



Fiji Law Reform Commission
Company and Commercial Law Reform
Discussion Papers 1, 2, 3, - 1997

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The Fiji Law Reform Commission has been given a reference :

“To enquire into and report whether changes are needed to existing company and commercial laws and practice and to make recommendations for the development and improvement of the corporate and commercial law framework in the areas of companies, insolvency and personal property securities law and in particular in relation to :

- Hire Purchase and Credit Contracts
- Bills of Sale Act and Sale of Goods Act
- Bankruptcy and Insolvency
- Companies Act
- Intellectual Property and Copyright Laws

AND TO REPORT thereon by 16 October 1998.”

The Attorney-General on the 16 October 1996 appointed Professor Di Everett as Commissioner responsible for Company and Commercial Law Reform.

These discussion papers look at :

- (1) Consumer Credit, Hire Purchase and Sale of Goods.
- (2) Securities over Personal Property.
- (3) The Law of Bankruptcy of Persons and Insolvency of Companies.

You are invited to make comments and submissions on the options set out in these papers. Your criticisms and comments will assist the Commission in preparing a final report to the Attorney-General on how the company and commercial laws and practice can be reformed.

Written comments should be sent by Friday 19 December 1997 to :

**The Director
Fiji Law Reform Commission
P O Box 2194
Government Buildings
SUVA**

**Phone No : (679) 303 900
Fax No : (679) 303 646
e-mail : info_firc @ itc.gov.fj**

Please note that these discussion papers are designed to encourage public participation and debate in the law reform process. It is not a final report and does not necessarily represent the final views of the Commission.

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FIJI LAW REFORM
COMMISSION

DISCUSSION PAPER 1

Consumer Credit, Hire Purchase
and Sale of Goods

**FIJI LAW REFORM COMMISSION
DISCUSSION PAPER
CONSUMER CREDIT, HIRE PURCHASE AND SALE OF GOODS**

A. INTRODUCTION

The related discussion papers by the Commission on Security over Personal Property and Bankruptcy and Insolvency identify a number of social issues which may be partially addressed by a range of law reform initiatives, including the introduction of new legislation to regulate transactions involving the extension of credit to consumers, small business, farmers and other primary producers. The Commission's Discussion Paper on Personal Property Securities envisages the establishment of a computerised registry to record and give priority to transactions of a security nature over personal property eg. hire-purchase, mortgages, finance leases, title retention.

This proposal involves the repeal or substantial amendment of a number of pieces of legislation eg. the *Bills of Sale Act* and the *Crop Liens Act* which not only provide for registration and priority but involve compliance with substantive requirements as to the form and content of security documents over chattels and certain crops.

In order to continue existing substantive protections for borrowers and existing rights of lenders in these cases, this paper canvasses the incorporation of such protections into a single enactment covering security type transactions given by consumers, small business operators and primary producers over personal property. The proposed new legislation would cover areas relating to the giving of credit via hire purchase, finance leases, credit cards, store cards, mortgages etc. with a view to providing borrowers and guarantors with information, protection against unconscionable terms, conduct and interest rates and regulation of enforcement proceedings.

B. CURRENT LEGISLATION IN FIJI

- (a) The *Crop Liens Act* applies to "agricultural produce" as listed in the legislation and to other crops notified by the Minister in the Gazette. The security must be in the statutory form and witnessed by prescribed persons who must explain its meaning to the borrower. The lien can be for a period of no more than 5 years. If the borrower sells a crop or proceeds contrary to the rights of the lien holder the borrower is guilty of an offence and subject to a fine or imprisonment for up to 3 years.

