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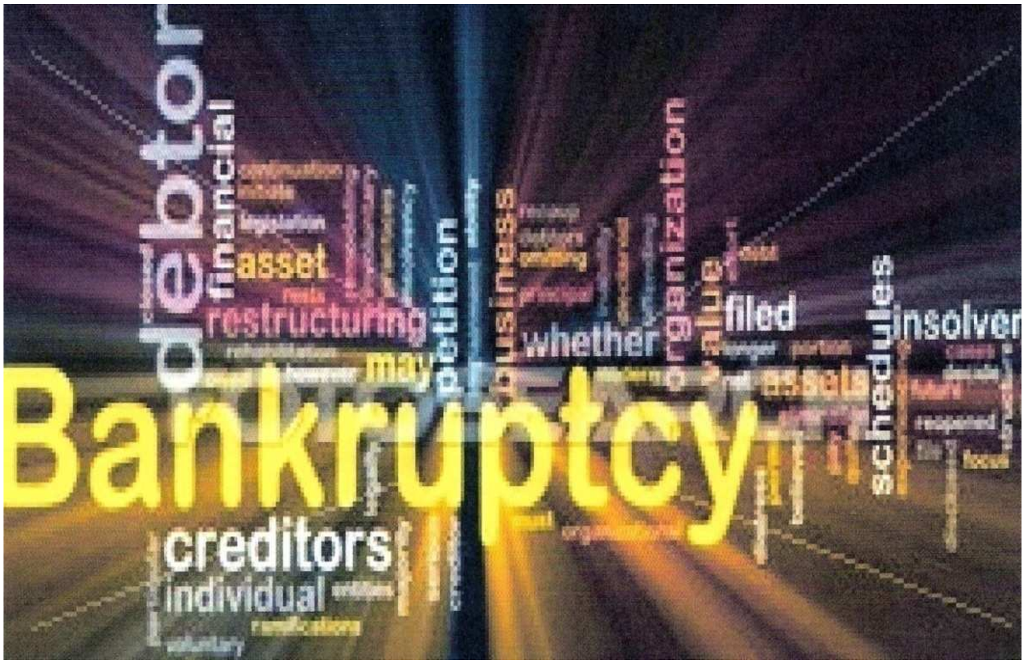

INSOLVENCY SYSTEMS IN SOUTH AFRICA

STRENGTHENING THE REGULATORY FRAMEWORK

December 2010

This publication was produced for review by the United States Agency for International Development. It was prepared by Gordon W. Johnson and Gerald E. Meyerman for Chemonics International Inc.

FINANCIAL SECTOR PROGRAM

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Contact: info@fsp.org.za
USAID Financial Sector Program
PO Box 21, Wendywood, Johannesburg 2144
South Africa

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ACRONYMS

ACTP	Association of Certified Turnaround Professionals
AIPSA	Association for Insolvency Practitioners in South Africa
BRP	Business Rescue Practitioner
CCA	Close Corporations Act
CCIL	Committee on Consumer Insolvency Law
CCRD	Consumer & Corporate Regulation Division
CTP	Certified Turnaround Professional
DC	Debt Counselor
DDG	Deputy Director General
DOJ	Department of Justice and Constitutional Affairs
DTI	Department of Trade and Industry
EBITDA	Earnings before Interest, Taxes, Depreciation and Amortization
FSP	Financial Sector Program (USAID)
GoSA	Government of South Africa
IAIR	International Association of Insolvency Regulators
IBRD	International Bank for Reconstruction and Development
IFC	International Finance Corporation
IMF	International Monetary Fund
INSOL	International Federation of Insolvency Practitioners
IP	Insolvency Practitioner
LRC	South African Law Reform Commission
MJCD	[Minister] for Justice and Constitutional Development
NCA	National Credit Act 34 of 2005
NCR	National Credit Regulator
NCRTF	National Credit Regulator Task Force
NDRC	National Debt Review Committee
NEDLC	National Economic Development and Labor Counsel
OCM	Office of the Chief Master
PMP	Project Management Plan
ROSC	Regulatory Observance of Standards and Codes
SACCL	Standing Advisory Committee on Company Law
SALRC	South African Law Reform Commission
SME	Small and Medium Enterprise
SOE	State Owned Enterprise
TMASA	Turnaround Management Association – Southern Africa
UNCITRAL	United Nations Commission for International Trade Law
USAID	United States Agency for International Development

EXECUTIVE SUMMARY

A number of applied research activities are undertaken annually by FSP specifically related to and undertaken in support of ongoing enabling environment activities. This *Review of the Insolvency Policy Framework* is one such applied research activities designed to build on previous FSP work inter alia on the Companies Act and Regulations and the National Credit Act (NCA).

Previous FSP work on the NCA and the design and regulation of the Companies Act and Regulations identified critical “gaps” in the access of juristic[1] SMEs to debt restructuring and insolvency. Preliminary research demonstrated that this problem was broader than initially thought and extended into the lack of harmonization of the wider insolvency policy area. As a USAID funded development project, FSP can only play a collateral, indirect role by providing technical assistance and support of the Government of South Africa in the development of policy, legislation and implementing regulations and mechanisms. FSP work in this broad area of insolvency system reform falls within a critical developmental area. Insolvency is a key core business climate area and is one of the 11 core areas of law identified by USAID as essential for an improved business environment. A modern and excellent business environment has been shown a key element in promoting element of economic growth, poverty reduction and employment creation – all major policy objectives of the Government of South Africa.

A key goal of this consultancy is to assure that all aspects of insolvency law and policy are as seamlessly integrated although responsibility for the implementation of component laws, regulations and oversight is distributed among several government departments and agencies. In the spirit of “cooperative government” embodied in the South African Constitution, this undertaking required and achieved the close cooperation of Government Ministries, departments, agencies as well as Universities, professional associations, firms and individual professionals from the public and private sector throughout South Africa.

Effective insolvency and creditor rights systems play a vital role in the stability of a country’s financial system and in promoting an attractive and thriving investment climate. While South Africa has a reasonably robust banking sector, inefficiencies in commercial law systems pose ongoing risks. Insolvency procedures are widely perceived to be fragmented and impractical, costly for liquidations and ineffective for business rescues. Reforms have been the subject of debate for at least two decades.

Procedures for winding-up companies have changed little over the years and are applied in a relatively routine manner, although the process is somewhat fragmented and governed by multiple laws. Principal criticisms of the liquidation process include procedural delays, high liquidation costs and low recoveries for general unsecured creditors. There are also complaints of high turnovers and a lack of experience among Masters of the High Court. A unified insolvency bill could significantly simplify insolvency procedures and improve overall efficiency. With the new Companies Act on the verge of becoming effective, and a

[1] Many SMEs are caught by the excessively broad definition of “juristic person” in the NCA. In the context of the NCA a juristic person includes “...a partnership, association or other body of persons, corporate or unincorporated, or a trust if …but excludes a stokvel…”

Parliamentary mandated review of the National Credit Act on the horizon, it would be timely to revisit earlier efforts to create a unified insolvency system.

Business rehabilitation mechanisms have not worked well in South Africa. While most corporate defaults aimed at rescue are reportedly handled on an informal basis, the system is hampered by having no centrally supported guidelines to support informal restructurings. On the formal side, compromises (schemes of arrangement) are not widely used due to the cumbersome nature of the procedure, high creditor approval thresholds, and other limitations in the statute, some of which have been addressed in the new Companies Act, which is expected to come into effect April 1, 2011. The judicial management procedure is even more impractical as a business rescue mechanism, numbering on average about two cases annually. It will be repealed by the new Companies Act.

The new Companies Act introduces a more modern and flexible business rescue procedure to be administered by newly designated and certified business rescue practitioners. The new process has a number of noteworthy features, including: a moratorium against enforcement actions upon commencement, with relief from the moratorium by consent or for cause shown; a priority for post-commencement financing; greater creditor involvement and a more flexible plan process; and improved protections for a secured creditor's collateral. A few provisions have been criticized as potentially detrimental to the process, but these *may* be addressed by the Companies Amendment Bill recently published and currently before Parliament for consideration and approval. Key to its success will be ensuring that practitioners have the necessary skills and qualifications to undertake the business rescue. Draft implementing regulations support a tiered approach with more seasoned experts handling more complex cases.

The National Credit Act of 2005 was a sweeping piece of legislation creating a comprehensive framework for credit reporting activities, a database for registering credits, pledges and other types of security arising under the Act, containing measures to prevent reckless credit granting and provide debt relief for over-indebted consumers. Since its introduction in 2007, there has been a growing backlog of debt relief applications and results in renegotiated debt have been dismal with approximately 45% of consumers failing to perform under their restructured debt repayment plans. Debt renegotiation by debt counselors of debt incurred under the NCA regulated credit agreements has underscored some troubling trends, including intentional abuses, inadequate training and knowledge by debt counselors, and inconsistent treatment of issues. Recent findings by the National Credit Regulator's Task Force indicate, among other things, that stronger regulation of debt-counselors is needed to ensure the integrity of the process. Overlaps in issues of over-indebtedness and personal insolvency require a coordinated approach to better integrate and harmonize policies under both systems.

South African insolvency practice is virtually unregulated, with wide variances in qualifications of insolvency practitioners, judicial managers and liquidators. While many liquidators are lawyers or accountants who are subject to the disciplinary control of their own professional bodies, most have no professional qualifications. There have been no prescribed qualifications for judicial managers apart from having the necessary skills to perform their duties, such as preparation of annual and other financial statements for submission to meetings of shareholders and creditors. New rules are being developed for business rescue professionals and may provide some guidance for a more standardized approach.

One significant shortcoming in the insolvency area is the dual system of appointments in insolvency cases designed to ensure equal participation by previously disadvantaged practitioners. Rather than empowering newcomers, the system has been marked by inefficiencies and lack of training on the part of newcomers. Strengthening the regulatory framework and adopting standardized training, licensing, monitoring and disciplinary rules will be essential to having an effectively functioning insolvency system going forward.

There are a number of serious problems that need to be addressed to improve the effective functioning of the insolvency systems in South Africa. Weaknesses in the system contribute to ineffective business rescues for viable businesses, which reduce job preservation and contribute to inefficient business performance. Procedures affecting creditor recoveries through individual enforcement or collective insolvency proceedings have been fragmented and inefficient, which ultimately increases performance risk to the banking system and reduces much needed access to credit. Now that the new Companies Act is on the verge of becoming effective, further reforms can help to improve the overall functioning of the insolvency systems.

To best address immediate and future reforms, there was a general consensus among insolvency practitioners and stakeholders to adopt a three pillar (or phase) approach for strengthening insolvency and enforcement systems, as follows: 1) business rescue – implement the new procedure and investigate other measures for promoting more effective business rescue through informal workouts and other formal mechanisms; 2) unify and modernize insolvency procedures; and 3) strengthen regulation of the insolvency process and practitioners. FSP will engage in ongoing coordination with Government to help move this agenda forward.

PROCESS AND ACKNOWLEDGEMENTS

A partial list of contacts is included as Annex G to this Final Report. Project Stages can best be broken down as follows:

Preliminary Interviews and Report Development Process

Implementation of this activity included several critical steps, each undertaken in close cooperation and with the input and support of key public and private sector champions and stakeholders. Working closely with the Department of Trade and Industry (*dti*), the South African Law Reform Commission, the Department of Justice and selected private sector stakeholders FSP conducted a comprehensive review of this critical area of legislation. The starting point was in consultation with the *dti* and specifically the Consumer & Corporate Regulation division (CCRD) a division FSP has worked closely with in a number of critical policy areas, including the Companies Act and Regulations and thus Chapter 6 – Company Rescue, a critical and important step forward in insolvency policy now ready for approval and implementation. The *dti/*CCRD informed the FSP Team that work on the reform of the Insolvency Act and broader insolvency policy issues had been deferred until such time as the business rescue provisions had been clearly defined and legislated. The dti/CCRD noted that by Cabinet agreement the follow up work on the reform of the comprehensive Insolvency Act would be championed and led by the Department of Justice (DOJ) and the Law Reform Commission (LRC). The *dti/*CCRD also indicated the important role of the *dti* in the forthcoming review of the National Credit Act (NCA) and recommended that FSP include the NCR in this project which transpired.

The *dti/*CCRD identified and set up meetings for the FSP Team with the appropriate persons in the DOJ and the Law reform Commission. Detailed meetings were held with each department and agency and full cooperation and support was received from each. The FSP Team benefitted from a rich collection of many research papers, published and unpublished, previously prepared by the DOJ and LRC as well as those prepared by academics and insolvency professionals collected over a period of decades. FSP would like to acknowledge the generous support and enthusiasm received from the management and staff at these Ministries, Department and Agencies.

Public Outreach and Stakeholder Consultation

The development of comprehensive policy reform invariably required extensive consultation and interaction between the public and private sectors. In addition to the FSP Team discussion with the public sector champions for this important policy initiative to succeed, a large number of organization – including the Banking Association, AIPSA, TMASA, SAICA, SAIPA, academics, labor unions, accountants, bankers, consumer debt counselors, insolvency practitioners, lawyers – were consulted. The FSP Policy Advisor was invited to speak at the AIPSA Annual Conference on Insolvency & Business Rescue Legislation & Practice addressing some 250 professionals for a full hour on the theme “Corporate Rescue – the Philosophy behind Restructuring Legislation”. This event established contact and access to many South African academics, public and private sector professionals interested in the reform of the insolvency system. It also permitted the identification of a limited number of “opinion leaders” who were consulted and asked to provide direct input to the preliminary versions of this report.

Public Sector Round Table

The Deputy Director General of the Department of Justice and Constitutional Affairs hosted a half day Public Sector Round Table at the DOJ in Pretoria. The event was designed to roll out and inform the various public sector Departments and Agencies mentioned earlier about the preliminary findings and Report and the preliminary recommendations for insolvency policy reform contained therein. A preliminary copy of this Report was distributed to participants permitting a more vibrant and focused discussion. A number of concerns and issues were raised by participants which were incorporated in the Preliminary Report subsequently distributed to participants in the Public Private Sector Roundtable Forum. Public sector participants stressed the need for cooperation among various Ministries, Departments and Agencies to achieve the stated goals and expressed clear recognition and support of the objectives sought through the comprehensive reform of the insolvency framework. The continued support from USAID/FSP and potentially the World Bank was considered important and welcomed. The FSP Team was requested to present more details about how this project could be taken forward to implementation, next steps and what role FSP/USAID and the World Bank could potentially play in providing technical assistance to the GoSa in this policy area. A brief, confidential outline paper was prepared by the FSP Team and presented to the DOJ.

Public-Private Sector Roundtable Forum

Prior to finalizing this Report, the USAID FSP together with the University of Pretoria Law Faculty – Centre for Advanced Corporate and Insolvency Law, convened a roundtable forum to address the issues raised in this report. Stakeholders attending the event included academics, accountants, bankers, consumer debt counselors, insolvency practitioners, lawyers, and public sector representatives. The event followed the general outline of the Preliminary Report, as enriched by the input received from the prior Public Sector Round Table and individual experts consulted. Each major area of interest in the Report was addressed, as follows:

- Consumer Bankruptcy – NCA/Insolvency Act
- Business Rescue Mechanisms
- Improving the Regulatory Framework
- Break Out Sessions - Comments and Recommendations for Each Session Topics
- Plenary Session – Comments and Recommendations Chair Reports
- Discussion, Consensus and the Way Forward

Each session, extending over 8 hours, was led by a leading academics from the University of Pretoria, University of South Africa (UNISA), and University of Johannesburg and enriched by selected skilled commentators from the public and private sectors, academics and insolvency practitioners. Based on the discussions, a general consensus emerged in support of the following three pillar approach to immediate and future reform efforts and policy recommendations. An “Interpretative Summary” of that event is currently in the final stages of preparation and will be printed and widely distributed to create a broader understanding of the importance of insolvency law and policy to economic development, provide a uniform vocabulary for discussion and outline the way in which this applied research can be taken forward and assist the Government in achieving comprehensive insolvency policy reform.

