directors of a company, but also the members of a close corporation. At the workshops\(^{168}\) the idea was mooted that a central register of all persons involved in an insolvency or failed business should be included in a central register.

20.7 This would effectively mean that a natural person debtor (including partners of a failed partnership), the trustees of a failed trust, the directors of a failed company, the members of a failed corporation or the management of an association debtor, would be “blacklisted”.

20.8 The idea of such a register would be for grantors of credit to access the register, in the form of a central database, in order to ascertain if applicants for credit have previously been liquidated or have been involved in a failed business. Blacklisting would be automatic, but persons listed in the register could apply to have their names removed from the register if they can prove, to a court, that the liquidation was not due to their negligence or fault.

20.9 However, a number of potential problems could arise with the implementation and maintenance of such a register, not the least being the fact that such a register may be in conflict with the rights conferred on individuals in terms of the constitution. The one problem would be the maintenance of such a register. Who would maintain it, where would the manpower come from and who would be responsible for the cost of implementing and maintaining such a system? A representative of one large banking corporation, which shall not be named in this report, stated that banks in general would be prepared to financially assist the implementation and

\(^{168}\) See pages 530 to 634 of the Workshops Transcriptions (Volume 2 of this report).
maintenance of such a register. Some opposition was also received in writing in respect of this type of register.\textsuperscript{169}

20.10 At present clause 110 makes provision for the maintenance of a register by the Registrar of Companies and Close Corporations. However, the Registrar cannot be expected to maintain a register which would contain the names also of individuals and trustees of trusts. The Master, as a central office of record, would be the obvious choice for the implementation and maintenance of a register of this nature, but it is doubtful whether the Master would be prepared to do so, especially if it has to supply the manpower in order to do so.

20.11 However, the idea remains a good one, and should be examined in order to determine the viability of implementation, especially since it would reduce the number of “phoenix companies” which arise from the ashes of debt so often in South Africa.

\textit{Clause 111 - change of address by directors and other officers}

20.12 Clause 111 is a re-enactment of section 363A of the Companies Act, and has been extended (sub-clause (4)) to include its application to close corporations.

\textit{Clause 112 - delinquent directors and others to restore property and to compensate the company}

20.13 Clause 112 is a re-enactment of section 423 of the Companies Act.

\textit{Clause 113 - private prosecution of directors and others}

20.14 Clause 113 is a re-enactment of section 426 of the Companies Act.

\textsuperscript{169} See the comments received in Volume 4 of this report.
CHAPTER 21

PERSONAL LIABILITY FOR RECKLESS OR FRAUDULENT TRADING AND INSOLVENT TRADING

Generally

21.1 The personal liability and insolvent trading provisions have been some of the most contentious issues dealt with in this report. Not only did this subject evoke a lot of emotional debate at the symposium on 23 October 1998, but also led to in-depth discussions at the workshops.

21.2 Edeling (practitioner), de Koker (UOFS) and Lessing (Gildenhuys Van der Merwe) were, in the main, the persons who made the most contributions in this regard. The thrust of Edeling’s proposals, which are connected to recoveries as well, seem to be to make it easier to prove fraudulent trading, and to keep the liability open-ended in order to make it easier to recover money and assets for the benefit of creditors. Edeling has also suggested that recklessness or gross negligence should be the test, and not only intent. An interesting proposal by Lessing, is that the provisions dealing with this aspect of the unification should perhaps be consolidated in a separate Act altogether.

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170 Friedman suggested that the word “recklessly be added to the heading of this clause, which has now been done (see page 129 and 130 of the Conference Transcriptions in Volume 4 of this report).

171 For discussions of section 424 generally, see Hyman 1980 SACLJ E1; Fourie 1980 THRHR 328; Cassim 1981 SALJ 162; Luiz 1988 SALJ 788; Hambidge and Luiz 1991 SA Merc LJ 123; Havenga 1992 SA Merc LJ 63. See also a submission received by Lessing of Gildenhuys Van der Merwe, which has been reproduced in its entirety in Volume 3 of this report.

172 See pages 530 to 634 of the Workshop Transcriptions (Volume 2 of this report). See also pages 76 to 81 of the Symposium Transcriptions (Volume 2 of this report).

173 According to case law the term “recklessness” must be given its ordinary meaning, and it does not denote mere negligence, but at the very least gross negligence. See Philotex (Pty) Ltd v Snyman 1998 (2) SA 138 (SCA). See also S v Goertz 1980 (1) SA 269 (C); S v Parsons 1980 (2) SA 397 (D); S v Harper 1981 (2) SA 638 (D) and Fisheries Development Corporation of SA v Jorgensen 1980 (4) SA 156 (W).