- (b) *Bills of Sale Act* covers most security type arrangements in relation to chattels, stock and growing crops (other than those covered by the *Crop Liens Act*) under which the borrower has possession of the property. The bill of sale must be made in duplicate and must set out the consideration and must be registered within 7 days (or 21 days outside Suva) otherwise it is void. It also must be attested, certified and explained by specific officers and renewed every 5 years (except for crops which last only one year). Priority is given by time of registration.
- (c) The *Moneylenders Act* seeks to control the business of money lending by requiring moneylenders to be licensed; by prohibiting unsolicited invitations to borrow money or enter into transactions involving borrowing money from a moneylender; by limiting newspaper advertising of moneylenders' business; by requiring a written and signed memorandum of a money lending contract with a copy given to the borrower before the money is lent; by prohibiting compound or penalty interest; by encouraging interest rates of less than 10% per annum and presuming 12% to be excessive; by allowing re-opening of transactions where the interest rate is excessive and the contract is harsh and unconscionable or substantially unfair. The Act however provides for lenders to be exempted from all aspects of the Act and even by 1986 at least 30 major institutional lenders were exempted.
- (d) The *Fair Trading Decree* in Part IV provides criminal sanctions and civil remedies for misleading and deceptive conduct, unconscionable conduct, misrepresentation by corporations in trade and commerce in connection with the supply of goods and services and misleading advertisements relating to goods, services or business interests, including unfair advertising. Part V incorporates into contracts for the sale (by a corporation directly or indirectly to a consumer) of goods, warranties that the goods are fit for a particular purpose, that goods comply with description, that goods are of merchantable quality and that they correspond with sample.
- (e) The *Sale of Goods Act* in Fiji covers not only the sale of goods, including implied terms as to fitness, quality and compliance with description or sample, but the supply of goods in the course of a business otherwise than by sale and the supply of services. The *Sale of Goods Act* also includes in Part IV detailed provisions regulating lay-by sales. Non-fraudulent misrepresentations relating to any contract may result in damages in lieu of recession under Part VI of this Act. In addition the Minister is given wide powers to make regulations prescribing or approving standard form agreements or contracts for the supply of prescribed goods or services and regulating legibility and comprehensibility of documents.

C. SOCIAL ISSUES IN FIJI

There is a perception, reported in the media, that action needs to be taken to deal with escalating bankruptcies and insolvencies and that the underlying problems involve easy access to credit through hire purchase, credit cards, bank loans and the charging of excessive interest rates, transaction fees and other charges. Those particularly vulnerable to credit related problems appear to be consumers and farmers.

The two related discussion papers of the Fiji Law Reform Commission on Bankruptcy and Insolvency and on Security over Personal Property, raise for comment proposals which seek to limit the harshness of the bankruptcy law whilst making it more effective and efficient and which propose that all "security-type" transactions relating to personal property be registered on a computerised single register. These reform proposals do not, however address the following issues:

- the provision of clear information as to the cost of credit, guarantees and security rights of lenders;
- the exclusion of excessive interest rates, charges or penalties;
- the adjustment of the rights, duties, liabilities and obligations of lenders, borrowers and guarantors.

The existing law in Fiji discussed above already provides to an extent some substantive regulation of some of the situations where borrowers are at risk. As is clear from the summary, the *Crop Liens Act*, *Bills of Sale Act*, *Moneylenders Act*, *Fair Trading Decree* and *Sale of Goods Act* each provide a measure of regulation. However the legislation sometimes overlaps. For example, the *Bills of Sale Act* regulates crops not covered by *Crop Liens Act* and misrepresentation and/or unconscionable conduct is regulated in the *Fair Trading Decree*, *Small Claims Tribunal Act*, *Money Lenders Act* and *Sale of Goods Act*. The existence of the legislation is possibly not very apparent for example lay by sales are regulated in the *Sale of Goods Act*.

D. REFORM ALTERNATIVES

Alternative 1.

- Repeal *Crop Liens Act*, *Bills Of Sale Act*, *Money Lenders Act*.
- Enact a *Credit Act* to cover the substantive regulation of the provision of all credit by way of credit cards, hire purchase, lease, secured and unsecured loans, crop liens, guarantees etc to consumers, farmers and other primary producers to which all lenders, including banks, will be subject.