Cooperation with the World Bank

World Bank officials in Washington DC and the World Bank office in South Africa were consulted and kept fully informed at all stages of this FSP project. South Africa based World Bank staff participated actively in most activities outlined above. FSP also wishes to acknowledge the coordination of this work with the World Bank. The work previously undertaken by the World Bank/IMF under the 2003-2004 Regulatory Observance of Standards and Codes (ROSC) was widely referred to by GoSA officials and forms an important benchmark for this work. The FSP was informed that the Minister of Finance has recently requested follow up work from the World Bank and the completion of the ROSC process started in 2003-2004. If such work is undertaken by the World Bank, it will clearly supplement the FSP work and assist in maintaining the necessary impetus for change and the implementation of recommended insolvency system reform.

SECTION I: INTRODUCTION

The Financial Sector Program (FSP) supports the accomplishment of the U.S. Government's Economic Growth Objective in South Africa, as one of three main vehicles to promote vibrant growth of historically disadvantaged small and medium enterprises (SMEs) and reduce unemployment and poverty. The objectives of this program are to expand access to financial services and lower financing costs for SMEs by reforming the legal and regulatory framework affecting the financial sector and business environment and improving the commercial viability of lending to historically disadvantaged SMEs in South Africa with the goal of expanding SME access to a range of high quality and affordable financial services.

FSP has been supporting the Government's efforts to finalize amendments and prepare Regulations for the new Companies Act (2008), to be corrected and amended by the Companies Amendment Bill (2010) recently certified for Parliamentary review. The new Act modernizes and includes significant advances in corporate law, including, among others, a new chapter to promote the rescue of financially troubled businesses. The new business rescue process was introduced in connection with recommendations made as part of broader dialogue on insolvency reforms over several decades. The new process is designed to be more flexible and modern in approach, replacing the more restrictive and little used Judicial Management process. The new business rescue process will be administered by turnaround and restructuring professionals who meet newly articulated criteria to be certified to handle business rescue cases.

Other reforms recommended in the field of insolvency include unifying the insolvency framework, which was put on hold pending the introduction of the new Companies Act. With initial reforms completed, it seemed timely to take stock of the current framework for insolvency in light of the new Act and the changing legal and regulatory landscape for insolvency over the past decade, including the experience with debt counselors under the National Credit Act. The addition of a new category of business rescue professionals also offers an opportunity to examine the overall regulatory framework for insolvency and restructuring professionals in South Africa, which to date has been almost entirely unregulated. It is hoped that this report will add to the dialogue as the GoSA considers the next phase of insolvency reforms.

This report surveys the experience and sufficiency of South Africa's systems for addressing the problems of financially distressed companies and individuals. Section II identifies the current landscape for insolvency and its impact on access to credit. Section III examines the experience and effectiveness of winding-up a business under the Companies and Close Corporations Act or liquidating the business under the Insolvency Act. Section IV reviews the experience and effectiveness of business rescue mechanisms, including informal workouts, compromises and judicial management procedures, while Section V examines the new Business Rescue process under Chapter 6 of the new Companies Act. Section VI addresses the experience with debt counseling and adjustment under the National Credit Act and its interaction and balance in relation with consumer insolvency. Section VII examines the regulatory framework, including for insolvency practitioners, rescue practitioners and debt counselors. And Section VIII contains some recommendations for consideration going forward. The impact of the new Companies Act on the existing mechanisms for winding up, insolvency and restructuring procedures is discussed where applicable.

SECTION II: CURRENT LANDSCAPE FOR INSOLVENCY

Effective debtor-creditor regimes, the backbone of sound credit markets, establish the rules that set market expectations and risks. In today's global environment, with greater competition and commercial risk, investors are more keenly aware of the problems of recovery and more selective about where they invest or lend. They often favor markets with less risk and more reliable structures to support recovery.

Effective legal systems enhance credit access and protection, ingredients of growth in all markets, and enable stakeholders to act swiftly to mitigate losses when a debtor defaults on obligations. Such systems are thus pivotal in maintaining confidence in daily commercial transactions. They are also vital for prompt responses to deepening insolvency, economic decline or stagnation, or systemic financial distress.[2]

Important Policy Objectives

1) ***Promoting financial sector stability and a sound business environment***. Insolvency and enforcement systems are vital to (i) maintain proper checks and balances on business behavior, (ii) reinforce accountability in contractual relationships, (iii) establish a reliable framework to manage risk, and (iv) provide mechanisms to rescue viable businesses and provide for swift and fair disposition in matters of insolvency.

2) ***Expanding Access to credit*.** Proper insolvency and enforcement systems promote wider access to credit at reasonable cost, which fuels economic growth, and promote responsible consumer credit-granting and borrowing behavior aimed at promoting a thriving consumer credit industry, while establishing an appropriate balance between meeting basic consumer needs and satisfying creditor obligations.

3) ***Enhancing prospects for business rescue and job preservation*.** Insolvency laws rehabilitate viable enterprises, restore solvency and preserve jobs where possible.

4) ***Strengthening practitioner skills***. Consistent with transformation goals to equip practitioners with the skills needed to maximize employment opportunities, proper regulation should aim to develop qualified practitioners held to appropriate standards of accountability, fairness, impartiality and transparency.

Insolvency and creditor rights systems play a vital role in the stability of a country's financial system and in promoting an attractive and thriving investment climate. These systems are the foundation for certainty in commercial relationships, assuring access to affordable credit, preserving jobs for viable businesses and facilitating efficient asset transfers where necessary to more efficient market players. Proper systems also ensure that market players and workers maximize their economic and business potential opportunities for employment that serve to support the ongoing transformation of the country and empowerment of citizens to participate in the economic benefits that society offers. These policy objectives are achieved in part through modern, effective, efficient and well-regulated commercial law systems.

Modern insolvency regimes provide flexible options to rehabilitate viable businesses and efficient mechanisms for liquidating those that are not viable. An insolvency law balances

[2] Johnson, Gordon W., 2007. Creating Effective Commercial Law Frameworks (Ch. 7). In Institutional Foundations for Sound Finance.

competing policies concerning how to allocate (or reallocate) the risk of loss among the different stakeholders of a company when a business becomes insolvent. The debtor's inability to fully discharge its liabilities as they become due and ensuing insolvency often leads creditors on a race to recover against the company's assets as quickly as possible, ensuring a higher recovery. Slower to act creditors often go unpaid. Insolvency laws preserve fairness by ensuring that creditors holding similar legal rights vis-à-vis the debtor and its assets will be treated equally. In other words, no single creditor is paid in full at the expense of other similarly situated creditors. A liquidation of the debtor's assets and a distribution of the proceeds results in at least equal, even if only partial, payment among the creditors. In general, a less costly and more efficient liquidation process will return higher dividends to creditors, thereby minimizing their losses.

A restructuring of the debtor's operations or balance sheet is almost always preferable to liquidation, if the business is viable, because the value of the business as a going concern will generally result in a higher overall recovery by creditors. Business rescues also preserve jobs, which is better for labor and for the economy. Consequently, the trend in modern insolvency laws is to adopt mechanisms that best promote the prospects for rehabilitating the debtor and rearranging its business affairs. The "business rescue" provisions of the new Companies Act fall into this category. Although liquidation and rehabilitation procedures are often viewed as relatively distinct from each other, there are considerable overlaps and linkages between them, both as a matter of procedure and in terms of the substantive issues they address.

Bankruptcy is best addressed by a comprehensive and integrated system to address issues of insolvency. In South Africa, the law has evolved differently and there is no integrated approach where an insolvent can migrate seamlessly from business "rescue" to "liquidation". There are no less than six laws governing company exit, business rescue and insolvency procedures.[3]

- Companies Act 61 of 1973, governing winding-up procedures for companies, unless insolvent.
- Companies Act 71 of 2008, soon to become effective, repealing the former Companies Act with some exceptions and governing compromises (schemes of arrangement) and a new business rescue process (Ch 6).
- Close Corporations Act 69 of 1984, governing liquidation of close corporations, with the administrative process being defined, at least in part, by reference to the Companies Act.
- Insolvency Act 24 of 1936, governing procedures for insolvent companies, consumers, partnerships and other juristic entities.
- Magistrates' Court Act 32 of 1944, governing procedures for administration orders.
- National Credit Act of 2005, regulating the process of debt restructuring for individuals (consumers) with respect to credits governed by the NCA.

The multiplicity of laws and procedures adds to the legal and regulatory complexity and does not provide for seamless treatment of an insolvent. Moreover, multiple courts exercise independent, or in some cases concurrent, jurisdiction over matters. Moving from one court to another creates additional delays in the overall administration process, which is

[3] In addition, there are specific laws governing the insolvency of banks and insurance companies that are not addressed in this report, but which have been considered for possible inclusion in a unified insolvency law.

considered by some to be already too slow. The Chart below maps the various insolvency procedures in South Africa.

	Rescue	Liquidation
Business	• Informal Workouts • Compromises (CA, CCA) • Business Rescue (CA, Ch 6)	• Voluntary Winding-up (CA73, CCA) • Involuntary Winding-up (CA73, CCA, IA) • Insolvency, Liquidation (IA)
Individual	• Informal Agreements & Voluntary Compositions • Debt Adjustments (NCA) • Administration Orders (MA)	• Sequestration (IA)

At the consumer level, the National Credit Act established a process for addressing consumer over-indebtedness. In effect, the new process shifts the "burden" of over-indebtedness from the borrower to the lender and puts in place a number of consumer protection mechanisms going well beyond traditional consumer insolvency remedies.

Prior to adoption of the NCA, the Magistrates Act provided for the rehabilitation of an individual's debt using the pro-creditor administration order procedure, which established relatively low total debt thresholds and required full repayment. With the expanding scope of the NCA, there are now overlaps and contradictions in procedures and policies designed to address consumer insolvency. The NCA also specifically exempts "juristic persons" from the purview of its protection, raising questions about the relationship between the NCA and provisions of the Companies Act, and how best to address gaps in relevant legislation to provide debt relief to individual entrepreneurs and disadvantaged SMEs. Reported abuses in the debt adjustment procedures under the NCA invariably impact on lender losses and thus costs and access to credit.

Although some insolvency related work is undertaken under court-supervision and by certified professionals, some areas of jurisdiction have limited oversight and standards of professional qualifications. The roles of "debt counselors" under the National Credit Act and "business rescue practitioners" under the new Companies Act create new professional categories not regulated, qualified or policed by established professional bodies, such as exists for accountants and lawyers. The cost/benefit of introducing such new professions and the best way to regulate such groups should be examined in light of international best practice. More broadly, the practice of insolvency is currently almost entirely unregulated and a comprehensive and integrated framework is needed to encompass all practitioners, whether operating under the Companies Act, the Insolvency Act or the National Creditor Act.

SECTION III: WINDING-UP AND LIQUIDATION OF COMPANIES

The Companies Act establishes a number of exit and recovery mechanisms for companies, including voluntary and involuntary winding-up procedures, company liquidations, and where the company is viable several options for enterprise rehabilitation (as described in Section IV below). Close corporations also may apply for winding-up pursuant to the Companies Act or liquidation under the Insolvency Act, although provisions dealing specifically with close corporations are contained in the Close Corporations Act. State-owned corporations that have not been formed as companies under the Companies Act are not subject to the insolvency framework.[4]

Structurally, the Companies Act governs company activities where the company is solvent, while the Insolvency Act governs procedures involving liquidations of insolvent entities. The two procedures overlap where a company or close corporation finds itself in a state of financial distress but is not clearly insolvent. In such instances, the Companies Act offers mechanisms for returning the company to health either by means of a compromise with creditors or through a judicial management. Where the company is clearly insolvent or unviable, however, the company becomes a candidate for liquidation procedures governed by the Insolvency Act. Once a company's estate is wound-up, the Master appoints a liquidator to realize and distribute the estate. Liquidators may be guided by creditors in how to realize the estate but not with respect to distributions, which are governed by strict priorities.

3.1 Voluntary and Involuntary Winding-Up

Procedures for winding-up companies or close corporations have changed little over the years and are applied in a relatively routine manner under the Companies Act. Procedures provide for voluntary winding-up by resolution of the company, one or more of its creditors, or by its members upon 75% membership vote in favor of winding-up. The process becomes effective immediately upon registration of the resolution with the Company Registrar's office, at which point a moratorium is imposed on executions against the estate. Voluntary procedures for winding-up a company are supervised by the Company Registrar, while company insolvency cases are supervised by the High Court.

In cases where a company is undergoing rehabilitation, a judicial manager can petition the court to convert the case to a winding-up proceeding, which the court may or may not grant. Conversely, upon cause, the court may set aside a winding up order and convert it to a case under judicial management.[5]

Creditors can apply for an involuntary winding-up order where the company is unable to pay its debts as they fall due. Rules governing compulsory liquidations under the Insolvency Act apply to the winding-up process *mutatis mutandis*. While having similar liquidation procedures under two laws seems slightly confusing to an outsider, local practitioners navigate the process without difficulty. In effect, there are two laws governing a single

[4] State-owned enterprises sometimes raise unique issues under insolvency, and should be held accountable with respect to the conduct of business as financially viable entities. Notably, the World Bank supports the view that "ideally, the insolvency process should apply to SOEs, or alternatively, exceptions of SOEs should be clearly defined and based upon compelling state policy." See World Bank, *Principles for Effective Creditor Rights and Insolvency Systems (2005)*, Principle C.3. (and accompanying footnote).

[5] As noted below, the judicial management process will be repealed when the new Companies Act comes into effect.

process with some of the process rules defined in the Insolvency Act and other rules defined in the Companies Act. These provisions are expected to be merged into a unified insolvency law in the future.

Companies in liquidation or faced with involuntary winding-up may apply for a compromise under section 311 of the Companies Act (discussed below). Where criteria for a compromise are satisfied, the court may set aside a winding-up order and approve the compromise.

Effect of the New Companies Act of 2008

The new Companies Act will not materially alter the winding-up procedures. Former sections of the 1973 Act applicable to winding-up are replaced by new sections 79-81 of the 2008 Act. To avoid conflict between the 2008 Act and ongoing efforts to develop a unified insolvency law, the new Act provides for transitional arrangements that retain the current regime for winding-up of "insolvent" companies until such time as a new uniform insolvency law is adopted.[6]

The new Companies Act of 2008 also provides that a court may order the winding up of a solvent company upon request pursuant to a resolution of the company or by application of a "business rescue practitioner" in a business rescue proceeding. The company, one or more directors, or one or more shareholders may also apply to the court for winding-up where the directors are deadlocked in management of the company or shareholders are deadlocked in their voting rights.

3.2 Judicial Liquidation Procedures under the Insolvency Act

Liquidations of companies have been on the rise over the past 5 years. As indicated in **Table 3.2** and **Chart 3.2** below, based on statistics maintained in the Integrated Case Management System, the number of liquidation cases has nearly doubled for companies from 2006-2010, while during the same period individual insolvencies have risen nearly 500%. Concerns have been raised by stakeholders that the system is not conducive to maximizing returns for creditors and may be subject to a degree of mismanagement and even abuse by insolvency practitioners.

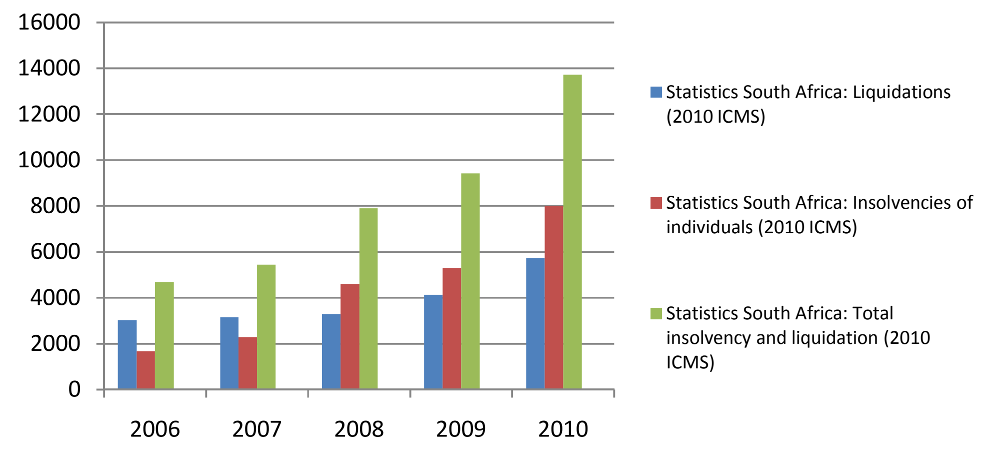
Table 3.2: Insolvencies and Liquidations (2006-2010)

	2006	2007	2008	2009	2010
Company Liquidations	3,026	3,151	3,300	4,133	5,729
Individual Insolvencies	1,671	2,286	4,607	5,295	7,994
Total: Liquidations & Insolvencies	**4,697**	**5,437**	**7,907**	**9,428**	**13,723**

Source: South African Statistics Office

[6] Section 224 (1) of the new Companies Act 2008 indicates that Companies Act of 1973 will be repealed subject to subsection (3), which provides that repeal will not affect transitional arrangements identified in Schedule 5 thereto. Schedule 5 clarifies that the Companies Act of 1973 will continue to apply to winding-up and liquidation of companies under the Act, as if the Act had not been repealed. Notwithstanding this exception to the repeal of the Act, section 343, 344, 346 and 348-353 will no longer apply to winding up of a solvent company, except to the extent necessary to give full effect to provisions of part G of Chapter 2 of the new Companies Act 2008. Where a conflict exists, the new law controls.