174 See Lessing’s submission in Volume 3 of this report.

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21.3 The Standing Advisory Committee on Company Law has already taken a decision in regard to whether the test should be intent or negligence, and there is no doubt that any test of mere negligence will be met with the gravest of opposition.

21.4 Chapter 21 represents a combination of the existing section 424 of the Companies Act (which has been slightly amended) and proposals made by De Koker in a paper delivered at the symposium on 23 October 1998. Some suggestions made by Edeling have been included in the proposals set out in Chapter 21.

21.5 De Koker proposes that a section dealing with fraudulent trading remain in the Companies Act 61 of 1973, which would replace the current section 424. He then proposes that a new Insolvency Act (or this Bill) should contain a section dealing with fraudulent trading and insolvent trading. After having carefully considered all the proposals made, I have decided not to include De Koker’s proposals in respect of fraudulent trading in the Bill. I have however included his proposals on insolvent trading provisions.

21.6 My reasons for excluding De Koker’s proposals on fraudulent trading are the following:

 Ç There is already a substantial body of case law on the subject of fraudulent trading as set out in the current section 424 of the Companies Act. It seems pointless to introduce a completely new system at this time, even if it is more modern than the provisions we currently have here, when most of the issues surrounding section 424 have been judicially considered.

 Ç De Koker’s proposals seeks to limit the liability under the fraudulent trading provision, while the current section 424 makes provision for unlimited liability.

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See Volume 2 of this report, where De Koker’s paper has been reproduced in full.

See Volume 3 of this report, where Edeling’s proposals have been reproduced in full.

See Ferreira’s comments on page 109 of the Conference Transcriptions (Volume 4 of this report) where he agrees with this view.
There has been substantial criticism of De Koker’s proposals by both Edeling and Ferreira. The introduction of, for example, new terminology will require our courts to once again interpret and give substance to many of the provisions contained in De Koker’s proposals.

21.7 I do, however, believe that the introduction of an insolvent trading provision into the new Bill could serve a useful purpose, and for this reason I have included these proposals by De Koker.

21.8 I also believe that a fraudulent trading provision should be included in both a new Insolvency Act as well as in the current Companies Act. The fraudulent trading provision in an Insolvency Act (or this Bill) should, however, apply to all debtors and not only to companies. With this in mind, I have amended the relevant clause accordingly. The fraudulent trading provision which is to remain in the Companies Act could then perhaps be amended to read as follows:

“424. Liability of directors and others for fraudulent conduct of business. (1) When it appears that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the court may, on the application of any creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct.

(2) (a) Where the court makes any such declaration, it may give such further directions as it thinks proper for the purpose of giving effect to the declaration, and in particular may make provision for making the liability of any such person under the declaration a charge on any debt or obligation due from the company to him, or on any mortgage or charge or any interest in any mortgage or charge on any assets of the debtor held by or vested in him or any company or person on his behalf or any person claiming as assignee from or through the person liable or any company or person acting on his behalf, and may from time to time make such further orders as may be necessary for the purpose of enforcing any charge imposed under this subsection.
For the purposes of this subsection, the expression “assignee” includes any person to whom or in whose favour, by the direction of the person liable, the debt, obligation, mortgage or charge was created, issued or transferred or the interest was created, but does not include an assignee for valuable consideration given in good faith and without notice of any of the matters on the ground of which the declaration is made.

(3) Without prejudice to any other criminal liability incurred, where any business of a debtor is carried on recklessly or with such intent or for such purpose as is mentioned in subsection (1), every person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be guilty of an offence.

(4) The provisions of this section shall have effect notwithstanding that the person concerned may be criminally liable in respect of the matters on the ground of which the declaration is made.

21.9 Clause 114 of the Draft Bill deals with fraudulent trading (which is a revamped section 424) and clause 115 with insolvent trading, which also applies to all debtors.

21.10 One important amendment has, however, been made to clause 114 which deals with fraudulent trading. The current section 424 refers to the party involved being “personally liable”. Edeling dislikes this and has requested that the phrase be changed to “responsible”. He motivates it thus:

“...the unnecessary word “personally” sometimes gives rise to a perception that a company (eg a holding company) cannot be liable for the debts of another company - which perception is against the international trend. But maybe say that the Act should make it clear that any person, whether natural or otherwise, can be liable for knowingly being party to fraud.”