- Update the *Sale of Goods Act* provisions relating to Lay-by Sales and cross reference the implied terms provisions in the *Fair Trading Decree*.
- Enact regulations under the *Sale of Goods Act* prescribing standard form agreements for eg. hire-purchases, sales of goods and/or legibility and comprehensibility of documents.
- Upgrade the resources available to enforce and monitor the *Fair Trading Decree* and the new *Credit Act*.
- Undertake a public education program to ensure awareness of the Small Claims Tribunal's powers and of the civil remedies (including defences to enforcement actions) available under the *Fair Trading Decree* to consumers.

Alternative 2.

- amend *Crop Liens Act* and *Bills of Sale Act* to provide consistency.
- enact a *Hire Purchase and Finance Leases Act* to govern substantive provisions and remedies.
- update the *Money Lenders Act* and remove all exemptions of lenders so that the provision of all credit in trade or commerce is regulated and is consistent with the *Fair Trading Decree*.
- update *Sale of Goods Act* re lay-by sales as (1) above.
- upgrade resources as in (1) above.
- public education as in (1) above.

The first alternative has the advantages of:

- a reduction in the number of pieces of legislation.
- the *Credit Act* of Australia could be used as the basis of the new all-encompassing Act with the benefit of familiarity to the major foreign banks in Fiji.
- the appearance of a "fresh start".

The second method has the advantages of:

- existing legislation stays in place for *Bills of Sale* and *Crop Liens* (except for the registration provisions);
- a *Hire Purchase Bill* for Fiji is already in draft form and could be amended to include finance leases;
- credit cards, loans and other financial transactions could be amply covered by the existing *Money Lenders Act* (with some other amendments) if all lenders and finance providers were subject to its terms.

E. PUBLIC COMMENTS

The Commission welcomes written submissions from all interested persons in response to the issues raised in this discussion paper.

Submissions should be forwarded by **19th December 1997** to:

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Level 7 Dominion House
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FIJI LAW REFORM
COMMISSION

DISCUSSION PAPER 2

Securities over Personal Property

**FIJI LAW REFORM COMMISSION
DISCUSSION PAPER
SECURITIES OVER PERSONAL PROPERTY**

A. EXISTING SYSTEM IN FIJI

From preliminary discussions held during 1997 with representatives of financiers, retailers and consumer representatives and the Registrar of Titles it is apparent that there is a need for a computerised single system to record security type transactions in relation to personal property.

In the absence of any other facility financiers are currently lodging agreements and credit contracts under s8 of the *Registration Act* with a view to obtaining benefits under that Act of priority, notice and secondary evidence. Further, security over specified company property requires registration under the *Companies Act* and securities over certain crops must be registered under the *Crop Liens Act*, securities over chattels stock and other crops are required to be registered under the *Bills of Sale Act* and security over patents and copyright are registered under the *Patents Act* and *Copyright Act* respectively.

The introduction of a comprehensive and mandatory system for registration of all security type transactions relating to property other than land will provide protection for financiers, enable efficient and economical registration and searching and provide protection for purchasers and subsequent financiers, particularly in the event of bankruptcy or insolvency.

B. OUTLINE OF OBJECTIVES

- To provide a single computerised central register of all security type interests over all property other than land eg. consumer credit contracts, hire purchase, leases, mortgages, title retention clauses over eg. furniture, vehicles, ships, patents, debts, insurance policies, shares, crops, cattle, stock in trade.
- To enable persons intending to deal with such property to search the register by computer using the name of the borrower and/or any identifying number of the property eg. a car registration number, patent registration number.
- To enable lodgment of finance statements rather than whole documents.

C. IMPACT ON CURRENT LEGISLATION

- Repeal *Bills of Sale Act* Cap 225
- Repeal *Companies Act* provisions on Charges over company property ss98-108
- Repeal *Crop Liens Act* Cap 226
- Amend *Registration Act* to the extent that it applies to securities over personal property
- Amend *Patents, Trade Marks, Copyright Acts* re registration of security

Amend *Bankruptcy Act* to provide that on bankruptcy or insolvency of a company an unregistered security interest is inoperative as a security although the financier may prove as an unsecured creditor.

D. CONTENT OF PROPOSED NEW LEGISLATION

(a) Personal Property Register

- Establish computerised register of security interests by simple form of financing statement
- Provide for searching of register
- Provide for effects of non-registration:
 - (i) Voidness on bankruptcy/insolvency
 - (ii) Loss of priority against competing securities

Provide for registered discharge of securities including automatic removal after time lapse.