Chart 3.2: Insolvencies and liquidations (July 2006 to June 2010)



Source: South African Statistics Office

The difficulty of effectively using restructuring mechanisms in practice gives creditors few incentives to attempt to save a business from liquidation. Consequently, the overwhelming majority of judicial proceedings tend to be liquidations. As indicated above, provisions in the Companies Act and the Insolvency Act govern compulsory liquidations, while liquidations of close corporations are governed by the Close Corporations Act 69 of 1984 and administrative procedures contained in the Companies Act, with jurisdiction vested in the Magistrate's Court or the High Court.

Principal criticisms of the liquidation procedures include process delays, high liquidation costs and lower recoveries for creditors.[7] While the law contains many features that are generally compliant with international standards, cases are reportedly mismanaged due to insufficient qualification of liquidators. A number of features discourage creditor participation in the system, including:

- Creditors are unable to exercise control over liquidators or actively influence decision-making, although they may be consulted on how to realize the estate;
- The fee structure for liquidations is reported to be unfair;
- By participating in the liquidation process, creditors face the risk of having to contribute additional monies if the debtor has insufficient assets to cover the liquidator's expenses.
- Creditors may be given VAT recoveries in lieu of a liquidation claim; and
- Payment priority in liquidation is given to the costs of the liquidation, employee salary and wage claims, and income taxes, leaving little or nothing for unsecured creditors.

There are complaints of high turnovers and a lack of experience among some Masters of the High Court. Examination and confirmation of accounts and other interventions by the Master are said to lead to delays. The Master of the High Court is typically involved in

[7] Statistics on the average length of time for proceedings are not readily available in the Statistics office. The World Bank's *Doing Business 2011* report ranked South Africa's procedures for closing a business (i.e. liquidation and exit mechanisms) 74 out of 183 countries. Local practitioners apparently reported that the process takes 2 years on average, costs approximately 18% of the estate's value, and pays all creditors an average of 34% of claim value. These estimates have not changed over the last 4 years of the Doing Business rankings. By comparison in this area, South Africa ranked behind Botswana (27th), Namibia (53rd) and Mauritius (71st), and ahead of Kenya (85th) and Nigeria (99th).

reviewing all aspects of the proceeding to ensure fairness, obviating the need for creditors to be involved.

There is a lack of confidence in a Master's exercise of discretion in appointing insolvency administrators or liquidators, often appointing practitioners lacking in adequate skills. A number of stakeholders report abuses by practitioners appointed by Masters in liquidation proceedings. The Master of the High Court is also responsible for monitoring the performance of liquidators, who account to the Master regarding the administrative process in every estate. The process relies on liquidators to provide periodic reporting regarding their performance (e.g., liquidation and distribution of accounts) and complaints by creditors or parties in interest, which is unrealistic.

As in every profession, transformation is essential and to be encouraged, but the current system stifles meaningful progress. Complaints were heard that the appointment by Masters of non-experienced liquidators had the effect of serving as a "tax" of up to 50 percent on qualified liquidators as a result of the mandatory fee sharing arrangements. In practice, because the lead liquidator provides the requisite performance bonding and professional liability insurance, he is unwilling to increase performance exposure by having inexperienced persons "participate" in the liquidation. Others complained of the opposite impact – receiving fees provided no meaningful work is done, thus assuring that the less experienced liquidator has little chance to learn and gain the experience and contacts to establish their own independent and viable liquidation practice. Consideration should be given to establishing entry level minimum technical training standards as well as practicum opportunities to build experience toward becoming a fully qualified, bonded and insured practitioner. In view of the important role that training plays in assuring a qualified, diverse and viable profession going forward, qualification programs should be integrated for insolvency, rescue and debt counseling practitioners, allowing for progressive responsibility based on knowledge, skills and experience.

3.3 Reform Proposals: A Unified Insolvency Act

A unified insolvency bill could significantly simplify insolvency procedures and improve overall efficiency. Such a bill has been the subject of debate for over two decades. Despite some 20 amendments to Insolvency Act 24 of 1936, since it replaced Insolvency Act 32 of 1916, the law as a whole remains in need of a comprehensive review and reform to unify the numerous disparate insolvency procedures contained under the Insolvency Act, Companies Act, and Close Corporations Act. The law governs insolvency of individuals (sequestrations), including individuals trading as firms and partnerships, as well as liquidations of companies not covered by the Companies Act and liquidations of close corporations governed by the Close Corporations Act. Under certain conditions, companies under an insolvency proceeding may apply for a compromise pursuant to section 311 of the Companies Act. The numerous procedures and need to resort to multiple laws and procedures governed by different bodies makes the overall process unduly cumbersome.

In 2003, the Cabinet approved the Insolvency and Business Recovery Bill, intended to unify insolvency procedures, but held the bill back pending efforts to address business rescue proceedings in the new Companies Act. The Bill was developed based on reports by the South African Law Reform Commission (SALRC) and the Standing Advisory Committee on Company Law (SACCL). Among other things, the Bill is designed to unify liquidation and rescue procedures for individuals, partnerships and trusts, and contains provisions for liquidation of companies and close corporations. With the Companies Act of 2008 about to come into effect, the unified insolvency bill should be conformed, updated and re-tabled for consideration. **Annex A** contains key benchmark dates reflecting efforts to modernize business rescue procedures and introduce a unified insolvency law.

Insolvency reforms aim to promote a more effective, speedy and fair process, while striking a better balance among the various stakeholders in the insolvency process. In particular, reforms aim to improve efficiency in an effort to maximize distributions to creditors, and promote a better balance among creditors, workers and government. The SALRC has proposed a number of technical changes to achieve these goals, some of which are described in **Box 3.3** below.

Box 3.3: Recommended Changes to the Insolvency Law & Policy

- Liquidators must be members of a professional body recognized by the Minister having oversight and jurisdiction for the area.
- Liquidators may preside at meetings of creditors unless questioning is to take place at the meeting or an interested party requests the Master of the High Court or a Magistrate to preside.
- Resolutions can be adopted at the first meeting, to be convened by the initial liquidator as soon as possible following appointment, and not by the Master of the High Court after the final sequestration order.
- Creditors under financial lease agreements are treated as secured creditors and must prove their claims.
- Priority claims - SALRC recommended to abolish the priority in favor of governmental (e.g. taxes) claims, but this was not accepted by Government.
- Avoidable pre-bankruptcy transfers – extend the reach back period and presumption of insolvency for insiders to three years, shifting the burden to insiders to prove the contrary.
- Compositions – provide for a binding composition between an individual debtor and a majority of creditors without need of an application declaring a debtor's estate insolvent.

SECTION IV: BUSINESS RESCUE MECHANISMS

Business rehabilitation mechanisms have not worked well in South Africa. There are three primary approaches to rescuing a business: informal workouts; compromises (schemes of arrangement); and judicial management. Each of these, for various reasons, encounters certain obstacles that make it difficult to achieve an effective rehabilitation of the business, which is why a new business rescue procedure has been introduced under the new Companies Act of 2008. Academics and practitioners have been critical of some of the provisions of Chapter 6 of the new Companies Act leading to a number of fundamental changes contained in the Companies Amendment Bill certified to go to Parliament for approval in the very near future.

4.1 Informal Workouts

Approximately 75% of all businesses encountering financial distress attempt to resolve the problem by informal workout or a turnaround of the business, according to stakeholders. Informal restructuring arrangements are purely contractual in nature and require affected creditors to agree to the proposed restructuring solution for it to be binding. Creditors not agreeing to the proposal would not be bound, since in the informal, out-of-court process there is no statutory rule for binding dissenting or minority creditors to the decision of the majority. Neither are the other formalities of a formal proceeding available, such as a moratorium to stay enforcement actions by creditors. Consequently, in conducting informal workouts, many practitioners adopt methods similar to the London Approach, agreeing a standstill with relevant creditors while renegotiating terms of the credit agreements in question. There has been no formal endorsement of a system similar to the London Approach[8] or the INSOL Multi-Bank Workout Principles.[9]

There are a number of drawbacks to informal workouts. Informal workouts require 100% approval from affected creditors. Voluntary restructurings are purely contractual in nature, and thus contractual provisions and the law may require a broader notice to creditors than desirable. Such transactions are not protected by a court order approving the transaction and may be vulnerable to challenge in a subsequent insolvency proceeding under the Insolvency Act as constituting a preference or fraudulent transfer. Strict tax rules restrict or discourage debt to equity exchanges. Labor rights are more difficult to affect informally where the rescue requires deeper operational restructuring. Finally, while such workouts could be prepared for a prepackaged type of compromise, compromises pose an additional layer of challenges and create a risk of loss of control over the transaction.

Adopting procedures that facilitate informal workouts is to be encouraged, whether through informal codes or a more formal regulation. The World Bank Principles state that "[a] *country's financial sector (possibly with the informal endorsement and assistance of the*

[8] The so-called London Approach was developed by the Bank of England as an unofficial set of guidelines to assist banks and their borrowers in reaching an agreement to restructure their bank debt. The basic tenets of the London Approach have spawned variant models used in the context of financial crises (e.g. Indonesia, Malaysia, South Korea, Thailand, Turkey, and more recently Iceland and Latvia) or in use informally in countries.

[9] INSOL International published its *Statement of Principles for A Global Approach to Multi-Creditor Workouts*, in which it articulates eight basic principles for multi-creditor workouts. The principles are viewed as fundamental to informal multi-creditor workouts and serve as a general framework for countries considering such a process. Annex B lists the INSOL workout principles.

central bank, finance ministry or bankers association) should promote the development of a code of conduct on a voluntary, consensual procedure for dealing with cases of corporate financial difficulty in which banks and other financial institutions have a significant exposure, especially in markets where corporate insolvency has reached systemic levels."[10]

Annex B contains a list of applicable World Bank principles on the subject of informal workouts.

Box 4.1: Legal Procedures Effecting Debt Restructurings

- Contract law - good faith requirements; rules governing debt modifications or transfers
- Enforcement regimes – effectiveness for recovery of secured and unsecured debt
- Formal insolvency proceedings – effectiveness and efficiency for rescue and liquidation
- Corporate governance law - powers of the general meeting; directors' liability
- Corporate and financial disclosure requirements
- Corporate rules on suppression of pre-emption rights
- Foreign investment rules - restrictions on foreign ownership of shares or real estate
- Banking regulations - restrictions on types of assets that financial institutions may possess (e.g. real estate, shares or convertible debt); loan loss provisioning and classification of restructured debt; and capital adequate rules on asset valuations
- Securities regulation – public debt unanimity or reinforced majorities requirements; prospectus and disclosure obligations; related party control and takeover restrictions
- Tax legislation – treatment of sales, stamp and duty taxes, transfer taxes, debt exchanges, write-downs and write-offs, net-operating losses and loss carry-forwards
- Industry specific regulations applicable to a debtor's business
- Rules for mergers and acquisitions – treatment of creditor opposition to mergers
- Labor laws and restrictions on changes that impact the work force
- Pension regulations with respect to underfunded pensions or employee buyouts
- Competition law rules and exemptions
- Arbitration and mediation procedures
- Transaction risk for stakeholders and investors (e.g. director liability within the suspect period, under avoidance actions, director or lender liability for financing)
- New financing incentives or mechanisms available during workout negotiations; cash management options, and procedures for protecting cash collateral
- Accounting and auditing rules - treatment of non-performing loans, treatment of subordinated loans as capital, etc.

4.2 Compromises (Schemes of Arrangement)

Compromises are not widely used due to the cumbersome nature of the procedure, high creditor approval thresholds, and other limitations in the statute. Section 311 of the Companies Act governs compromises, also known as schemes of arrangement, whereby a company reaches agreement with its creditors to restructure their obligations. Absent a winding-up order or liquidation, the court has no authority to order a moratorium on creditor enforcement actions during the period prior to approval of the composition.

[10] See World Bank Principles *for Effective Creditor Rights and Insolvency Systems* (2005), Principle B.5.1 (and accompanying text).

While the procedures are generally sensible, in practice the approval thresholds are so high that it is difficult to obtain the requisite numbers and value approval by creditors. The process requires a court order to call a creditors meeting and a separate order to sanction the compromise. Creditors must approve by majority holding 75% in value of the total claims. The compromise does not bind preferred and secured creditors without their consent. The process also results in revival of employment contracts that may have been terminated in a liquidation proceeding. There is limited scope for collective creditor action in the case of a failing, but potentially viable business, and it is frequently difficult to meet the 75% approval threshold.

Compromise Changes Introduced by the New Companies Act

The 2008 Companies Act introduces several changes that should make the Compromise process more effective, efficient and potentially afford greater flexibility for the parties.

- The compromise provisions are contained in Section 155 of the new Act, which now splits compromises involving shares and creditors.
- There is no longer a need for a court order to convene the creditors' meeting.
- There is no moratorium from the time of giving notice to creditors to the date of the creditors' meeting.
- Prescribed contents of the plan are almost identical to those for business rescues, and are not sufficiently flexible.
- The process still requires approval, in person or by proxy, by a majority in number representing 75% in value of the creditor class.
- Secured creditors are entitled to vote their full claim, leaving open the question of whether their secured rights can be altered by a vote of the class of unsecured creditors. If adopted, the proposal appears to bind dissenting minority creditors even without a court sanction of the proposal.
- Parties may apply to the court to sanction the proposal, which can be done on grounds that it is just and equitable, but this does not seem to be mandated.
- The sanction order is considered fully binding on parties from the date of filing.

4.3 Judicial Management

The judicial management procedure will be repealed once the new Companies Act comes into effect, and is to be replaced by the new business rescue process. It is worth examining the experience under the Judicial Management procedure, however, to determine what lessons can be learned to ensure that the new business process functions more effectively. Most of the shortcomings under the Judicial Management process have been addressed in the new business rescue procedure (discussed below).

The general consensus is that judicial management has proven ineffective as a rehabilitation mechanism over the past 75 years, and now numbers only about 1-2 proceedings annually. A company (but no other form of legal entity), or a shareholder or creditor of the company, could petition for a judicial manager to be appointed where the business could not pay its debts and a reasonable probability exists that judicial management would enable the debtor to pay all debts in full. A number of problems have been identified as impediments to achieving a successful rehabilitation of the business under the Judicial Management procedure, including the following:

- The procedure is too court-driven, providing insufficient opportunity for creditors to have meaningful input into the rehabilitation process.
- There is no requirement for a plan, nor provision for negotiation with creditors or monitoring by a creditors committee.

- The full payment requirement is mandatory even if creditors wish to write-down or exchange debt for equity, which makes the process unsuitable for a case where major financial or operational restructuring is needed.
- From appointment, the judicial manager has sole control of the business and is required to act in the interest of both shareholders and creditors, which creates a divided set of loyalties and may lead to decisions potentially not in the best interest of creditors.

Close corporations may also apply for compositions under section 72 of the Close Corporations Act. Notwithstanding the adoption of the new Companies Act 2008, the Close Corporations Act continues indefinitely but gradually will be phased-out following the effectiveness of the new Companies Act, as no new close corporations will be formed and no companies may be converted to close corporations. The new Companies Act provides for the formation of legal entities similar to close corporations.