21.11 Certain procedural aspects related to this chapter on personal liability are discussed in more detail under Chapter 27, which deals with general provisions.

21.12 Although a lot of debate went into the discussion of these proposals at the conference held on 6 October 1999, no real suggestions were made in respect of the proposals as they now stand. In fact, there was substantial agreement on all the provisions, even the provision relating
to insolvent trading, which are new in the context of South African insolvency law. There is obviously still a lot of room for debate on these provisions generally, but no major suggestions for improving the current proposals contained in this report, were made.\(^\text{178}\)

**Uniform provisions applicable to all debtors**

21.13 The need to have uniform provisions applicable to all debtors is clearly illustrated by the problem encountered by the different wording used in section 424 of the Companies Act and section 64 of the Close Corporations Act.\(^\text{179}\)

21.14 In section 424 of the Companies Act the wording of the fraudulent trading provision reads as follows: “When it appears, ...., that any business of the company was or is being carried on **recklessly or with intent to defraud creditors**...” In section 64 of the Close Corporations Act\(^\text{180}\) it is stated thus: “If it at any time appears that any business of a corporation was or is being carried on **recklessly, with gross negligence or with intent to defraud any person** ....”

21.15 While the requirement of “recklessness” as used in section 424 was discussed in the decision of *Ex parte Lebowa Development Corporation Limited*,\(^\text{181}\) the court in *Philotex v Snyman and Another*\(^\text{182}\) found that recklessness includes gross negligence. The court in the *Philotex* case also then discussed the test for recklessness.

21.16 This being the case under section 424, what is to be read into the fact that section 64 of the Close Corporations Act makes a distinction between “recklessness” and “gross

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\(^\text{178}\) For the discussion generally of this subject at the conference of 6 October 1999, see pages 100 to 134 of the Conference Transcriptions in Volume 4 of this report.

\(^\text{179}\) See Lessing’s submissions in Volume 3 of this report, where he also mentions the need to have uniform provisions.

\(^\text{180}\) It is submitted that the provisions of section 64 should remain in the Close Corporations Act for cases where there is no liquidation, but where the members are sought to be held personally liable.

\(^\text{181}\) 1989 (3) SA 71 (T).

\(^\text{182}\) 1998 (2) SA 138 (SCA).
negligence”? Does “recklessness” under section 64 have a different meaning to the “recklessness” contained in section 424? It is exactly this type of interpretation problem which prompts one to suggest uniform provisions which will be applicable to all debtors. In this way certainty is also created among businesspeople.

**De Koker’s proposals in respect of fraudulent and insolvent trading**

21.17 For the sake of completeness, De Koker’s proposals for a fraudulent trading provision in the Companies Act and Insolvency Act read as follows:

**Companies Act**

“(1) Without prejudice to any other criminal liability incurred, any person who is knowingly a party to the carrying on of any business of the company with intent to defraud the creditors of the company, or any other person or for any other fraudulent purposes, shall be guilty of an offence and, on conviction, shall be liable to be sentenced to imprisonment for a period not exceeding 10 years, or a fine.

(2) This section applies whether or not the company has been, or is in the course of being, liquidated.”

**Insolvency Act**

“(1) If a company goes into insolvent liquidation the court may, upon application, declare that any person who knowingly participated in fraudulent trading as set in section X shall be liable to pay such amount as awarded under this section.

(2) The application referred to in subsection (1) may be brought by the liquidator of the company on behalf of creditors who extended credit to the company while it was trading fraudulently or, if the liquidator refuses or fails to obtain the necessary authority or directions in terms of section 386(3) and (4), by such a creditor or group of creditors.

(3) The court shall determine the amount payable with reference to the loss that was or will be suffered on account of the fraudulent trading by the creditors represented before the court.

(4) The amount will be payable to applicant(s) for distribution among the creditors represented in the application or for distribution in such way as the court is requested to order and as it deems equitable.
See the submission made by Lessing in Volume 3 of this report. Lessing’s submissions contain a very handy exposition of section 424, which also contains a comparative study of legislation in other countries. It is suggested that Lessing be co-opted into the process when the time comes to overhaul the provisions relating to personal liability.

The comments by De Koker have been roughly translated into English from an e-mail message received, wherein De Koker commented on the provisions.

21.18 It is not intended to comment on De Koker’s proposals in any detail in this part of the report, as De Koker has himself explained it in his paper, which forms part of this report. De Koker himself stated that the following criticism could be levelled at the provisions, he has proposed, and these should of course be debated:

Why should the right to recover be limited to those who were directly prejudiced by the insolvent trading?