- Provide for notification on register of enforcement action.

(b) Consumer Protection in Credit Transactions

In addition to the need to rationalise the registry systems in Fiji, there is a need for reform of the substantive law relating to the acquisition of personal property on credit and the provision of credit to consumers, small business, and farmers.

This is discussed in the related paper on Consumer Credit and Hire Purchase and involves incorporating, expanding and redefining protections for borrowers which currently appear to some extent in the *Bills of Sale Act* and *Crop Liens Act*.

E. FORM OF PROPOSED NEW LEGISLATION

There are currently a number of regimes which provide for the registration of securities over personal property in various countries which, in the interests of closer economic relations with trading partners, could be used as a model for Fiji. There is also considerable international interest in reform of this area of the law to facilitate the taking of effective security over property which moves across borders (eg. aircraft) or whose location for the purposes of the application of national laws is difficult to determine (eg. where is a debt located? - if the proper law to apply to transfer or security over a debt is the place of residence or business of the debtor, the result may be a totally impractical and uncommercial application of the law of multiple jurisdictions to a portfolio of receivables owed to a single lender).

The principal models are:

- North American "Article 9" models (USA - Canada Acts and NZ draft)
- Australian Law Reform draft bill.
- European Bank for Reconstruction and Development model law for developing nations.

The essential and common characteristics of the international models are:

- a single register
- computerised
- name indexed by borrower
- asset indexed for identifiable assets such as cars, ships, farm machinery etc.
- multiple search and registration locations including in relatively remote areas.
- simple finance statement to be filed (not whole documents)
- limited registration time (eg. 5 years) with automatic removal unless extended.
- covers all borrowers, (corporations, natural persons, partnerships etc.)
- covers all transactions with a security purpose (eg. time payment contracts, mortgages, floating charges, leases for more than one year, hire purchase, title retention contracts etc.).
- covers all property other than land (eg. stock in trade, debts, motor vehicles, aircraft, ships, copyright, patents, furniture, stock, crops and farm machinery).
- gives priority by time of registration.
- unregistered securities are void in particular events such as bankruptcy, liquidation or certain other events.
- registration is not required for possessory securities.

F. RESOURCE IMPLICATIONS

Fiji currently has a number of registries:

- The Registrar of Titles administers registries relating to Torrens system land under the *Land Transfer Act* and relating to general law land under the *Registration Act*, including Native Leases and Crown Leases.
- The Registrar also registers Crop Liens under the *Crop Liens Act*.
- Bills of Sale are also registered through the Registrar's Office.
- Deeds of any type including those relating to hire purchase, lease or credit contracts relating to chattels are also registered under the *Registration Act* by the Registrar.
- Company Charges are registered under the *Companies Act*.

The introduction of a single computerised register would alleviate to some extent the present problems in the Titles Office. If documents relating to personal property securities were no longer filed in that registry the historical records would appear to be reduced by around 10% and the current workload by up to 25%.

Depending on the workload of the Companies registry, the single personal property system could subsume this register and be administered through that office with remote locations via other established government offices. The principal resource requirement is an appropriate computer system and training or upgrading of skills of existing staff.

G. PUBLIC COMMENTS

A draft bill is in the course of preparation and comments on this discussion paper would be of great benefit to the Commission before the proposed draft bill is itself circulated for comment in early 1998.

Submissions should be forwarded by **19th December 1997** to:

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FIJI LAW REFORM
COMMISSION

DISCUSSION PAPER 3

The Law of Bankruptcy of Persons
and Insolvency of Companies

**FIJI LAW REFORM COMMISSION
DISCUSSION PAPER
THE LAW OF BANKRUPTCY OF PERSONS
AND INSOLVENCY OF COMPANIES**

The Law Reform Commission of Fiji has received a reference from the Attorney General of Fiji to consider the reform of the law relating to, amongst other areas, bankruptcy and insolvency of companies.