SECTION V: A NEW BUSINESS RESCUE REGIME

Chapter 6 of the new Companies Act introduces a much anticipated new, more flexible business rescue procedure for companies. The new procedure takes stock of shortcomings in other rescue mechanisms and attempts to redress those in the current procedure, which is defined as a proceeding to facilitate the rehabilitation of a company that is financially distressed. The process contains features generally consistent with international best practices for a modern business rescue procedure.

5.1 Key Features of the New Business Rescue Process

The procedure is administered under a temporary supervisor (business rescue practitioner, "BRP"). The process is easily commenced by filing a board resolution with a new Commission that replaces the Company Registrar, although affected persons may apply to the court to set aside the resolution or the appointment of the BRP. Key features of the process include:

- Upon commencement, the process is aided by a temporary moratorium to halt legal proceedings and enforcement actions against the company and its property. Stakeholders may obtain the consent of the BRP or leave of court to pursue such actions on any conditions imposed by the court.
- Setoffs are allowed.
- The company also now has the ability to obtain post-commencement financing with a statutory priority in the event of a subsequent liquidation.
- Secured creditors are protected against sales of their collateral, unless the proceeds of the sale fully discharge the creditor's debt.
- The plan process affords greater flexibility to the parties in negotiating a restructuring or repayment plan.

The BRP's rights are generally consistent with the duties of an insolvency practitioner. The BRP has authority to investigate voidable transactions, fraud and other reckless conduct related to the company. The BRP's duties in connection with claims verification, resolution, allowance and satisfaction is not significantly different than existing practices and follows general international practice.

In preparing the plan, the BRP is obliged to consult with creditors, who must approve the plan by 75% of voting interests and 50% of independent creditors' voting interests – each interest being equivalent to the value of a claim to the total claims. The new formula does away with a numerical majority of creditors. Once a plan is adopted, it becomes binding on all parties and, on implementation, debts are discharged, unless otherwise provided in the plan. If rejected, the BRP must take steps to terminate the business rescue procedure. In short, the process is similar to other modern business rescue procedures.

5.2 Concerns Pertaining to the New Business Rescue Process

The new business rescue process contains some features that are unusual and could stifle the effectiveness of the rehabilitation procedure. The BRP is authorized to "suspend for the duration of the business rescue proceedings any obligation of the company" arising under agreements to which the company was a counterparty at the commencement of the proceeding and where the obligation would otherwise become due during the proceedings.[11] It is unclear whether this later result overrides the damage claim provision in

[11] Companies Act of 2008, S. 136(2).

section 136(3) of the new Companies Act. While the BRP alternatively may seek court approval to entirely, partially or conditionally cancel an agreement to which the company is a party on any terms that are "just and equitable", there is some concern that the process may enable BRP's to cherry-pick portions of contracts that are in its favor while suspending obligations under other provisions of the same contract that impose a burden or monetary obligation on the debtor, which would seem patently unfair.

The preference in favor of new money does not preempt employees or the BRP's costs. It is unclear whether the latter provision applies to any pre-commencement back wage or employee claims, or merely to post-commencement employee claims. Employee contracts can only be amended as changes occur in the ordinary course of attrition or by agreement between the company and workers pursuant to applicable labor laws. And the BRP is a newly created position for which qualification requirements and procedures need to be clearly defined. The prospect of an employee preemption over the new money lender makes it much less likely that lenders will be willing to lend to distressed businesses in a business rescue procedure.

Authority to pursue voidable dispositions is questionable. There is no express grant of authority to the BRP to apply for certain dispositions to be set aside, such as the judicial manager had under the Insolvency Act. Although there is a reference to voidable transactions, it is unclear to what extent the BRP may actually enforce such dispositions absent a court order.

The rights relating to secured creditors are particularly problematic. Such creditors are entitled to vote in the general creditor class based on the full amount of their claim irrespective of collateral.[12] That all creditors are placed in a single class is itself problematic. Similar claims should be classified together and treated accordingly. For example, secured creditors enjoy a higher priority than unsecured creditors by virtue of their collateral, which entitles them to a first in right priority of repayment from the proceeds of the collateral. Such rights could be undermined in placed in a common class of creditor where all creditors vote on a percentage dividend offered to all creditors. Requiring a secured creditor to accept a dividend amount lower than the value of its collateral amounts to a rewriting of the collateral agreement by virtue of a vote from creditors who are subordinate in repayment right to the secured creditor. The potential perverse effect of this approach is likely to cause secured creditors (typically the largest in amount) to vote against the plan in order to force a liquidation in which such creditors will be assured of realizing the full value of their collateral. A more likely outcome is that this treatment will be tested in the courts. Courts could well conclude that the statute is ambiguous and based on principles of equity conclude that the statute should be interpreted to mean that the right to vote related only to that portion of the secured creditor's claim that is effectively unsecured or under-secured.

Stakeholders have expressed some concerns regarding the new business rescue procedure, some of which have been addressed in the context of the recently proposed amendments to the Companies Act 2008 and others which have not:

- Novel and unclear terminology (securities holders, publish/notify)
- Unclear decision-making by board vs. shareholders

[12] Ibid. S. 145(4)(a). Typically secured creditors may vote in respect of their claim in a class of similar claims, or may vote as an unsecured creditor only to the extent that the claim is unsecured.

- Applicability should be limited to companies (exclude (i) close corporations, not as yet converted, dealt with under CCA and (ii) sole proprietorship, business trust and partnerships)
- Secured creditor rights may be altered and primed
- Plan requirements are minimal and rigid, requiring information without clear reason (e.g., list of holder of securities or informal proposals from creditors)
- Process lacks clear classification and cram down criteria
- Treatment and Voting Rights of Secured Creditors are unclear
- Discourages pre-negotiated agreements due to onerous notice and creditor inclusion requirements
- Unclear mandate to establish a regulatory framework

5.3 Interim Licensing Rules for Business Rescue Professionals

Regulations accompanying the new Companies Act provide for prospective business rescue practitioners to be licensed by a designated Commission having certification, oversight and monitoring responsibilities for such professionals. Licensing is not automatic or guaranteed. A person wishing to serve as a BRP must first submit an application to the Commission, which grants the license (or a conditional license) if satisfied that the practitioner is of good character and integrity and has the requisite education and experience to perform the functions of a BRP. Persons who subsequently become disqualified from appointment may have their license revoked. A person who has been denied a license or had their license suspended or revoked may apply to the Tribunal established under the Companies Act to review the Commission's decision.

The draft regulations establish a three-tiered qualification system for BRPs based on the level of experience and complexity of cases. Novice practitioners, those having less than five years of relevant experience, may handle business rescues of private small companies. Experienced practitioners with 5-10 years of relevant experience may handle rescues of medium and small companies. And Senior Practitioners with at least 10 years relevant experience may handle any size rescue case.[13] The regulations also establish a tariff of fees for BRP categories. Regulations do not indicate what specific experience and skills should be adopted for purposes of assessing relevant education and experience, and it is expected that these will be fleshed-out in more detail following a transitional period.

Notably neither the new Companies Act nor implementing regulations indicate that a BRP must be a licensed professional from a particular profession, such as a lawyer or accountant. This is appropriate as the function of rescuing a business involves a number of inter-disciplinary skills, including knowledge of business management, accounting and financial procedures and techniques, and legal procedures, especially those unique to financially distressed businesses. **Annex C** contains a list of topics typically important for a turnaround and business rescue professional to understand, and which may form the basis for a BRP training curriculum.

[13] Medium and large companies also contain a category for public or state-owned companies of a particular size based on a public interest score of 750 or less, or 750 and above respectively. The public interest score is a new concept being put forward under proposed regulations to support new financial reporting standards.

SECTION VI: THE NATIONAL CREDIT ACT

Consumer credit legislation is usually the means by which credit grantor-credit consumer relationships are regulated. The main purposes of consumer legislation is said to be the protection of the consumer from exploitation. . . .

'What is equally, if not more important, is an actual balancing of the interests of both credit consumers and credit grantors. The reason for the emphasis on this balance is that over-protecting the consumer may result in the investor (credit grantor) withdrawing his funding from the consumer credit market, due to the fact that the general administrative expenses of making credit available no longer proves a lucrative venture due to the stringent consumer laws. Another feature of the over-protection of the consumer may be the passing on of administrative costs to the consumer. A subtle balance needs to be obtained. The risk of over-protecting the consumer could prove detrimental.'[14]

6.1 Debt Counseling and Adjustments

The National Credit Act of 2005

The NCA creates a comprehensive framework:

- for credit reporting activities
- creating a database for registering credits
- encompassing pledges and other types of security arising under the NCA
- establishing measures to prevent reckless credit granting
- providing for debt relief to over-indebted consumers

The NCA over-indebtedness provisions overlap with personal insolvency provisions requiring a coordinated approach to better integrate and harmonize such policies as part of an integrated insolvency framework.

The National Credit Act (NCA), introduced in 2005, was a sweeping piece of legislation establishing rules on consumer lending and creating a legal framework for credit reporting activities, and establishing a database for registering credits, pledges and other types of security arising under the Act. Uniquely, the NCA introduced measures to prevent reckless credit granting, impose sanctions for reckless credit, and provide debt relief for over-indebted consumers. Notably, the NCA only applies to certain specified transactions of up to 1 million Rand with respect to agreements entered into by natural persons, or small and intermediate credits for small juristic persons. Only natural persons are entitled to seek debt relief due to over-indebtedness, a state of existing or future inability to satisfy all of one's obligations under credit agreements governed by the NCA. Other problems exist with trying to remove blacklisted consumers from the system.[15]

Since its implementation in 2007, there has been a growing backlog of debt relief applications and an estimated 45% of consumers fail to perform under their restructured debt repayment plans. NCR statistics reveal that currently there are approximately 1,733 debt counselors registered with the NCR. At least 184,000 consumers

[14] Desert Star Trading v. No..11 Flamboyant Edleen (98/10) [2010] ZASCA 148 (29 November 2010) (quoting Monica L. Vessio 'The Preponderance of the Reckless Consumer – The National Credit Bill 2005' (2006) 69 *THRHR* 649).

[15] In 2008, of the estimated 17 million then credit-active consumers owing approximately 1 Trillion Rand, at least 6.5 million had been blacklisted at credit bureaus. Since then the numbers are estimated to have risen.

have applied for debt counseling and relief under the NCA since its implementation, with another 7,500 applications being filed each month. Only 10% of new cases are being resolved through the courts. Payments under debt counseling arrangements have increased from R11 million in June 2008 to R192 million in June 2010. Yet, credit providers report a default rate of 48%, with the balance of contracts making payments at approximately 60% of the required levels.

6.2 NCR Debt Review Task Force Findings

In October of 2009, the NCR established a Task Team to review blockages in the debt review process where there is a growing backlog of debt relief applications. The Task Team engaged relevant stakeholders over a period of six months, including payment agencies, debt counselors, banks, retailers, micro lenders, credit provides, magistrates and industry specialists. Specific problems identified include:

- severe capacity constraints, especially among magistrates, contributing to a growing backlog of cases;
- process weaknesses;
- a breakdown in role of and cooperation between players (e.g., credit providers and debt counselors); and
- abuse of process, negligence and improper exercise of authority by debt counselors and acts of willful fraud by consumers.

Concerning the respective roles of debt counselors and credit providers, the NCR Task Force found that debt counselors were not sufficiently motivated, engaged in improper practices, encouraged debt counseling for the wrong reasons, failed to cooperate with credit providers during debt negotiations, and that the overall system lacked an effective framework and regulation. To address the problems, a National Debt Review Committee (NDRC) is working to develop codes of conduct to regulate the behavior of debt counselors and a set of enhanced debt review guidelines to promote standardization.

6.3 Debt Adjustment Framework

The NCA provides for debt restructuring, but this does not "automatically" lead to a consumer discharge on simple, stated conditions such as after specific period of two or three years. The purpose of the NCA is stated to be the promotion of responsibility in the credit market by encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers, and to discourage reckless credit granting by credit providers and contractual default by consumers. The Act aims to address and prevent over-indebtedness of consumers and provides mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations. Over-indebtedness is addressed by providing for debt review and the restructuring of credit agreement debt. The review and debt restructuring process is described in greater detail in **Annex D –** The NCA Debt Adjustment Framework.

The NCA limits the ability of credit providers to proceed with litigation to enforce security rights under a credit agreement against a consumer who is under debt review or subject to a debt restructuring order or agreement. One of the NCA main objectives is to provide debt relief to over-indebted consumers by shifting the onus for over-indebtedness from the debtor to the creditor. Reckless credit granting may lead to a complete or partial setting aside or suspension of the credit agreement. Little empirical information is available on the impact of the NCA on access to credit, the cost of credit and on government priority policies, such as economic growth, employment creation and transformation. The five-year review of the NCA scheduled for 2011 will undoubtedly address these issues in detail.

6.4 Key Issues Affecting the Debt Adjustment Process

In addition to the foregoing problems, a number of key issues affecting the debt adjustment process are described below:

- Protection of the NCA is limited to consumers and excludes juristic persons. This exclusion was included to avoid limiting access to credit for SMEs. The definition of 'juristic person' as defined in the NCA includes a partnership, association or other body of persons, corporate or unincorporated, or a trust if there are three or more individual trustees or the trustee itself is a juristic person, but does not include a *stokvel*. This definition lends itself to broad interpretation and blurs the line between a person borrowing for personal consumption and borrowing for income producing activities.
- The NCA does not provide comprehensive relief to over-indebted debtors but rather limited relief to some consumers who are subject to the Act. Relief will be effective only if a consumer has the ability to repay debt.
- Despite the NCA aims to assist over-indebted consumers, it perpetuates the over-indebtedness by not providing a simple debtor discharge mechanism.
- The Insolvency Act, despite appearing to be more creditor friendly, favors debtors by providing for a debt discharge, and provides specific terms for debtor "rehabilitation" permitting a fresh start for over-indebted consumers.
- The only real statutory discharge available to debtors remains the rehabilitation that follows sequestration. Consideration must be given to a more comprehensive and integrated provision for the discharge to some insolvent debtors and permit the broader rehabilitation of creditors, based on a plan that encompasses all liabilities and takes into account all assets and income.
- The NCA imposes no time limitation upon debt restructuring with the result that restructuring orders may run over unrealistically long periods – occasionally decades - are granted by courts. This leads to increasing numbers of consumers with "negative credit histories", undermines the ability of creditors to rely on collateral, may limit access to and increase the cost of credit.
- A person overburdened with debt, may wish to consider protection under the broader insolvency laws including sequestration by voluntary surrender or consider an application for compulsory sequestration. The interaction of overlapping legislation should be clarified.
- The debt relief measures in the NCA, providing for extended repayment periods may increase the over-indebtedness of many debtors rather than resolve it.
- The role and qualifications of debt counsellors may need to be reviewed and harmonized and may need to be extended to encourage them to assist over-indebted consumers with all of their debts and direct them to the most appropriate insolvency mechanism for their specific situation.
- A comprehensive review of the insolvency policy should examine the impact of legislation on the interests of debtors as well as the interests of credit providers as well as the public interest considerations including the impact on economic growth, employment and transformation.

6.5 Consumer Insolvency: Administration Orders & Sequestrations

The administration order process, designed to enable an insolvent consumer to restructure his debts, is unduly restrictive of offers little genuine relief. Administration orders are governed by S. 74 of the Magistrates Courts Act of 1944. There are apparently about 100,000 applications per year, largely attributed to the prolific growth in the micro-lending industry. The process is restricted to debt relief of R50,000 maximum, excluding *in futuro* debt, and debts must be paid in full without reference to a specific timeframe. In most instances, the nominal debt is inflated by interest over time, making it difficult or impossible for consumers to repay under their repayment plans. Moreover, no discharge is available. Frequently, no dividends are paid to creditors, who write off the debt, while the administrator continues to collect.

Administrators are unregulated and the fees charged in cases are often controversial. Another problem with the administration order procedure is that it results in an overburdening of the courts. Limitations in the administration order procedure explain in part why the NCA debt adjustment process has become the debt restructuring mechanism of choice. Because the NCA relates only to credits governed by the NCA, however, some debt counselors frequently use the debt adjustment process together with the administrative order process to achieve a wider, more effective outcome.