According to this argument all creditors are prejudiced, also historical creditors, since the claims on the pool of assets are increased by the fraudulent conduct. On the other hand, where the application succeeds, it leads to the payment of the new claims. The new creditors claims are therefore taken out of the insolvency process. De Koker feels that it is more elegant to limit the claim to those who were directly prejudiced.

The term “prospective and contingent liabilities” is vague and the determinability thereof may invite quite some debate. To define the term in any detail will require a long and detailed section. De Koker feels that this should be left to constructive public debate.

Edeling’s comments on the De Koker proposals

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183 See the submission made by Lessing in Volume 3 of this report. Lessing’s submissions contain a very handy exposition of section 424, which also contains a comparative study of legislation in other countries. It is suggested that Lessing be co-opted into the process when the time comes to overhaul the provisions relating to personal liability.

184 The comments by De Koker have been roughly translated into English from an e-mail message received, wherein De Koker commented on the provisions.
21.19 Edeling’s comments on the de Koker provisions can be summarised as follows:¹⁸⁵

**Personal liability for fraudulent trading**

21.20 Edeling points out that the phrase “knowingly participated” is a new term which has not yet been judicially considered. He suggests that the phrase “knowingly party to the carrying on of the business in the manner aforesaid” as contained in section 424 of the Companies Act, has been widely interpreted and provides an easier test.

21.21 Edeling also suggests that recklessness should be retained, but that the term should be properly defined, since “businessmen must have some guidance”.

21.22 Edeling questions why the section is limited to creditors who extended credit whilst the debtor was trading fraudulently. This aspect has already been dealt with above. Edeling would also like to see a more detailed set of rules than the provision contained in the last two lines of this sub-clause.

21.23 Edeling points out that the test in this sub-clause for quantum is very limiting, and introduces a causation test which is absent from section 424 of the Companies Act. He states that such a limitation renders the statutory remedy no better than the existing common law claim in delict. He further states that the current authority of the court, to order liability without limit and without proof of causation, should be retained, without which the section becomes useless.

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¹⁸⁵ Proposals made by Edeling and which have been included in the De Koker provisions, have not been included here.
Clause 115(1)

21.24 Edeling is of the opinion that the words “who caused or allowed” in sub-clause (1) creates problems and would add to the evidential burden of the liquidator. According to Edeling it is accepted that controllers exercise control and therefore the onus is on such person to establish the defence of non-participation.

21.25 Edeling also opposes the idea that the loss incurred should be limited to the incurring of debts. He states that loss is caused not only by increasing debt, but also by reducing assets, and would like to see it extended to any business act that causes loss, citing the example of wrongful dispositions.

Clause 115(3)

21.26 The same comments made in respect of De Koker’s fraudulent trading clause above.

Clause 116 - repayments by members of close corporations

21.27 In line with the unification of all provisions relating to corporate entities, the provisions of section 70 of the Close Corporations Act have been included under this clause.

Clause 117 - repayment of salary or remuneration by members of close corporations

21.28 In line with the unification of all provisions relating to corporate entities, the provisions of section 71 of the Close Corporations Act have been included under this clause.
CHAPTER 22

COMPOSITIONS

Comments on compositions generally

22.1 At present there are various provisions relating to compositions. In the first place sections 119 to 123 of the Insolvency Act 24 of 1936 provide for compositions in the case of individuals. Section 72 of the Close Corporations Act makes provision for compositions in the case of close corporations. Previously sections 119 to 123 also applied to close corporations, but a recent amendment to the Close Corporations Act now provides for separate provisions for close corporations.

22.2 In Discussion Paper 66, Project 63, the SA Law Commission proposed an insertion of an additional sub-section to section 74 of the Magistrate’s Court Act. The insertion of section 74X amounts to a pre-liquidation composition which can be entered into by the debtor with his or her creditors. It was suggested at the workshops that all provisions relating to compositions, whether pre- or post-liquidation, should be included in the new unified proposals. It was also suggested that administration orders, which are currently governed by section 74 of the Magistrate’s Court Act, should be transferred to the unified proposals.

22.3 After consideration of these proposals I have decided to include pre-liquidation compositions (as proposed by the SA Law Commission) in the unified proposals, but to exclude

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186 The proposals made by individuals at the conference of 6 October 1999 relate to proposals made by the Law Commission and will not be addressed by this report. However, see the comments by Gihwala at pages 136 to 143 of the Conference Transcriptions in Volume 4 of this report.