A. THE CURRENT LEGAL STRUCTURE IN FIJI

The law in Fiji currently deals with the law of bankruptcy of natural persons under the *Bankruptcy Act* and the insolvency of companies under the *Companies Act* which includes by reference some of the *Bankruptcy Act* provisions. Both personal and corporate insolvencies are administered through the office of the Official Receiver in Bankruptcy.

The duality and inter-reaction of the two legislative regimes raises the initial issue of whether Fiji should adopt a single legislative system for the administration of the estates of bankrupt persons and insolvent companies as has been done recently in the United Kingdom. The alternative is to deal with current problems by amendment of the existing enactments as has been done in Australia.

The determination of the most appropriate overall legislative structure may be influenced by resource issues such as:

- whether the Official Receiver's Office is to continue to administer the winding up of insolvent companies as well as personal bankruptcies;
- whether the Companies Office will function principally as a registry office;
- whether adequate resources, particularly staff, are to be made available in either the Official Receivers Office or the Companies Office;
- whether there is sufficient work in Fiji to support private trustees in bankruptcy and liquidators or other insolvency practitioners such as administrators, receivers and managers.

Balance has to be achieved between the role of public officials such as the official Receiver who functions at public cost and the role and potential role of private insolvency practitioners whose costs are recouped from the insolvent estate or who are directly paid and/or indemnified by the creditors. Reform initiatives must take account of resource needs and of the commercial viability of alternative procedures.

B. CURRENT BANKRUPTCY LAW IN FIJI

The principal features of the *Bankruptcy Act* which appear to be causing concern to the public and/or the administration are:

- a bankruptcy petition can be presented to the court for any debt or debts which total \$100;
- immediately on a bankruptcy petition being filed after an act of bankruptcy, the court may make a receiving order for the protection of the estate of the debtor;
- on the making of a receiving order the official receiver becomes the receiver of the property of the debtor and debt recovery (except for secured creditors) and all legal proceedings are prohibited without leave of the Court;
- a meeting of creditors must be held
- a statement of affairs is to be filed and a public examination of the debtor must be held;
- thereafter, unless a composition or scheme of arrangement is approved by the meeting of creditors, the court adjudges the debtor bankrupt and the property becomes divisible amongst creditors and a trustee is appointed (either "some fit person" or the official receiver);
- discharge from bankruptcy can be ordered by the court after application by the bankrupt provided that the bankrupt can pay 50 cents in the dollar on all debts;

C. BANKRUPTCY STATISTICS

- There are 307 persons in Fiji who are currently subject to receiving orders;
- There are (information not available) persons in Fiji who are currently bankrupt;
- There are (information not available) persons in Fiji who are currently subject to compositions or arrangements with their creditors under the Bankruptcy Act;
- Discharges in the last 3 years were:

1994 - 31
1995 - 24
1996 - 50

- Total indebtedness of bankrupts is:

??? below \$500]	
??? below \$1,000]	
??? below \$5,000]	(information not available)
??? below \$10,000]	
??? above \$10,000]	

D. BANKRUPTCY SOCIAL ISSUES

After discussions with the Official Receiver and/or his officers, consumer interest groups, financiers and the media it is apparent that there are a number of important social issues which flow from either the current law or the practice of creditors and debtors.

- There is a perception at least that the low threshold (a \$100 debt) for bankruptcy encourages the use of the bankruptcy process for the collection of debts at the expense of government through the use of the Official Receiver's position during the currency of a receiving order and if bankruptcy ensues, as the trustee or as the supervising officer of trustees.
- The processes relating to the period prior to the hearing of the bankruptcy petition are time consuming, expensive and largely unproductive in the majority of cases.
- The requirements for discharge mean that in practice most bankrupts die as bankrupts.
- Recovery of property disposed of by debtors in anticipation of bankruptcy proceedings is difficult, time consuming, costly and often unsuccessful.