The consumer sequestration (liquidation) process also suffers from being unduly restrictive and offers little prospect for a debtor to obtain a discharge and a meaningful fresh start. A Sequestration, South Africa’s equivalent of liquidation, is governed by the Insolvency Act of 1936. The process is entirely pro-creditor. If the court, in its discretion, concludes that the process will benefit creditors, generally interpreted as a pecuniary benefit of some sort, it may open the case. Thus, the process is neither automatic nor assured. Cases in which the debtor has no income or no assets (NINA cases) are typically dismissed, because the debtor cannot demonstrate an advantage to creditors. Consequently, the debtor does not receive a discharge. Again because of the pro-creditor orientation of the law, compulsory (involuntary) sequestrations are easier to obtain than voluntary sequestrations, as they have a lower threshold of proof. This has given rise to the practice of friendly sequestrations in which consumers will incur debts to friendly persons who will then commence the process. Once started, a debtor may try to convert to rehabilitation, but this is not guaranteed. Another drawback of the sequestration process is that the consumer is allowed to retain only minimal assets with no assurance of getting even the basic necessities for tools and other means of subsistence, absent creditor approval.

Reform proposals have been recommended by several commissions both for the administration order and sequestration procedures. In 2002, a committee on consumer insolvency law (CCIL) made a number of recommendations to improve the administration order process, including: stronger regulation of administrators; formation of debtors’ courts; introducing a repayment timeframe linked to a discharge; harmonizing of procedures; and emphasis on consumer education to prevent over-indebtedness. Other reform proposals have focused on establishing a pre-sequestration composition procedure, similar to that found in the Companies Act for companies, providing for a debt restructuring plan covering all debts, subject to approval of a 2/3 majority. For sequestrations, recommendations have concentrated on the importance of identifying exempt assets, a discharge, debtor educational counseling, and provision for treating NINA cases.

6.6 Balancing Debt Counseling and Consumer Insolvency

Debt counseling and consumer insolvency procedures provide alternatives for addressing common policy concerns of consumer over-indebtedness. While the Insolvency Act has provided a means for individual sequestration and liquidation of an individual's estate for many years, debt counseling under the NCA was intended to help alleviate the burden on the courts by establishing a more efficient mediation process to address issues of consumer over-indebtedness with respect to debt under credit agreements governed by the NCA. As noted above, the original intention does not seem to have been achieved, as courts are still called upon to resolve at least 10% of all such cases, which have been increasing, and the backlog in unresolved cases with debt counselors continues to grow. More importantly, the two procedures should be designed to work in tandem for a comprehensive solution for debt counselors. Instead, the debt adjustment process contains loopholes that clearly invite abuse and create distortions in achieving the common policy of efficient resolution of consumer over-indebtedness.

Technically, a consumer's inability to satisfy its obligations means that it is insolvent based on an illiquidity test of insolvency. The debt adjustment scheme is designed to restore the consumer to solvency by developing a plan that enables it to repay the debt on terms that the consumer can sustain and the credit provider is willing to accept. However, the theory falls short of achieving its objective, because debt counselors are given wide latitude to develop repayment plans, without necessarily having buy-in from a particular credit provider.

The bigger problem is one of creditor discrimination, which is something that the consumer insolvency law is designed to avoid under a principle of *pari passu* treatment for creditors holding similar debts. A consumer's inability to pay debts governed by the NCA is the result of a choice by the consumer regarding which debts to pay and which not to pay. Resolving the issues with respect to one or more credit agreements governed by the NCA does not ensure that the debtor is either solvent or engaging in responsible credit management with respect to other obligations and debts. Yet, absent a comprehensive review of the debtor's assets and debts, current economic position, and prospects for satisfying all obligations, it is difficult to ensure responsible credit behavior and avoid unfair treatment to other creditors, both those whose credits are being adjusted and those with agreements not governed by the NCA. Accordingly, a sound debt management practice must be carefully designed and implemented so as to integrate with other consumer policies, including consumer insolvency procedures.

A number of countries have now adopted comprehensive and integrated debt counseling systems. Indeed, in many countries, debt counseling is considered a pre-bankruptcy alternative to be offered and evaluated by designated officers. Where the debt counseling procedure fails, the consumer would be required to file for insolvency. In other systems, the insolvency law provides the possibility of a comprehensive rehabilitation of the debtor's assets, proposing a plan for repayment of all creditors at some relevant percentage of the debt. Such systems may also require a form of debt counseling to avoid future credit mismanagement. **Table 6.6** below illustrates the four basic approaches and select key features of the process adopted by countries in addressing consumer bankruptcy. **Annex E** contains a set of basic principles for a consumer insolvency regime.

TABLE 6.6: FOUR DIFFERENT APPROACHES TO CONSUMER BANKRUPTCY

	Norway	Germany	France	United States
Goal	Rehabilitation	Repayment	Prevention	Efficiency
Nature of Law	Debt adjustment law	Bankruptcy Law	Consumer Protection Law	Bankruptcy Law
Mandatory counseling	Yes	Yes	No	No
Duration of Plan	5 years	6 years	10 years	3-5 years
Bearer of Costs	State	Debtor	State	Debtor
Applicability to Home Mortgages	Yes	No	No	Yes
Subsequent Filing	Prohibited	10/20 years	Allowed	6 years[16]

[16] A discharge can be granted in a subsequent bankruptcy filing under US law, only after 8 years since receiving a discharge in a consumer liquidation case or 6 years in a consumer reorganization case.

SECTION VII: IMPROVING THE REGULATORY FRAMEWORK

7.1 Regulation of Insolvency Practitioners

South African insolvency practice is virtually unregulated, with wide variances in qualifications of insolvency practitioners, judicial managers and liquidators. Insolvency practitioners number over 1000 and demonstrate a range of knowledge and skills. Certainly, the number of practitioners is adequate to handle the existing caseload. However, the quality of skills among practitioners varies widely and there is inconsistent training and qualification requirements and inadequate regulation to ensure that all practitioners demonstrate the requisite skills. Clearly the seniors and those employed by large firms are considered to have the requisite expertise to handle cases effectively, including large, complex cases. The same cannot be said of many newcomers, who are perceived to lack both the knowledge and skills to effectively handle estate administrations, especially large, complex estates. Unfortunately, there has been little transfer of knowledge and skills among the veterans and newcomers outside of one's particular firm environment.

While many liquidators are lawyers or accountants who are subject to the disciplinary control of their own professional bodies, most have no professional qualifications. Consequently, the professional associations cannot ensure that their members have or maintain an acceptable level of knowledge and skill to perform the work of an insolvency practitioner. Indeed, there is no regulatory framework in South Africa to train, qualify, supervise and discipline insolvency practitioners. Although the Office of the Chief Master has been working on such a regulatory framework, it still does not exist. Nor is there a positive list of qualifications and experience for appointment of practitioners. Rather the Companies Act 1973 contained a negative list of grounds that would disqualify a person for appointment as a liquidator, including a relationship with directors or management of the debtor company. To be appointed a liquidator, however, one need merely apply to the Office of the Master of the High Court, whose staff reviews the application, despite having no specific criteria for approval of an application.

Similarly, there are no prescribed qualifications for a judicial manager apart from having the skills to prepare annual and other financial statements for submission to meetings of shareholders and creditors. The new Business Rescue chapter also provides for the appointment of "business rescue practitioners," another professional. To the DTI's credit, it has at least made provision for establishing criteria for licensing and monitoring the activities of business rescue practitioners, which are under development. And finally, although criteria exist for the qualification of debt counselors under the NCA, recent investigations disclosed serious problems in the skills levels of such practitioners, suggesting a need for stronger definition of criteria and regulation.

One significant problem involves the dual system of appointments in insolvency cases designed to ensure equal participation by previously disenfranchised and disempowered practitioners. While on its face, the rules prescribing equal access and participation seem reasonably designed to achieve those goals, in reality, the absence of proper regulation has contributed to a weakening (as opposed to strengthening) of qualification, training and skills for disempowered practitioners. Moreover, the system creates perverse incentives that reward such practitioners for non-involvement and non-participation, establishing a dual system whereby the old, experienced practitioners do all or most of the work, but share the fees with those not doing the work. Those doing the work tend to be content to have the newcomers sit on the sidelines, so as to not increase their own liability and insurance costs by engaging in malpractice or providing sub-standard service.

The current system is unsustainable and untenable in a market where the fundamental objectives should be to empower new practitioners with real skills and qualifications to meet the demands of the future. The current system is neither fair nor profitable for inexperienced professionals and other stakeholders. The system is not fair toward new professionals who wish to build a career based on legitimate qualifications and equal access to the system at all levels. An effectively integrated regulatory framework should ensure adequate skills and qualifications for the tasks performed, mentoring and trainee relationships, and individual but equal distribution of cases among qualified practitioners on an inclusive but regulated basis.

The other indirect penalty on the overall system is that a doubling of professionals comes at the expense of creditors, whose interests are to be protected. Failing to adequately equip less experienced liquidators places a tax on the entire system by raising liquidator costs and the costs for ensuring the system, and by allowing for inefficiencies in the process that contribute to greater loss (lower dividends) for stakeholders. Such losses are routinely transferred to market participants in the form of higher lending costs and fees, and a more restricted access to credit.

7.2 Regulating Business Rescue Managers

Proposed regulations accompanying the new Companies Act provide for prospective business rescue practitioners to be licensed by a Commission with certification, oversight and monitoring responsibilities for BRPs.[17] Practitioners must apply for a license and satisfy character and integrity, education and experience requirements. The proposed regulations establish a three-tiered system of BRPs based on a person's level of experience and the complexity of cases. Provision is made for denying, suspending and revoking of licenses, and appeal to the Tribunal for review of Commission decisions. The preliminary regulations outline a basic framework for elaborating more detailed guidelines for regulating BRPs.

Overlaps in procedures for rescuing or disposing of a business require integration of regulations regarding BRP and insolvency practitioners. Invariably there will be times when the business rescue fails or the business is not viable. It would be economically more efficient to have BRPs that are also duly qualified serve as liquidators in connection with a subsequent winding-up or liquidation procedure for the company. This would avoid having to engage a new professional to be reeducated on all aspects of the company, thereby minimizing costs and maximizing the dividends for creditors. The process of restructuring and liquidation is a dynamic one, and in some cases the best solution for a company is an outright sale of the business as a going concern. In the same way that businesses require integrated solutions to salvage the business or the economic value of its assets, the process of regulating professionals handling such cases requires an integrated framework.

[17] An amendment to the Companies Act of 2008, Companies Amendment Bill B40 2010, is currently pending before Parliament. On the assumption that these amendments will be substantially adopted, draft regulations prepared contain general rules and regulations for qualification and licensing of BRPs.

7.3 Regulating Debt Counselors under The National Credit Act

Debt renegotiation by debt counselors of debt incurred under the NCA regulated credit agreements has underscored some troubling trends. In order to obtain debt relief, a consumer may apply to a debt counselor for an evaluation of over-indebtedness and declared so by a court. The role of debt counselors in determining over-indebtedness and renegotiating debts is fundamentally important. Accordingly, debt counselors must meet requirements for education (grade 12 certificate), experience (2 years in specified areas, including the "general business environment") and competence (passing an NCR approved course). Unfortunately, there are numerous reports of incompetence and corruption among the 1700+ debt counselors, with many lacking the requisite skills to adequately review issues of over-indebtedness.[18]

7.4 Regulating Masters

There have also been criticisms about the independence and qualification of Masters appointed under the Office of the Chief Master. There was a severe shortage of masters to handle matters in early 2008, at which time their numbers were expanded by 45%. Currently, only 90% of the posts for masters are filled. With recent increases in the number of filings, a further right sizing of the number of masters may be in order. Some masters are said to lack sufficient training and experience to perform the duties of their office, while there are reports that others have engaged in abusive and self-serving practices. Masters are trained by the Justice College on an ongoing basis, but the high turnover rate among masters means that there is a continuing problem in finding suitably trained and qualified masters.

7.5 Integrating the regulatory framework

South Africa's insolvency procedures require a more robust and integrated regulatory framework to achieve greater effectiveness and efficiency. As noted throughout this report, there are multiple insolvency, rescue or debt adjustment procedures that apply to businesses and consumers pursuant to a multiplicity of laws. Rules and criteria for appointment of such professionals are insufficient to properly monitor qualifications and performance, or impose discipline on practitioners. In order to address the current shortcomings, there is a need for a full review of all aspects of the regulatory framework, both at the level of regulatory bodies involved and at the level of competence qualifications for practitioners. **Annex F** contains a list of issues for consideration in a regulatory framework and a discussion of the basic principles and guidelines articulated by the World Bank for an insolvency regulatory framework.

[18] Annex D describes the debt adjustment process and some of the abuses in more detail.

SECTION VIII: THE WAY FORWARD – POLICY RECOMMENDATIONS

The foregoing discussion indicates that there are a number of serious problems that need to be addressed to improve the effective functioning of the insolvency systems in South Africa. Weaknesses in the system contribute to ineffective business rescues for viable businesses, which reduce job preservation and contribute to inefficient business performance. Procedures affecting creditor recoveries through individual enforcement or collective insolvency proceedings have been fragmented and inefficient, which ultimately increases performance risk to the banking system and reduces much needed access to credit. Now that the new Companies Act is on the verge of becoming effective, further reforms can help to improve the overall functioning of the insolvency systems.

Prior to finalizing this Report, the USAID FSP team together with the University of Pretoria Law Faculty convened a roundtable forum to address the issues raised in this report. Stakeholders attending the event included academics, accountants, bankers, consumer debt counselors, insolvency practitioners, lawyers, and public sector representatives.   Based on the discussions, a general consensus emerged in support of the following three pillar approach to immediate and future reform efforts and policy recommendations.

8.1 Three Pillar Approach

To best address immediate and future reforms, there was a general consensus among insolvency practitioners and stakeholders to adopt a three pillar (or phase) approach for strengthening insolvency and enforcement systems, as follows: 1) business rescue – implement the new procedure and investigate other measures for promoting more effective business rescue through informal workouts and other formal mechanisms; 2) unify and modernize insolvency procedures; and 3) strengthen regulation of the insolvency process and practitioners.

Phase 1 - Business Rescue Implementation. The new business rescue procedure will become effective with the new Companies Act (anticipated in April 2011). To ensure that the procedure is administered properly, business rescue practitioners need to be trained and qualified, and the judiciary and other officials participating in the process need to be adequately informed about the procedure. Among other things, this requires that the Commission overseeing licensing of the BRPs be operational in the very short term. With negative publicity surrounding failures in oversight by CIPRO to prevent the hijacking of companies, it is critical that the new Commission be established as an independent body, possibly comprised of representatives from private sector, and held to appropriate standards of governance and conduct. Training programs for practitioners should be designed to meet transformation objectives and establish minimum standards of knowledge and experience set by the Commission with business rescue oversight, with training to be administered by different associations, institutions and professional bodies.   A second aspect of the effort to promote a stronger business rescue culture would involve an investigation of other reforms and measures that might be adopted to promote informal workouts, compromises and other techniques to restructure and turnaround businesses.

Phase II - Unified and Harmonized Insolvency Procedures. Now that the new Companies Act is about to become effective, efforts to unify and harmonize insolvency procedures can resume. Cabinet approved the 2003 Insolvency and Business Recovery Bill, but this was put on hold pending the adoption of a new business rescue procedure in connection with the

Companies Act reform project. Given the multitude of laws and departments that have an oversight role, it would be advantageous to have an inter-departmental working group represented by the relevant government departments (e.g., DoJ, DTI (and NCR), Treasury, etc.) to undertake a coordinated review of insolvency related procedures and propose reforms. It would also be advantageous to have private sector experts assist in addressing industry specific issues or concerns and provide feedback or reports to the governmental committee.

Phase III - Strengthening the Regulatory Framework. In 2005, the Cabinet appointed a Task Team to investigate issues affecting the industry and the need for overall regulation. Given the numerous overlaps in areas of qualifying, educating, monitoring and disciplining insolvency practitioners, there is a need for a comprehensive overhaul of the regulatory framework for insolvency systems. Implementing a new regulatory framework should also address transformation objectives and be supported by appropriate standards of qualification, education and knowledge requirements for all business rescue practitioners, insolvency practitioners and debt counselors. Regulatory oversight among different bodies should be evaluated to determine how best to coordinate and harmonize procedures.