187 In the case of companies a compromise is entered into - this is dealt with in section 311 to 313 of the Companies Act and has also been included separately under these new proposals (see below).

188 Section 72 of the Close Corporations Act.
However, if one is to talk of truly unified proposals, the American experience may serve as an example. In terms of the United States Bankruptcy Code, a natural person debtor has a choice between Chapter 7, which is bankruptcy or sequestration, and Chapter 13, which is a procedure similar to our administration order procedure under section 74 of the Magistrate’s Court Act, and which provides for the re-organisation of debts. Should we therefore follow the American example of a truly unified Act, a new Act should include the administration procedure. See the submissions (dated 29 October 1999) made by Roestoff in Volume 5 of this report.

In the United States the ceiling is a lot higher than is the case in South Africa.

22.4 With a view to including the existing composition provisions as well as the proposed section 74X in the unified proposals, it was decided to distinguish between them on the basis of “pre-liquidation compositions” and “post-liquidation compositions”. Pre-liquidation compositions therefore represent the proposed section 74X of the SA Law Commission, and post-liquidation compositions the proposed composition provisions contained in the Law Commission’s Draft Insolvency Bill.

22.5 One change which has been made to clause 118 (pre-liquidation compositions), is the amendment of sub-clause (16). It is felt that the provision in this sub-clause that the presiding officer can convert the application for a composition into a liquidation proceeding, the debtor thereby avoiding the requirement of advantage to creditors, is going to lead to abuse in

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189 However, if one is to talk of truly unified proposals, the American experience may serve as an example. In terms of the United States Bankruptcy Code, a natural person debtor has a choice between Chapter 7, which is bankruptcy or sequestration, and Chapter 13, which is a procedure similar to our administration order procedure under section 74 of the Magistrate’s Court Act, and which provides for the re-organisation of debts. Should we therefore follow the American example of a truly unified Act, a new Act should include the administration procedure. See the submissions (dated 29 October 1999) made by Roestoff in Volume 5 of this report.

190 In the United States the ceiling is a lot higher than is the case in South Africa.
Instead it is submitted that either the composition proceeding should come to an end (where the composition is not accepted by creditors), or the presiding officer should, in appropriate circumstances, be empowered to consider the granting of an administration order in terms of section 74 of the Magistrates’ Court Act. In this way bona fide debtors will receive at least some sort of relief, but will exclude mala fide debtors who wish to abuse the process in order to have their estates liquidated where no order would be granted by the High Court in respect of a liquidation proceeding. This amendment should serve only as an interim measure, until such time as the business rescue proposals, which should include provisions relating to a fresh start for individuals, have been properly debated and implemented.

22.6 In addition to merging these provisions in one chapter, the provisions have also been amended to be made applicable to trust debtors, close corporation debtors and association debtors. Whether or not this will be acceptable, especially in light of the recent amendment to section 72 of the Close Corporations Act, is not known. I can however see no reason why these provisions cannot apply uniformly to all types of debtors, excluding companies which receive special treatment in these proposals.

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191 See Roestoff and Jacobs Statutêre Akkoord voor likwidasie: ‘n toereikende skuldenaarremedie 1997 2 De Jure 189.

192 It is submitted that the provisions contained in section 72 of the Close Corporations Act are so similar to the new proposals concerning compositions in this Bill (and as submitted by the Law Commission), that a separate clause dealing with compositions in the case of close corporations is unwarranted.
CHAPTER 23

COMPROMISES

Comments on compromises generally

23.1 The provisions of sections 311 to 313 of the Companies Act, which deal with a compromise or arrangement between a company and its creditors or members, have been included in these proposals, but with one very important difference - the provisions incorporated here only deal with a compromise between a company and its creditors.\(^\text{193}\)

23.2 The references (in the current section 311 of the Companies Act) to an arrangement between a company and its members, have been omitted. It is envisaged that a provision dealing with an arrangement between a company and its members will remain in the Companies Act.

23.3 The reason for including compromises between a company and its creditors in these proposals, stems from a suggestion at the symposium and the workshops that this should be done, since it essentially deals with cases where the company is unable to meet its commitments towards its creditors.

23.4 Due to the large body of case law dealing with compromises, and the largely successful implementation of compromises in practice, it was decided not to amend any of the provisions currently contained in section 311 to 313 of the Companies Act. Therefore the provisions of section 311 to 313 have been reproduced here their entirety. The only omissions relate to references in the section to a company and its members.