E. IMPRISONMENT OF DEBTORS

The *Debtors Act* enables the arrest and imprisonment of persons who fail to make certain payments eg. penalties, payments out of salary pursuant to court order, amounts recoverable summarily before a magistrate and, where the debtor has the means to pay but refuses so to do, judgment debts. Under this Act absconding defendants may also be arrested and imprisoned until bail or security for the claimed sum is provided. Personal property of defendants who seek to avoid satisfaction of a judgment by removing that property from Fiji may be taken into custody by the sheriff on order of the Court to be held as security for the claim. Whilst imprisoned the plaintiff (in the case of an absconding debtor) or the judgment creditor is required to pay a daily sum for the sustenance of the prisoner which is added to the debt.

The *Debtors Act* represents the historical approach to indebtedness and does not sit well with the *Bankruptcy Act* and the practice of most other common law jurisdictions. The *Bankruptcy Act* in s25 provides for arrest of debtors after issue of a bankruptcy notice or presentation of a bankruptcy petition or for failure to attend any court ordered examination or for removing goods after service of a bankruptcy petition.

The issue for consideration is whether imprisonment for debt should continue to be available at the investigation of creditors or whether the powers in the *Bankruptcy Act* and the inherent jurisdiction of the Courts to punish contempt of court and to issue "Mareva" injunctions to preclude removal of assets pending litigation are sufficient to deal with insolvent or recalcitrant debtors. Particular reference should be made to the *Small Claims Tribunal Decree* which, in section 38, provides for imprisonment of persons for, amongst other things, wilfully disobeying a tribunal order but which specifically excludes this process in relation to orders for the payment of money to creditors.

F. DEEDS REGISTRATION

The registration of deeds legislation currently provides for registration of deeds and guarantees to bankers to be registered for execution. This process, which is apparently not being used, has the potential for direct enforcement by administrative officers at the cost of government on the request of private parties without court process. Repeal of these provisions is recommended.

G. REFORM PROPOSALS

To alleviate the problems briefly noted above while protecting existing and future creditors of an insolvent person, it would appear to be essential to amend the *Bankruptcy Act* and at the same time it would be necessary to introduce a comprehensive register of security interests over personal property as canvassed in the Commission's associated discussion paper on that topic and to provide for substantive regulation of the provision of credit to consumers, small business and farmers as canvassed in the Commission's paper on Consumer Credit and Hire Purchase.

- (a) In that context it is suggested that the following basic reforms of the *Bankruptcy Act* be considered:
- increase the debt limit to \$2,000.
 - remove the receiving order process and replace it with a non-bankruptcy process for small estates (\$2,000 to \$5,000) and provide for compositions and arrangements without bankruptcy for most insolvent debtors.
 - provide for automatic discharge from bankruptcy 3 years after the debtor files the required statement of affairs and subject to objection by the official receiver and/or trustee.
 - revamp the provisions relating to income contributions by bankrupts.
 - provide for more effective administrative recovery of antecedent and post bankruptcy recovery of assets from related entities and other third parties.
 - avoid securities (including hire purchase, leases etc.) which are not registered under the personal property securities law.
 - consider removing the first priority position of Crown taxes, local rates and Crown rents in the distribution of assets.
 - establish a register of persons qualified to act as Trustees in Bankruptcy.
- (b) It is further recommended that the *Debtors Act* be repealed and the *Registration Act* be amended to exclude registration for execution.

H. CURRENT COMPANY INSOLVENCY LAW IN FIJI

Insolvent companies may be wound up by the High Court under the *Companies Act*, principally under section 220 (g) where "the company is unable to pay its debts". This is deemed to have occurred if either it is:

- (a) proved to the satisfaction of the court after taking into account contingent and prospective liabilities; or
- (b) shown that a court order or judgment in favour of a creditor is unable to be satisfied by execution or other process; or
- (c) established that a debt of more than \$100 remains unpaid or unsecured for 3 weeks after a notice to pay has been served on the debtor company's registered office.

A petition for winding up is presented to the court usually by the creditor who served the notice of demand and the court may either appoint an interim liquidator or make a winding up order and appoint a liquidator.