8.2 Policy Recommendations

The following policy recommendations are offered for consideration in connection with efforts going forward to improve the insolvency framework:

Business Rescue Proceedings

- The new business rescue process should be implemented immediately with an interim procedure for licensing business rescue practitioners at appropriate levels, as indicated in the draft Regulations. Such a process will require elaborating the requisite application forms and interim licensing criteria.
- BRP qualifications and entry requirements should be defined in as much detail as possible and “all practitioners” must demonstrate requisite knowledge and experience. Standardized qualifications are essential
- Prior to the effectiveness of the new Companies Act, training programs should begin for professionals and officials who will be involved in the new business rescue process.
- Training programs and bench books should be developed for judges and other administrative officials with oversight of business rescue cases.
- Efforts should begin on developing training programs for BRPs to ensure they have the requisite knowledge and experience to carry out their functions in a business rescue. Such training programs can be developed and offered by independent trainers or by various associations and professional bodies to their constituents, but should be pre-qualified to ensure that they meet minimum requisite standards.
- For practitioners not otherwise governed by a code of conduct or ethics, such a code of ethics for BRPs would be useful.
- Adopt a simpler and faster dispute resolution process. Regulations should provide for specific reference to an accredited ADR agency in business rescue matters. As currently written, parties must resort to the courts to resolve most disputes. The Commission can accredit an agency for ADR purposes. (Is S 166 sufficient to confer authority on referral of disputed matters to an appropriate accredited forum?) Explore possibility of having Tribunal authorized to “adjudicate” disputes.
- Need to amend S 136 suspension to make it apply to a very short period of time or repeal the provision altogether. As written, this provision constitutes a major impediment for

secured creditors. Could suspend indefinitely if there are ongoing objections to the process, etc.

- Amend act to clarify that rights of secured creditors with respect to security cannot be impaired. Allow separate classes for voting or allow creditors to waive security and vote as unsecured creditors.
- Impose sanctions for BRPs acting unethically in accepting inappropriate cases, by disqualifying a BRP from serving in future cases. This should encompass cases involving potentially “friendly BRP”.
- Include provisions in the Companies Act or regulations allowing for prepackaged plans.

Informal Workouts and Banking Regulations

- Strong consideration should be given to adopting an informal set of guidelines by the Reserve Bank or the Bankers Association outlining procedures that support informal workouts and restructurings.
- Risk management practices within financial institutions should be reviewed to ensure capacity and a proper approach for dealing with informal workouts.
- Other rules and regulations affecting asset valuation and loan loss provisioning, tax treatment should be evaluated to ensure treatment conducive to promoting informal workouts and restructurings.

Winding-up and Insolvency Proceedings

- Efforts should be renewed toward development of a unified insolvency law, including updating prior efforts to reflect the impact of the new Companies Act and taking into consideration policy objectives that overlap between the debt adjustment scheme under the NCA and those for liquidation.
- A new unified insolvency law should be developed and adopted that is consistent with international standards of best practice, covering insolvent liquidations and rescues for legal entities and individuals. To the extent possible, such a law should simplify the number of proceedings available. Consideration should be given to accelerated liquidation procedures for small businesses and consumers.

National Credit Act Debt Adjustment Practices

- A more thorough review of the NCA debt adjustment practices should be conducted with a view to identifying specific weaknesses and problems. Where the law is vague or contains loopholes that permit abuses, amendments should be introduced.
- There is a need to standardize the application and court process for debt adjustments. For example, the NCA does not define a fixed process with respect to documents, process, and requirements. Standardized forms could define documents needed, possible claims, and other relevant matters.
- Debt adjustments procedures for over-indebtedness and an inability to pay should be harmonized with conventional notions of insolvency and bankruptcy, so as to preclude abuses of the process by enabling insolvent consumers to renegotiate or adjust debts that they will be unable to repay.
- Classification of “protected assets”. Defined limits for exempt assets beyond which assets would have to be liquidated for the benefit of creditors (e.g. main or adequate housing). Exempt assets should be sufficient to satisfy a consumer’s basic needs and harmonized with procedures under the uniform insolvency act.
- Consider introducing a discharge into the NCA. Alternatively, a reasonable term for repayment should be specified (e.g. 3-6 years). If the specified term is unrealistic, the

consumer should be ineligible for debt adjustment and required to resort to alternative procedures to be elaborated in the NCA or as outlined in the uniform insolvency act.

- NINA Cases. Recommend adopting defined procedures for expedited resolution of no income, no asset cases. Currently there is no process to address such cases.
- Introduce compulsory periodic review to determine whether debtor/consumer can pay more toward his debts. Review could lead to debt readjustment payments of a higher or lower amount.
- Rehabilitation options should be considered for debtors that are insolvent or unable to pay applying modern practices and options for consumer insolvency.
- Pre-sequestration should replace administration orders, with prescribed procedures in the new uniform insolvency act.
- Debt counselor licensing standards should be developed to ensure proper knowledge by debt counselors in carrying out their functions. More vigorous training programs should be considered, and stricter relevant work experience requirements should be applied.

Regulation of Insolvency

- Conduct a full review of all insolvency regulatory bodies and procedures applicable to the qualification, appointment, supervision and disciplining of insolvency and business rescue practitioners, liquidators and debt adjustment counselors.
- A new insolvency regulatory framework should be developed articulating a coherent set of integrated criteria for qualifying, licensing, monitoring and disciplining insolvency and business rescue practitioners and debt counselors.
- Regulated practitioners should be held to minimum standards of qualification for knowledge and experience, and should be required to engage in continued educational requirements relevant to their field on a periodic basis (e.g. annually).
- Integrate qualifications for IPs, BRPs and DCs.
    - BRP framework might serve as a model for other practitioner qualifications and skills. Entry level, mid-level and senior level. DC requirements might be lower.
    - Have common requirements at entry level. Separate more rigorous requirements at higher levels.
    - Maintenance of level by meeting annual continuing education requirements.
- Emphasize principle of transfer of skill through apprenticeship or articling type capacity. Encourage senior BRPs to take on role of mentoring junior and unqualified professionals. (alternative to fee sharing to promote goals of transformation and skills transfer).
- Court access and role in each of the procedures might serve as a basis for establishing a common regulatory framework.
- Training and education standards and experience qualification should be evaluated in the light of transformation objectives to ensure that all practitioners are adequately trained to discharge their functions capably, and to provide appropriate incentives for maintaining high standards of conduct and ethics.

SECTION IX: SOURCES AND SELECT READINGS

9.1 South Africa Sources and Select Readings

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- Close Corporations Act 69 of 1984
- Companies Act 61 of 1973
- Companies Act 71 of 2008
- Insolvency Act 24 of 1936
- Magistrates Courts Act of 1944
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SECTION X: ANNEXES

ANNEX A: INSOLVENCY REFORM IN SOUTH AFRICA

The following timeline represents recent benchmark dates in connection with reform efforts to modernize business rescue procedures and develop a unified insolvency law in South Africa:

1998 – Standing Advisory Committee on Company Law established to evaluate merging liquidation provisions of the Companies Act and Close Corporations Act into the Insolvency Act.

February 2000 – South African Law Reform Commission issues report on proposed reforms to insolvency legislation.

October 2000 – Standing Advisory Committee on Company Law issues report on proposed reforms to business rescue, judicial management and other procedures contained in the Companies Act.

2002 – Insolvency and Business Recovery Bill submitted to Cabinet based on recommendations of SALRC and SACCL.

End 2002 – Judicial Matters Second Amendment Bill approved by Cabinet and referred to Parliament, providing for Minister for Justice and Constitutional Development to set policy for liquidators' appointment, to promote consistency, fairness, transparency and achievement of equality for persons previously disadvantaged by unfair discrimination. Policy applies only in cases where the Master exercises discretion, not where the Master appoints the nominee or nominees of creditors.

March 2003 – Cabinet approves Insolvency and Business Recovery Bill, 2003, for submission to Parliament.

April 2003 – Bill submitted to State Law Advisors for certification, who completed a draft by March 2004. The bill was held back pending inclusion of modern provisions on business rescue.

June 2005 – Cabinet approves establishment of Inter-Departmental Task Team to look into aspects raised by Ministerial Committee of Enquiry into the Liquidations Industry. The Task Team concluded that DTI should take responsibility for the reform process in the area of business rescue.

2008 – Companies Act 71 of 2008 adopted, to become effective following preparation of implementing regulations

November 2010 – Companies Amendment Bill amending certain provisions of the Companies Act 71 of 2008, introduced together with proposed implementing regulations, including for Chapter 6 on Business Rescues.

April 2011 – anticipated effective date for new Companies Act to become effective.

ANNEX B: INFORMAL WORKOUTS

The World Bank

Principles for Effective Insolvency and Creditor Rights Systems (2005)

The relevant principles are as follows:

B.3 ENABLING LEGISLATIVE FRAMEWORK

Corporate workouts and restructurings should be supported by an enabling environment that encourages participants to engage in consensual arrangements designed to restore an enterprise to financial viability. An environment that enables debt and enterprise restructuring includes laws and procedures that:

B3.1 Require disclosure of or ensure access to timely, reliable and accurate financial information on the distressed enterprise;

B3.2 Encourage lending to, investment in or recapitalization of viable financially distressed enterprises;

B3.3 Flexibly accommodate a broad range of restructuring activities, involving asset sales, discounted debt sales, debt write-offs, debt rescheduling, debt and enterprise restructurings and exchange offerings (debt-to-debt and debt-to-equity exchanges);

B3.4 Provide favorable or neutral tax treatment with respect to losses or write-offs that are necessary to achieve a debt restructuring based on the real market value of the assets subject to the transaction;

B3.5 Address regulatory impediments that may affect enterprise reorganizations;

B3.6 Give creditors reliable recourse to enforcement as outlined in Section A and to liquidation and/or reorganization proceedings as outlined in Section C of these Principles.

B.4 INFORMAL WORKOUT PROCEDURES

B4.1 An informal workout process may work better if it enables creditors and debtors to use informal techniques, such as voluntary negotiation or mediation or informal dispute resolution. While a reliable method for timely resolution of inter-creditor differences is important, the financial supervisor should play a facilitating role consistent with its regulatory duties as opposed to actively participating in the resolution of inter-creditor differences.

B4.2 Where the informal procedure relies on a formal reorganization, the formal proceeding should be able to quickly process the informal, pre-negotiated agreement.

B4.3 In the context of a systemic crisis or where levels of corporate insolvency have reached systemic levels, informal rules and procedures may need to be supplemented by interim framework enhancement measures to address the special needs and circumstances encountered with a view to encouraging restructuring. Such measures are typically of an interim nature designed to cover the crisis and resolution period, without undermining the conventional proceedings and systems.

B.5 REGULATION OF WORKOUT AND RISK MANAGEMENT

B5.1 A country's financial sector (possibly with the informal endorsement and assistance of the central bank, finance ministry or bankers' association) should promote the development of a code of conduct on a voluntary, consensual procedure for dealing with cases of corporate financial difficulty in which banks and other financial institutions have a significant exposure, especially in markets where corporate insolvency has reached systemic levels.

B5.2 In addition, good risk management practices should be encouraged by regulators of financial institutions and supported by norms that facilitate effective internal procedures and practices that support prompt and efficient recovery and resolution of non-performing loans and distressed assets.

INSOL Multi-Bank Workout Principles

FIRST PRINCIPLE: Where a debtor is found to be in financial difficulties, all relevant creditors should be prepared to co-operate with each other to give sufficient (though limited) time (a "Standstill Period") to the debtor for information about the debtor to be obtained and evaluated and for proposals for resolving the debtor's financial difficulties to be formulated and assessed, unless such a course is inappropriate in a particular case.

SECOND PRINCIPLE: During the Standstill Period, all relevant creditors should agree to refrain from taking any steps to enforce their claims against or (otherwise than by disposal of their debt to a third party) to reduce their exposure to the debtor but are entitled to expect that during the Standstill Period their position relative to other creditors and each other will not be prejudiced.

THIRD PRINCIPLE: During the Standstill Period, the debtor should not take any action which might adversely affect the prospective return to relevant creditors (either collectively or individually) as compared with the position at the Standstill Commencement Date.

FOURTH PRINCIPLE: The interests of relevant creditors are best served by co-ordinating their response to a debtor in financial difficulty. Such co-ordination will be facilitated by the selection of one or more representative co-ordination committees and by the appointment of professional advisers to advise and assist such committees and, where appropriate, the relevant creditors participating in the process as a whole.

FIFTH PRINCIPLE: During the Standstill Period, the debtor should provide, and allow relevant creditors and/or their professional advisers reasonable and timely access to, all relevant information relating to its assets, liabilities, business and prospects, in order to enable proper evaluation to be made of its financial position and any proposals to be made to relevant creditors.

SIXTH PRINCIPLE: Proposals for resolving the financial difficulties of the debtor and, so far as practicable, arrangements between relevant creditors relating to any standstill should reflect applicable law and the relative positions of relevant creditors at the Standstill Commencement Date.

SEVENTH PRINCIPLE: Information obtained for the purposes of the process concerning the assets, liabilities and business of the debtor and any proposals for resolving its difficulties should be made available to all relevant creditors and should, unless already publicly available, be treated as confidential.

EIGHTH PRINCIPLE: If additional funding is provided during the Standstill Period or under any rescue or restructuring proposals, the repayment of such additional funding should, so far as practicable, be accorded priority status as compared to other indebtedness or claims of relevant creditors.

Common Features of a Functional Workout Environment

A functional workout process includes a number of common features, including:

1. Enabling Framework. A functioning restructuring environment depends on a legal framework that facilitates the restructuring plan, such as allowing debt-equity swaps, forgiveness of bank debt and taking of collateral and authorizing priority financing for new money. The legal framework must also provide proper incentives for the parties to accept treatment that will render the restructured business viable (e.g., favorable offsetting tax treatment for debt forgiveness and debt-equity swaps). Common features include:
    - Criteria for debtor participation (access thresholds)
    - Venue or forum for resolution
    - Designation of a lead creditor
    - Creditor participation mechanisms (e.g., committees)
    - Creditor standstills and moratoria (need, protections, duration, extensions)
    - Creditor appointment of advisors for due diligence; who pays
    - Form and content of restructuring proposal
    - Threshold for creditor approval
    - Financial disclosure obligations
    - Valuation and viability assessments of sustainable debt, cash flow projections; sales of non-core assets to reduce debt
    - Treatment of non-sustainable debt (e.g., converted into convertible bonds or equity)
    - Priority and protections for new money
    - Rules for resolution of inter-creditor impasse
    - Enforcement of inter-creditor arbitration decisions (e.g., fines by designated authority)
    - Default in case of failure

2. Neutral forum: a 'forum' in which both debtor and creditors can initially come together for the purpose of exploring and negotiating an arrangement to deal with the financial difficulty or insolvency of the debtor. This might include a forum favorable to mediation, similar to the approaches adopted in Asia, the Istanbul Approach or elsewhere, as opposed to one in the courts.

3. Participants: the workout process should involve all key constituencies, generally the lenders group, and sometimes other key creditors who may be affected by the restructuring or are critical to the resolution.

4. Coordination: to better coordinate negotiations, a 'lead' creditor should be appointed to provide important leadership, organization, and administration. The lead creditor typically reports to a committee that is representative of creditors to assist the lead creditor and to act as a provisional sounding board toward proposals.

5. Stabilization: parties need to promptly stabilize the business operations and provide for a negotiation period, which is generally reflected by a 'standstill' agreement (a contractual agreement to suspend adverse actions by both the debtor and the main creditors) that endures for a relatively short period. This may be compared with the 'moratorium' or stay of actions which is a feature under the Companies Act or in bankruptcy.

6. Liquidity and Access to New Money: liquidity is essential to stabilize the business, and may be more difficult to provide in informal workout procedures. This is because formal bankruptcy laws frequently provide for a 'priority' for on-going funding of a debtor, but that law does not extend to informal arrangements. In these cases, creditors need to devise a contractual priority by means of an 'inter-creditor' agreement, which clarifies that emergency funding by one or more creditors will rank for repayment in advance of their other respective entitlements.