23.5 At the conference held on 6 October 1999, the proposals set out above were considered and found to be acceptable. The only suggestions which were made relate to the use of the current name “compromise or arrangement”. It was decided at the conference that the term

\(^\text{193}\) Edeling has proposed that the clause be amended to allow for a compromise between a “proposer” and the creditors of a company, in order to nullify the problems sometimes encountered in practice.
“compromise” would best serve the purpose, and that no negative connotation would be attached to the term. All references to the term “arrangement” have accordingly been omitted.194

194 See pages 144 to 146 of the Conference Transcriptions (Volume 4 of this report) for a discussion of this issue by Klopper, and pages 147 to 152 for a discussion by Delport. See generally pages 135 to 163 of the Conference Transcriptions in Volume 4 of this report.
CHAPTER 24

JUDICIAL MANAGEMENT

Comments on business rescue generally

24.1 In the initial proposals on this subject which were debated at the conference on 6 October 1999, there were three chapters contained in the unified proposals which dealt with business rescue provisions. At the symposium and subsequent workshops, the view was generally held that a new business rescue regime should be developed in South Africa which could replace the current judicial management contained in section 424 et seq of the Companies Act.

24.2 Nel (PriceWaterhouseCoopers) volunteered to design provisions for a workable corporate rescue regime in South Africa in conjunction with Kloppers (University of Stellenbosch). The initial proposals submitted by Nel were radical to say the least, but a more tempered version was submitted on 14 May 1999, which were compiled in conjunction with Edeling. These proposals appeared in the third chapter on business rescue in the initial

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195 See pages 61 to 75 of the Symposium Transcriptions and pages 635 to 727 of the Workshop Transcriptions (Volume 2 of this report). It must be noted that Rajak and Henning’s paper, which was delivered at the symposium on 23 October 1998 (“Business Rescue for South Africa”, see Volume 2 of this report), were not considered in any detail due to the fact that no concrete proposals in respect of legislation were received. However, two important points must be made. Firstly, many of the points that Rajak and Henning make were addressed by the three models which appeared in the conference documentation. Secondly, their paper gives an excellent exposition of the current business rescue regime in South Africa, namely judicial management. Rajak and Henning also made valid suggestions in respect of who should oversee a process of business rescue. Any new business rescue regime must take cognisance of their proposals.

196 The first chapter on business rescue was entitled “Judicial Administration”, and was submitted by Kloppers from the University of Stellenbosch. The second chapter on business rescue was entitled “Business Administration”, and was based on a paper delivered by Smits at the symposium held on 23 October 1998 (and which has subsequently been published in 1999 De Jure 80). The third chapter on business rescue was entitled “Business Recovery Administration”, and was submitted by PriceWaterhouseCoopers.
proposals.

24.3 Smits delivered a paper at the symposium on 23 October 1998, wherein he proposed that South Africa should consider business rescue provisions similar to those contained in Chapter 11 of the United States Bankruptcy Code. Realising that the Chapter 11 provisions could not merely be transplanted here, Smits suggested adapting the provisions to meet local conditions.

24.4 Unfortunately Smits was unable to draft the legislative provisions himself, and requested the author of this report to complete the process. After the first draft, the provisions were submitted to Rochelle, who was kind enough to comment on the proposals on business administration in detail. Many of his suggestions were included in the provisions.

24.5 While Kloppers’ proposals sought to modify and improve judicial management, the submissions made by PriceWaterhouseCoopers and the Smits model, were new in their approach. Both the latter proposals had automatic stays as their basis and were formulated in wide terms in order to maximise the rescue of the business without being hampered by judicial process.

24.6 One of the options open when finalising those initial proposals, was to merge the best of each of the systems provided for. However, I did not feel comfortable making such a grave decision and decided instead to reproduce each of the systems as they were submitted to me, or as drafted by myself. The proposals have since been discussed in an open forum (at the

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197 This paper has since been published: 1999 De Jure 80.

198 See Volume 2 of this report, where Smits’ paper has been reproduced in its entirety.

199 Michael R Rochelle, of the Texas Bar, is a member of Rochelle, Hutcheson & Murphy, Dallas, Texas, and is a co-author of the 1998 Collier Handbook for Trustees and Debtors in Possession, published by Mathew Bender.
conference on 6 October 1999), but no unanimity could be reached on which of the proposals is workable. 200

24.7 At the conference on 6 October 1999, Kloppers and Edeling volunteered to draft one set of proposals based mainly on the plans submitted by PriceWaterhouseCoopers and Kloppers himself. Unfortunately the proposals had not been completed at the time of the compilation of this report, and can consequently not be included here.