There are no qualification requirements or disqualification criteria for liquidators (except a prohibition on companies acting as liquidators, and bribery). A liquidator must however provide security to the satisfaction of the Official Receiver and notify the Registrar of his/her appointment. The legislation envisages, and it is the practice, that the Official Receiver in Bankruptcy will most frequently be appointed as liquidator. The Official Receiver has a full range of supervisory, investigative reporting and management duties including supervision of any third party liquidator.

Where the Official Receiver is acting as liquidator or provisional liquidator the Court may under section 259 appoint a special manager to the company with broad powers including those of a receiver or manager where the Court is satisfied that the nature of business or property of the company or the interests of creditors or members require it.

Both the provisions relating to proof of debts and priorities and those relating to dispositions of property and other pre-petition payments and transfers are principally dealt with by reference to the relevant *Bankruptcy Act* provisions.

Officers and former officers of a company being wound up may be guilty of a range of offences under sections 319, 321 and 324 which involve in the most serious offences establishing fraud or the intent to defraud creditors.

I. INSOLVENCY STATISTICS

- Winding up petitions in the last 3 years:

1994 - 167

1995 - 172

1996 - 211

- Winding up orders made in the last 3 years:

1994 - 44

1995 - 47

1996 - 53

- Official Receiver appointed as liquidator in the last 3 years:

1994 - 44

1995 - 47

1996 - 53

- Compositions or arrangements in the last 3 years:

1994]

1995] (information not available)

1996]

- Provisional Liquidator appointed in last 3 years:

1994 - 44

1995 - 47

1996 - 53

- Officers prosecuted in last 3 years:

1994]

1995] (information not available)

1996]

- Officers or third parties required to contribute assets or money to the insolvent estate:

1994]

1995] (information not available)

1996]

- Dividends paid to unsecured creditors in 1996:

0	-	10c in \$1]	
11c	-	25c in \$1]	
26c	-	50c in \$1]	(information not available)
51c	-	85c in \$1]	
85c	-	\$1 in \$1]	

J. COMPANY INSOLVENCY SOCIAL ISSUES

An effective, efficient and just system for the winding up of insolvent companies is needed to instil confidence in a business community. Such a system should also provide for the rejuvenation of ailing companies where feasible. It must also discourage the proliferation of corporate managers, promoters or officers who use the corporate structure to avoid personal liability for fraudulent, reckless or dishonest conduct.

Available statistics support the common perception that the winding up process is being utilised as a debt collection mechanism at considerable cost of the court system. A rough figure of 1 in 3 petitions results in a winding up order.

The making of a winding up order places the burden of investigation of offences, recovery of assets, administration, management and sale of assets and the business of the company in the hands of the Official Receiver whose office is widely regarded as insufficiently staffed to effectively handle, with its other duties, the doubling of winding up orders in the period 1995 through 1996.

K. INSOLVENCY REFORM PROPOSALS

If a whole new *Insolvency Act* to encompass both personal bankruptcy and corporate insolvency is to be enacted, the UK model could be adapted to Fiji. However, the current issues in Fiji may also be adequately addressed by amendments to the *Companies Act* which:

- increase the debt limit to \$2,000;
- require any challenges to the amount, or existence, of the debt in the statutory notice of demand to be instituted within the 3 weeks currency of the demand and not otherwise to prevent petitions based on disputed debts;
- provide for qualifications of liquidators, disqualifying factors such as relationships with the company and registration;
- amplify the powers, duties and protection of special managers under section 259 to enable "work-outs" to occur without liquidation or introduce a voluntary administration process for this purpose (as in Australia).
- introduce specific provisions for the recovery of property of insolvent companies prior to winding up, in particular from related entities;

- strengthen provisions imposing personal liability on directors for trading whilst the company is insolvent;
- broaden the categories of charges which are required to be registered to be effective against a liquidator to all security-type transactions (including leases, hire purchase, title retention) against all types of personal property as discussed in the commission's Discussion Paper on Personal Property Securities.

PUBLIC COMMENTS

The Commission welcomes written submissions from all interested persons in response to the issues raised in this discussion paper or in relation to any other issues relating to the reform of the law of Bankruptcy and Insolvency.

Submissions should be forwarded by **19th December 1997** to:

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