7. Information: access to reliable and accurate information on the business is essential to reaching a consensual agreement, including its business activities, trading position, and general financial statements. This is comparable to the statutory requirement for the provision of similar disclosure found in formal rescue regimes.

8. Negotiation, Agreement & Voting: negotiating, agreeing and implementing the restructure plan is generally based on agreement among the creditors and the debtor as to the terms and conditions for the restructuring, and acceptance by a requisite majority of creditors. The percentage approval necessary may vary depending on the specific acts undertaken during the restructuring (for example, 75-90% for restructuring, 75% for moratoriums, 66% for capital expenditures, credit draws and asset sales, and 100% for new money). In the case of new money, obviously no lender could be forced to extend new financing against its will. It is recommended that majority thresholds be fair, while at the same time low enough to encourage maximum potential for rehabilitation (e.g., simple majority).

9. Legally Binding: the final restructuring agreement is made legally binding on a dissenting minority, providing they are party to an inter-creditor agreement that contractually binds them to the majority decision. Parties who have not bound themselves contractually would not be bound by the decision of majority creditors, which raises a risk that the restructuring could be rendered meaningless by independent action of minority and holdout creditors. In formal proceedings, the statute creates the mechanism for binding minority creditors. Solutions should be considered to provide for a formal binding approval, where needed, such as by use of the prepackaged plan provisions in the insolvency law.

10. "Safe harbor" rules: Public bank staffs are generally reluctant to agree to corporate debt restructuring (especially second restructurings) or to extend credits, out of concern that a loss to the bank may result in liability to the staff. "Safe harbor" rules alleviate these concerns by addressing: (i) conditions under which staff of public banks can agree to corporate debt restructuring (e.g., viable debtor, with positive EBIDTA); (ii) acceptable debt restructuring terms (e.g., anything accepted by similarly-situated private banks; and (iii) conditions for extending new credits or rolling over credits (e.g., positive EBITDA, enforceable security, covenants).

11. Tax, legal, and regulatory impediments: Even when a debtor and its creditors are willing to reach a corporate restructuring agreement, implementation could be impeded by a host of other factors – e.g., tax treatment of debt reduction; transfer taxes; tax treatment of non-cash corporate reorganizations (e.g., mergers, spin-offs); insufficient opportunity to transfer net operating losses; creditor review for proposed mergers; constraints from legal lending limits; limits on the ability of foreign creditors to own real property; and capital market protections for public shareholders.

The following Chart compares some of the key features contained in quasi-formal workout procedures adopted during financial crises in other countries.

	Indonesia	South Korea	Malaysia	Thailand	Turkey
Name of arrangement	Jakarta Initiative Task Force (JITF)	Corporate Restructuring Agreement	Corporate Debt Restructuring Committee	Corporate Debt Restructuring Advisory Committee	Istanbul Approach
Basic approach	Forum selected with time-bound mediation	Framework for debtor-creditor negotiations and resolution of inter-creditor differences	Forum for negotiation	Forum for facilitation; superseded by contractual approach, that is, "Debtor-Creditor Agreements"	Coordination Secretariat; Framework for debtor-creditor negotiations and resolution of inter-creditor differences
Default for failure to reach agreement	JITF may refer an uncooperative debtor to government for possible bankruptcy petition	Receivership or liquidation	Foreclosure, liquidation, or referral to Danaharta Asset Management Company with super-administrative powers	Less than 50% support for proposed workout, Debtor-Creditor Agreements oblige creditors to petition court for collection of debts	Less than requisite majority approval, application to Arbitration Committee; parties may pursue other rights
Resolution of inter-creditor disputes	No special procedures	After three failures to obtain 75% creditor support, plan goes to seven-person Coordination Committee for arbitration	Persuasion by central bank	Mediation, per inter-creditor agreement, if only 50–75% approval; but any bank with large exposure (for example, a foreign bank) could opt out	Arbitration if majority approval is not reached; large firms (55-75%); SMEs (less than 75%)
Role of Central Bank	None	None. But strong support from Financial Supervisory Committee	Secretariat support	Not mandated, but central bank can use influence	None; but strong support from BDDK which administered process
Support from legal system	None	Credible threat of receivership or liquidation	Credible threat of foreclosure or liquidation encourages good faith by debtors	75% creditor threshold both for workouts and court-supervised reorganizations; cram down by court possible	Credible threat of foreclosure or enforcement; court supervised proceeding with cram-down

ANNEX C: BUSINESS RESCUE PROFESSIONALS

Topics and Skills Relevant to Business Rescue

A robust training and licensing program for business rescue practitioners should ensure that the practitioner is familiar with and has experience in relevant areas of business management, accounting and finance and legal procedures pertinent to distressed businesses. The following non-exhaustive list illustrates typical areas of knowledge required in the context of business rescues and restructuring. These may serve as guide for developing training programs.[19]

Business Management

- Causes of business decline and failure
- Early warning signs of decline and failure
- Basic requirements for successful business rescue
- Characteristics and attributes of successful BRPs
- Stages of the rescue process
- Management change
- Evaluation of the business
- Design and selection of business rescue strategies
- Emergency actions
- Stabilizing the business
- Normalizing business operations
- Special legal topics affecting the rescue process
- Establishing a Code of Ethics

Accounting and Financing Techniques

- Understanding financial statements and cash flow analyses
- Cash flow forecasting and planning
- Credit analysis and short-term financial management and planning
- Breakeven analysis
- Cost analysis
- Capital structure and financial strategies
- Corporate valuation
- Tax issues and considerations
- Financial reporting requirements

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[19] The list is adapted from a curriculum developed by the Association of Certified Turnaround Professionals (ACTP) now merged with and administered by the Turnaround Management Association (TMA Int'l) to certify turnaround professionals. The "Certified Turnaround Professional" (CTP) must complete and pass the curriculum materials and demonstrate requisite experience based on years of practice as a turnaround practitioner.

Legal Considerations

- General contract law issues
- Secured transactions and rights of secured creditors
- Judicial enforcement proceedings
- General insolvency framework overview
- Moratorium and property of the estate
- Operating the business; use, sale or lease of assets; financing solutions and use of cash collateral
- Parties and professionals in a business rescue proceeding
- Understanding and renegotiating executory contracts
- Dealing with stakeholder claims and interests
- Developing the business rescue plan
- Employment issues
- Environmental issues
- Other regulatory considerations
- Bankruptcy ethics and crimes
- International restructuring and insolvency

ANNEX D: NCA DEBT ADJUSTMENT FRAMEWORK

The NCA provides for debt restructuring but does not "automatically" lead to a consumer discharge on simple, stated conditions such as after a period of two or three years. The purpose of the NCA is stated to be the promotion of responsibility in the credit market by encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers, and to discourage reckless credit granting by credit providers and contractual default by consumers. The Act aims to address and prevent over-indebtedness of consumers and provides mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations. Over-indebtedness is addressed by providing for debt review and the restructuring of credit agreement debt.

The Debt Review Process. Debt review proceedings may be commenced when a consumer applies to a debt counselor for an evaluation to determine whether he or she is over-indebted. When the debt counselor receives application, all of the consumer's credit providers and all registered credit bureaus must be notified. Both the consumer and credit providers must cooperate in the debt review. Ultimately the debt counselor determines whether the consumer is over-indebted, likely to become over-indebted in the future, or not over-indebted at all. If the debt counselor finds that the consumer is over-indebted, a recommendation is made to the Magistrate's Court to enter a declaration as such. If applicable, the debt counselor may also recommend that the court enter a finding that the case involves "reckless credit".

The Debt Counselor

A Debt Counselor must satisfy minimum qualification requirements:

- Debt-counseling course (typically 2 days)
- Grade 12 certificate
- 2 years work experience in fields such as consumer protection, legal or paralegal services, accounting or business environment.
- Demonstrate ability to manage own finances and counseling or transfer skills.

Ref.: S 44 (3) and Reg. 10

The review process[20] is detailed and has various stages, including: the consumer's application for debt review, the subsequent duties of the debt counselor, the obligations of the consumer and credit providers during the debt review process, the debt counselor's determination of over-indebtedness, and steps that may be taken after such determination. The Act also provides for termination of debt review in certain circumstances.[21]

The debt counselor conducts a review and completes a five-part form consisting of personal information, income, monthly commitments, total debt obligations and finally, a consumer declaration. The consumer declares his/her commitment to comply with the debt counselor's request and every step of the process; consents to all information being submitted to all credit bureaus and other registers and, perhaps most importantly, undertakes not to enter into any further credit agreements. The exception is to enter into a "consolidated"[22] agreement until such time as the credit counselor rejects the application, the magistrate's court decides there is no over-indebtedness or until the obligations are rearranged or fulfilled. If a credit

[20] The debt review process is set out in S. 86 and Regulations 24-26 of the NCA.

[21] See S 86(10) - if a consumer is in default under a credit agreement under review, the credit provider may seek to terminate the review in the prescribed manner, by giving notice to the consumer, the debt counselor and the NCR. Such notice may be given only 60 business days after the consumer applied for the review. Termination of the debt review does not prevent the consumer making subsequent applications for debt relief.

[22] The agreement consolidates various debts due to the same credit provider.

provider in respect of a particular credit agreement has proceeded to take the steps[23] prior to the issuance of a summons, such credit agreement may not be included in the application.

Beyond the application process, the debt restructuring process poses a number of problems, due mainly to a lack of procedural clarity. The outcome of the restructuring process will be severely influenced by the determination of the court whether the consumer is over-indebted. The court must further determine if such conditions existed when at the time the credit agreement was made and the ability to pay and circumstance at the time the order is made. A finding that the credit agreement was "reckless"[24] may lead to an order setting aside or suspending the force and effect of that specific credit agreement and the restructuring of other credit agreement debt.

Reliance on the courts to make a series of inquiries and make findings regarding the consumer's circumstances imposes a heavy burden on the court system. Until such time as the court makes such determinations and orders, the proceeding will come to a halt, frequently for a considerable period of time and will result in the postponement of the proceedings. This court evaluation of the consumer circumstance adds another layer of litigation time and costs. The impact, in terms of the backlog of cases and steps to reform the system are referred to elsewhere in this Report.

The Act imposes no time limitation upon such restructuring with the result that restructuring orders that run over unrealistically long periods of time, sometime decades, are sometimes granted by courts.[25] As long as the restructuring order is in effect, no provision is made for the discharge of debt after a certain period, nor repayment of a certain amount of the original debt. There do not appear to be remedies for the credit providers if the period of restructuring is deemed unreasonably long or the debtor's circumstances have improved and not to the creditors benefit.

The objective of debt restructuring under the NCA is fulfillment of financial obligations without any time limit or the possibility of change in favor of the creditor or discharge in favor of the debtor. It seems that a credit provider is boxed in and will have to accept the payments in terms of the proposed restructuring ordered by the court, without possibility of further legal action, even if such a debt takes the consumer's lifetime or beyond to settle.[26]

The procedural shortcomings of the NCA will, in the absence of reform, raise the questions on the effect of debt review and debt restructuring and its interaction with insolvency law and the alternatives offered by sequestration.[27]

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[23] See S 129 NCA.

[24] See S 83 of NCA

[25] There is no process foreseen permitting the credit provider to approach a court to review the order so long as the consumer pays in terms of the debt restructuring order.

[26] See van Heerden and Boraine for an example on file with the authors granting a restructuring period of 832 months (69.3 years) in the case of a debt secured by a mortgage bond.

[27] For a detailed discussion see van Heerden, C. M. and Boraine, Andre, The Interaction between the Debt Relief Measures in the National Credit Act 34 of 2005 and Aspects of Insolvency Law, Potchefstroom Electronic Law Journal, Vol. 12, No. 3, 2009.

ANNEX E: CONSUMER INSOLVENCY

INSOL International - Consumer Debt Report Principles/Recommendations

Principle 1: Fair and equitable allocation of consumer credit risks

> **Recommendation 1**: Legislators should enact laws to provide for a fair and equitable, efficient and cost effective, accessible and transparent settlement and discharge of consumer and small business debts
>
> **Recommendation 2**: Legislators may provide for appropriate alternative proceedings depending on the circumstances of the consumer debtor
>
> **Recommendation 3**: Legislators should consider providing for separate or alternative proceedings for consumer debtors and small businesses.
>
> **Recommendation 4**: Legislators should ensure that consumer insolvency laws are mutually recognised in other jurisdictions and aim at standardization and uniformity

Principle 2: Provision of some form of discharge of indebtedness, rehabilitation or "fresh start" for the debtor

> **Recommendation 5**: Legislators should offer consumer debtors a discharge from indebtedness as a method of concluding a liquidation or rehabilitation procedure

Principle 3: Extra-judicial rather than judicial proceedings where there are equally effective options available

> **Recommendation 6**: Legislators should encourage the development of extra-judicial or out-of-court proceedings for solving consumer and small business debts problems.
>
> **Recommendation 7**: Governments, semi-governmental or private organisations should ensure the availability of sufficient competent and independent debt-counseling

Principle 4: Prevention to reduce the need for intervention

> **Recommendation 8**: Governments, semi-governmental or private organisations should set up educational programs and improve information and advice on the risks attached to consumer credits.
>
> **Recommendation 9:** Lenders should observe the way credit is made available to consumers and small businesses, information is presented and the way these credits are collected.
>
> **Recommendation 10:** Organisations of lenders and consumers should set up joint programs to monitor consumer loan delinquencies.

ANNEX F: REGULATORY FRAMEWORK FOR INSOLVENCY

Key Features

The following issues arise in the context of defining a suitable regulatory framework to assure the integrity and effective functioning of the insolvency system.

The Regulatory Body

1. Regulatory objectives
    - independence of individual office holders
    - standards as to suitability and competence, and guidance as to probity which reflect requirements of legislation; recognize interests and rights of those involved in insolvency; and meet public expectations of a profession
    - prompt, effective corrective action against incompetent/dishonest office holders
2. Regulatory models
    - Government regulator – government department/agency
    - Self-regulated - professional body (or bodies) or special groups
    - Hybrid models : combine governmental oversight of professional body and (additional) assurance of system's independence and rigorousness
3. Regulatory body for other professions (e.g., lawyers and accountants) may require
    - Specific rules and standards to recognize difference between office holder undertaking public interest functions etc. and lawyer or accountant advising/acting in private interest rights; and
    - Systems of accountability and transparency, and oversight which will assure the impartial and fair discharge of regulatory functions.

The Regulatory Process

1. Regulatory framework should set for office holders:
    - Professional standards
    - Ethical standards
    - Best practice guidance
    - Continuing professional education requirements
    - Insurance/bonding requirements
2. Regulatory body should
    - Have procedures for authorization
    - Ensure availability of continuing professional education
    - Ensure arrangements for insurance/bonding
    - Have procedures for monitoring performance and compliance
3. Monitoring should cover
    - Returns from office holders
    - Visits to office holders
    - Enquiries into complaints
    - Use of information/data from other bodies/agencies.
4. Emphasis on competence and compliance, and body should provide or make arrangements for providing advice to an office holder on proper running of practice and administration of cases.

Office Holder Regulation

1. Oversight of individual cases should be undertaken by creditors and/or the court requiring the office holder, as specified by them or by legislation, to:
   - Hold meetings/attend hearings
   - Provide reports and accounts of administration
   - Obtain approval of particular courses of action
   - Obtain approval of particular payments
   - Receive remuneration/fees and expenses according to prescribed rules
2. Identify risks for creditors and/or the court of appointing an office holder who is:
   - Unqualified
   - Incompetent
   - Inappropriate because of absence of independence
   - Dishonest
3. Establish an independent body (or bodies) to:
   - Establish qualification and suitability requirements
   - Set professional and continuing education standards
   - Formulate best practice and ethical guidance
   - Monitor continuing competence, probity, compliance and insurance/ bonding
   - Take action against incompetent or fraudulent office holders
   - Review and revise requirements, standards, guidance and monitoring on continuous basis to maintain the standing of the profession and confidence in the regulatory system.
4. Ensuring that office holders are regulated:
   - Simplifies for creditors and/or the court the appointment; and obviates need for enquiries into suitability, competence, insurance/bonding, etc
   - Limits the level of detailed oversight which may be needed/appropriate, and cost of supervision
   - Enables questions of competence and probity to be referred to body for investigation
   - Streamlines procedures in the event of removal, retirement or death.