24.8 As a result I have had no choice but to revert to the retention of judicial management until such time as proper proposals for a new business rescue regime have been properly considered by all the role players in an open forum. 201 Once properly considered proposals have been finalised, they can be inserted into the unified proposals, replacing judicial management. The proposed retention and amendments to judicial management are discussed in the next paragraph.

Retention of judicial management

24.9 The fact that no final proposal could be made in respect of business rescue provisions, must not be allowed to derail this attempt at proposing a unified Insolvency Bill. The most important aspect of this report is that a unified Insolvency Act can be, and in my opinion has been, achieved. It has been shown that the business rescue proposals are not workable at this stage, and the solution would be to leave them out completely, to be inserted at a later stage when the whole issue has been subjected to rigorous public debate.

24.10 It is felt that at least some sort of business rescue provision be retained or included in a new Act, and my suggestion would be to retain the current provisions relating to judicial management. 202 These provisions could then be retained until a proper business rescue regime

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200 See pages 164 to 226 of the Conference Transcriptions in Volume 4 of this report.

201 To this end the Centre for Advanced Corporate and Insolvency Law at the University of Pretoria intends holding a series of symposia and conferences on this contentious issue during 2000.

202 As contained in the current section 427 et seq of the Companies Act.
can be implemented. However, if judicial management is to be retained in the meantime, it is suggested that at least the following changes be brought to these provisions:

1. That the provisions be made applicable to all debtors (with the exception of natural person debtors and partnership debtors);

2. That the burden of proof which is currently required in order to obtain a judicial management order, be toned down from “probability” to “possibility”.

24.11 Chapter 24 therefore contains the “new” judicial management provisions which have, save for these few changes, been repeated here in the form of section 427 et seq of the Companies Act 61 of 1973.

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An initial proposal that the provisions be amended to allow for the implementation of a plan by the judicial manager which makes provision for the re-organisation or writing-off of the debtor’s debt, has not been included here due to the difficulty of placing it within the confines of the current provisions. It is submitted that the court’s powers are wide enough in the case of a judicial management order, to give such an order, or confirm such a request, in practice.
CHAPTER 25

OFFENCES

Generally

25.1 The amendments made to these provisions relate to the differences between natural and juristic persons. References have also been made to the “management of a debtor” in appropriate circumstances.\footnote{79}
CHAPTER 26

CROSS-BORDER INSOLVENCIES

Generally

26.1 The UNCITRAL model law on cross-border insolvencies has been adopted in amended form by the SA Law Commission. The amended proposals have been included here as a separate chapter and were forwarded for inclusion by Cronje of the Law Commission.

26.2 No amendments have been made to the content of the provisions, although various amendments to section numbers and other incidental matters have been made.
CHAPTER 27

GENERAL PROVISIONS

Generally

27.1 There are various general provisions which are currently contained in the Companies Act, which were included in the initial unified proposals submitted at the symposium on 23 October 1998. In the initial proposals these provisions were contained in the chapter relating to special provisions only applicable to juristic persons.

27.2 At the suggestion of Cronje of the Law Commission, it was felt that a number of these provisions could also be applied to natural persons. As a result, these provisions have now been included under Chapter 27, which deals with general provisions of general application.

Clause 170 - court may stay or set aside liquidation

27.3 This clause is a re-enactment of section 354 of the Companies Act, and has been made applicable to all debtors.

Clause 171 - meetings to ascertain wishes of creditors and others

27.4 This clause amounts to a re-enactment of section 413 of the Companies Act but must not be confused with meetings of creditors held under Chapter 11 of these proposals.

27.5 The idea of this section is that the court may convene a meeting in order to ascertain the wishes of the relevant parties.
Clause 172 - dispositions and share transfers, or transfer of a members’ interest after liquidation void

27.6 This clause is a re-enactment of section 341 of the Companies Act, and has been amended to have a wider application.

Clause 173 - inspection of records of debtor

27.7 This clause is a re-enactment of section 360 of the Companies Act, and has been extended to apply to all debtors.

Clause 174 - general provisions relating to Chapter 7 or Chapter 21 proceedings

27.8 Edeling made substantial proposals in respect of proceedings for recoveries by the liquidator in an insolvent estate. This clause was proposed by Edeling and also includes certain sub-clauses which were initially included under other Chapters of the Bill.205

27.9 Edeling motivates the inclusion of this new clause as follows.206

"Chapters 7 and 24 deal with proceedings which may be taken by the liquidator or by creditors. 

There is a need for the Act to make it clear what the liquidators powers are, including his powers to settle and compromise claims that actually vest in creditors. 

In most cases the liquidator is in a better position than creditors to pursue these claims, and it is often felt that it is his duty to do so. However, his rights and powers should be made more clear. 

This new provision addresses a number of important issues in this connection.

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205 These clauses have been indicated in the relevant chapters, for example Chapter 24.

206 Please note that references to clauses refer to the clause numbers under the unified proposals as they appeared in the documentation of the conference held on 6 October 1999.
It provides that the liquidator will have the power to act, and even to make potentially contentious decisions such as agreeing to contingency fees and settling claims on behalf of creditors.

It goes on to control these powers and to give creditors the opportunity to be excluded from any such proceedings. In other words, more conservative creditors or those that would prefer to enforce their own rights can elect not to participate or be represented by the liquidator.

There is provision for the court to give procedural and other directions as may be appropriate from case to case.

It is further provided that liquidators need not give security for costs unless they are shown to be acting in a vexatious or frivolous manner.

Various other practical provisions are included to make recovery actions quicker and more effective.

The court retains wide powers to ensure that its orders are effective. Any flexibility needed is catered for by the courts wide powers.

A common complaint is that it takes a very long time before creditors actually get anything back in recovery actions. One reason for these delays is that it the liquidator must first investigate the facts, and this takes time. After the enquiry is done, the usual litigation process and trial take a long time as well.

In terms of proposed clause 202,

“Where any such liability has been investigated and prima facie established by way of statutory enquiry, the proceedings may be launched by way of notice of motion and supported by the evidence obtained by way of enquiry. If the court is unable to decide the case on the papers and the enquiry record, disputes of fact shall be referred to oral evidence as may be necessary”

This provision will address dilatory tactics by defendants whose liability has already been prima facie established. On cases where the enquiry record shows liability, this procedure will make it very difficult for the defendant to delay the case, and should contribute to more efficient recovery.”
27.10 Many names have been bandied about for a new unified Act. The initial idea was to rename the Act the Bankruptcy Act. However, many persons felt that this was “too American”, and that the current name of “Insolvency Act” should be retained if possible. Due to the fact that the Bill does not only cover insolvency issues, but also issues relating to the rescue or recovery of businesses, the proposed name of the new Act is the “Insolvency and Business Recovery Act”. 207

207 With acknowledgement to René Bekker of PriceWaterhouseCoopers.
SCHEDULES

Schedule 1 generally

28.1 Schedule 1 has been amended and added to in certain respects. The amendments and additions relate to the re-alignment of the contents to also provide for debtors other than natural person debtors.

Form A - statement of debtor’s affairs

28.2 Form A which has been approved by the Law Commission makes provision for natural person debtors. Initially it was felt that the form could not be adapted to make provision for debtors other than natural person debtors but, after consultation with a number of people, it was found to be possible and desirable to do so. All persons who gave input in this regard were of the opinion that most of the information required in form CM 100 of the Companies Act 61 of 1973, is never used.

28.3 Form A of Schedule 1 has therefore only been amended to reflect any unpaid share capital in the case of a company debtor, and to make provision also for other debtors other than natural person debtors.

Form B - affidavit for proof of claim not based on a promissory note or other bill of exchange

28.4 Form B has been amended to make provision for an e-mail address and facsimile number of the creditor. This suggestion was made by Edeling in order to align the form with the definition of “personal notice”, which includes giving notice by electronic mail and by facsimile.

Form C - affidavit for proof of claim based on a promissory note or other bill of exchange

28.5 What has been said under paragraph 28.4 above, also applies here.
**Form D - form and contents of accounts**

28.6 In the main, this form can also be applied to debtors other than natural person debtors. However, in the case of a company or close corporation having a surplus after all expenses and the creditors have been paid, the surplus has to be distributed amongst the shareholders or members who are entitled thereto, and not into the Guardian’s Fund as is the case with natural person debtors.

28.7 The amendment has been brought about by the insertion of paragraph 6.3 into the provisions of Form D. The insertion amounts to a re-enactment of List B of Annexure CM 101 of the Companies Act.

**Form F - statutory demand**

28.8 Form F has been added to the schedules in view of the amendment that has been made to clause 2 of the Draft Bill, more particularly clause 2(3)(a)(i). The aim of the demand is discussed in more detail under Chapter 2 above.\(^{208}\)

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\(^{208}\) The statutory demand was submitted by Cronje of the S A Law Commission.