Additional Areas of Consideration

- Benefits of a Regulatory System
- Regulation of Office Holders' Agents
- Transitional issues in implementing a regulatory system

World Bank Principles on Insolvency Regulatory Frameworks

The following discussion of the World Bank Principles on insolvency regulation is offered as further elaboration on the key features of an insolvency regulatory framework.

World Bank Principle D.7

Role of Regulatory or Supervisory Bodies

> *The bodies responsible for regulating or supervising insolvency administrators should: (i) be independent of individual administrators;*
> *(ii) set standards that reflect the requirements of the legislation and public expectations of fairness, impartiality, transparency and accountability; and, (iii) have appropriate powers and resources to enable them to discharge their functions, duties and responsibilities effectively.*

The regulatory or supervisory body may be a government department or agency, a separately constituted public authority, a court, a professional association (or associations) or it may be some combination of these, provided their roles, duties and responsibilities are clearly spelled out. It is essential where a professional body is involved that its independence from its members is clearly demonstrated through its constitution, mechanisms and processes, and through its staff. Resources for the regulatory or supervisory body are crucial to effective and efficient regulation. The system of regulation, however, should be proportionate, taking account of (i) the costs imposed and benefits for those who will have to bear them and (ii) the requirements which may unnecessarily restrict the numbers of insolvency administrators.

The regulatory or supervisory body should be able to show that standards and practice guidance reflect the requirements of the law; recognize the interests and rights of those involved in insolvencies; and meet public expectations of a profession. The procedures should be fair, impartial and transparent both towards those it regulates and those who complain or are otherwise adversely affected by an insolvency administrator's conduct, decisions or actions; and are subject to appeal or review.

The regulatory or supervisory body should expect to periodically publish and make widely available reports explaining its functions, duties and responsibilities, and powers, and how it has discharged them. These reports should be used to promote professionalism, setting standards for effective regulation and good practice through the promulgation of guidance and provision of training. They would serve to be effective to promote understanding and awareness in the financial and business and consumer communities of insolvency and the role of insolvency administrators.

How the regulatory or supervisory body is established partly depends on what systems exist for recognition and regulation of lawyers, accountants and other professionals appointed as administrators; for setting standards; for monitoring performance; and for taking regulatory action. Some of those systems may need to be refined for insolvency to reflect the differences between a lawyer, accountant or other professional undertaking the public interest responsibilities of an administrator and acting in pursuit of private interest on behalf of a client.

A system for licensing individuals or recognizing bodies will make it easier to identify suitable persons to act as administrators whether such persons are designated by the courts, creditors or another party with the power to appoint. It may be useful to identify an individual's experience within particular industries or businesses (e.g. an engineering company or property business) or with respect to different types of procedures (e.g. liquidation or rehabilitation) and to consult key parties where specialized knowledge and skills are likely to be required.

Licensing requirements vary from jurisdiction to jurisdiction based on the particular duties to be performed, but may include another professional license (such as in law or accounting), business or economics degree, a minimum level of experience, and specialized training as an insolvency practitioner or administrator. The process of granting or continuing or renewing a license should not be mechanistic where compliance with a number of specific requirements automatically leads to approval: but nor should it be bureaucratic.

An effective process, and one which is known to be rigorous, will reduce the risk that unsuitable or incompetent individuals will seek to put themselves forward as, or to continue as, insolvency administrators. Professional bodies may not have a specific statutory, regulatory or supervisory function relative to the insolvency system and those who administer cases within it. But many have recognized the increasing importance and complexity of insolvency and have established their insolvency qualifications and relevant professional and ethical standards, best practice guidance and continuing professional education for members specializing in insolvency. They have also adapted their monitoring, complaint handling and discipline procedures to reflect the nature of insolvency. Professional bodies can provide an essential pillar in the development of a regulatory framework.

The regulatory or supervisory body should be proactive and responsive. It would not be realistic nor economically efficient to expect it to examine in detail every insolvency and all the returns and reports submitted in relation to all of them. In developed frameworks, the regulatory or supervisory body will have built up profiles and databases of insolvency administrators and of insolvency procedures and practices, enabling it to focus its attention on those which are likely to give rise to concerns and complaints, and therefore to target its investigations and enforcement action. Also, it may be appropriate that the regulatory or supervisory body's oversight procedures and practices are subject to systematic review by a board or committee, alongside the outcomes of them. It provides an opportunity for those not immediately involved to test and check the appropriateness, validity and consistency of the procedures and practices, and outcomes, and whether they are delivering effective regulation.

In most jurisdictions the oversight of individual cases is seen as the responsibility of creditors (or their representatives) and the court—to receive reports, approve proposed actions, give directions, sanction payments and fix remuneration and fees, as set out in legislation, specified by creditors or the court or as appears necessary to the administrator. In some jurisdictions the regulatory or supervisory body may be responsible for ensuring that cases are administered properly and in the best interests of creditors. The different points and levels of oversight will depend on who made the appointment and constructed the checks and balances in the system and on the nature, complexity, costs and risks of the proposed action.

World Bank Principles D.8

Competence and Integrity of Insolvency Administrators

> *The system should ensure that: (i) Criteria as to who may be an insolvency administrator should be objective, clearly established and publicly available; and, (ii)Insolvency administrators be competent to undertake the work to which they are appointed and to exercise the powers given to them; and (iii) act with integrity, impartiality and independence.*

Those who administer insolvencies[fn.1]—whether appointed by creditors, the court, a government department or agency, a public or statutory authority or the debtor—are given powers[fn.2] over debtors and their assets, and they have a duty to protect them and their value. The nature of the appointment in some jurisdictions is seen as that of, or closely resembling, a trustee exercising public interest powers and undertaking functions on benefit of the creditors and the debtor. But with those powers and functions go responsibilities and mechanisms for ensuring their proper discharge. The nature of those duties is very much underlined in jurisdictions where the administrator is defined as or deemed to be an officer of the court (whether appointed by the court or not).

Those appointed as administrators come from a range of backgrounds and may not be exclusively involved in insolvency work. In many jurisdictions administrators are lawyers or accountants, usually but not necessarily members of a professional body recognized in that jurisdiction. Thus they will have been subject to formal training, examination and qualification, and to some form of professional regulation. Or those appointed as administrators may hold some other qualification considered relevant, such as an economics or law degree; or have a particular specialization, such as property or business management; or hold no special qualification but be appointed on the basis of experience.

In some cases the selection of the administrator may be predicated on particular skills required to deal with the circumstances of the case—be it the nature of the debtor's business or other activities, the type of assets or the market in which the debtor operates or has operated; the special knowledge required for understanding the debtor's affairs; or some other special reason. The focus in a particular case may be on unraveling complex financial transactions, continuing a manufacturing business or dealing with stock, commodity or futures market transactions. Whatever the type of insolvency, the highest professional and ethical standards for the administrator are of paramount importance. The interests of those involved in and affected by the insolvency and the public interest override the administrator's private interests.

The administrator needs to be able to handle novel and contentious issues where time is invariably short and where commercial considerations have to be balanced with legal

[fn.1] Insolvency administrators may be referred to as insolvency representatives, trustees, liquidators, administrators, supervisors, receivers, curators, official or judicial managers, commissioners or promoters. The insolvency administrator may be an individual, or in some jurisdictions may be a corporation or other separate legal entity.

[fn.2] Powers of the administrator generally include the right to manage the business and make business decisions regarding the assets (subject to review and approval in some cases), to negotiate and enter into agreement with creditors and to bind the company, to collect and dispose of assets, including to bring legal actions to recover assets transferred, to hire professionals needed to assist the administrator in carrying out his responsibilities, and so on.

requirements. In all this it is appropriate for the administrator to call on specialists for assistance. What is essential is that the administrator has a practical understanding of insolvency and other relevant legislation and (with the increasing emphasis on rehabilitation) experience with business issues. This points to the need for an insolvency qualification exam for administrators. Some legal, accountancy and other degrees may already cover insolvency and related legislation. Insolvency is not merely a matter of general principles, however, and general qualifications will not provide the technical knowledge and practical understanding that is needed to effectively perform one's duties. Moreover, experience - particularly in jurisdictions where insolvency legislation is relatively new- may be limited. Once they are recognized as insolvency administrators, it is equally important that they maintain their knowledge through continuing education or experience that covers the range of insolvency issues at both technical and practical levels**.**

An insolvency administrator should be expected to be competent to undertake the work to which he is appointed. Competence would expect to be assessed or confirmed by evidence of educational and/or professional qualifications, examinations and/or experience, which may be supplemented by some form of test or interview, and the testimony of credible individuals, organizations or institutions. Criteria for selection of persons to be recognized as insolvency administrators should be objective, clearly established and publicly available.

An insolvency administrator should be expected to be honest and act with integrity and probity. Integrity and probity imply not merely honesty and bare compliance with the law, but fair dealing and truthfulness; not using powers given to him oppressively or to seek unfair advantage; recognizing the need for transparency and accountability; providing information and explanations, promptly and clearly expressed; and not improperly withholding facts and information.

An insolvency administrator is required to act in accordance with the law and to deal with all parties – creditors, the debtor and others having dealings with or otherwise involved in or affected by the insolvency – fairly and openly. As he is not acting for his own account but for the benefit of all those parties, it is therefore important that objectivity, impartiality and independence are not compromised or at risk of compromise, or that it might appear that they could be compromised. Objectivity is the state of mind that has regard to all considerations relevant to the task in hand, but to no other. It is the art of dealing with matters uncolored by personal feelings or opinions and without regard to personal relationships, advantage or disadvantage, gain (beyond proper remuneration for administration of the insolvency) or loss, preferences or prejudices, and above all without favor.

ANNEX G: PRELIMINARY CONTACT LIST OF INDIVIDUALS AND ENTITIES

NAME OF CONTACT	NAME OF INSTITUTION AND POSITION
AD Smith	University of South Africa (Unisa)
Adam Harris	Bowman Gilfillan, Director, Cape Town AIPSA
Alastair Smith	UP Law Clinic, Professor, Dept of Mercantile Law
Allan Pellow	Westrust/ Association of Insolvency Practitioners in South Africa (AIPSA) , Director
Andre Boraine	University of Pretoria, Professor, Department of Procedural Law; Centre for Advanced Corporate & Insolvency Law, Co-Director
Andrea Snyman	Consumer Assist, CEO
Anneke Smit	University of Pretoria, Head of Debt Relief Department
Anneli Loubser	University of South Africa, Professor and Subject Supervisor: Corporate & Insolvency Law
Benita Coetzee	Investec
Callie Lombard	ABSA Legal, Head of Business Support
Chunlin Zhang	World Bank, Lead Private Sector Development Specialist
Claire van Zuylen	Bowman, Gilfillan, Director, Johannesburg
Coenraad van Beek	Nedbank, Special Operations Department
Corlia Van Heerden	University of Pretoria, Associate Professor
Corne Viljoen	Viljoen Quinn
Deon Rudman	Department of Justice and Constitutional Development, Deputy Director General
Desmond Ramabulana	Department of Trade and Industry, Consumer & Corporate Regulation Division
Eberhard Bertelsman	High Court of Justice, Judge
Eric Levenstein	Werkmans Attorneys, Director
Ewald Muller	South African Institute of Chartered Accountants (SAICA)
Frans Haupt	UP Law Clinic, Director
Fundi Tshazibana	National Treasury, Chief Director: RIA Division
Gabriel Davel	CEO, National Credit Regulator (NCR)
Gerry Anderson	COO, Financial Sector Board (FSB)
Gert Holtzhauzen	Nedbank, Special Operations Dept
Hans Klopper	Corporate Recovery
Hermie Coetze	University of Pretoria, Lecturer
Hernriette Du Plessis	First Rand Bank
Ina Meiring	Werkmans Attorneys
J Engelbrecht	Insolvency Practitioner
Jan van der Walt	Corporate Renewal Solutions, CEO / Turnaround Management Association-South Africa, CEO and Director (TMA)
Janet Hofman	Standard Bank
Jeanne-Marie Venter	Nedbank
Johan de Ridder	National Credit Regulator, Debt Review Task Team
Juanite Steenkamp	South African Institute of Chartered Accountants (SAICA)
Juanito Damons	JMR Law/ AIPSA, Chairperson
Juanitta Calitz	University of Johannesburg, Senior Lecturer
Karl Gribnitz	CEO, Gandalf Trust

NAME OF CONTACT	NAME OF INSTITUTION AND POSITION
Kathleen Van der Linde	University of Johanesburg, Professor of Mercantile Law
Khashane Manamela	Manamela Marobela and Associates, Director/Attorney /AIPSA
Lawrence Bassett	Department of Justice, Chief Director of Legislation
Lee Steyn	University of KwaZulu Natal (UKZN)
Lester Basson	Acting Chief Master for the High Court
Lindelani Sogogo	Advocates Group 21, Advocate
Luke Hirst	Debt Counsellors Debt Busters, Managing Director
Lulama Andisa Potwana	Consumer & Corporate Regulation Division, Director
Mareesa Kreuser	University of Pretoria, Head of Research and Short Courses
Mark Brit	Banking Association of South Africa
Marlene Heymans	National Credit Regulator/NCR Debt Review Task Team /FinMark Trust
Martinus (Tienie) Cronje	Department of Justice and Constitutional Development, Law Reform Commission, Researcher
Maryke Steynberg	National Credit Regulator (NCR)
Matthew Klein	AIPSA, Advocate
Mattie Kleyn,	Advocate and Insolvency Practitioner
McDonald Netshitenzhe	Consumer & Corporate Regulation Division, Director
Mias Strauss	HCS Consulting
Michael Milazi	National Treasury, Chief Director
Michelle Kelly-Louw	University of South Africa (UNISA)
Miranda Feinstein	Edward Nathan Sonnenbergs, Chair, Company Law Committee, Law Society of South Africa
Navin Lalsab	South African Institute of Professional Accountants (SAIPA), Executive Accreditation, Compliance and Development
Nelisa Mali	Nelisa Mali Attorneys, Director
Neville Melville	National Credit Regulator, Debt Review Task Team
Nic Arnold	Solidarity Trade Union, Manager, Legal Services
Nicky Lala-Mohan	Banking Association South Africa, General Manager
Nicolaas van Wyk	Association of Chartered Certified Accountants (ACCA), Technical Support
Nolwazi Nzama	Standard Bank
Nomfundo Maseti	Consumer & Corporate Regulation Division, Chief Director
Ozius Dewa	USAID Financial Sector Program, Monitoring and Evaluation Specialist
Patrick O'Brien	University of Johannesburg
Paul Slot	OCTOGEN / National Credit Regulator, Director, Debt Review Task Team
Paul Winer	Werksmans Attorneys, Director
Peter Setou	National Credit Regulator (NCR)
Philip Reynolds	Deloitte Touche LLP, Partner
Piet A Delport	University of Pretoria, Professor, Department of Mercantile Law; Centre for Advanced Corporate & Insolvency Law, Co-Director
Priscilla Adipa	National Treasury, RIA Division
Rene Bekker	Attorney /AIPSA
Rob Easton-Berry	Consumer Friend; National Credit Regulator, Debt Review Task Team
Roger Evans	University of South Africa (UNISA), Professor
Shelley Canfanelli	Standard Bank
Stefan Renke	University of Pretoria, Senior Lecturer
Stuart Grobler	Banking Association South Africa
Sybrand Stadler	Stadler Attorneys

NAME OF CONTACT	NAME OF INSTITUTION AND POSITION
Tanya Woker	University of KwaZulu Natal (UKZN) / NCA Tribunals, Professor, Consumer Law, Consumer Credit Act, Consumer Protection Act
Valarie Bosman	FNB Bank
W. Seriti	High Court of Jusice, Judge
Y. Mbatha	Insolvency Committee, Chair
Yolande Smit	National Treasury, Director: RIA Division
Yvonne Mbatha	Insolvency Committee, SA Law Society, Chair
Zodwa Ntuli	Department of Trade and Industry, Deputy Director General

E&OE – based on information currently available.