

# **Appendices**

## **Standard documentation for implementation of a compromise**

**By Robert B Walker**

**September 2010**

\_\_\_\_\_ LIMITED

**NOTICE OF MEETING OF CREDITORS TO CONSIDER A PROPOSAL FOR COMPROMISE FOR  
\_\_\_\_\_ LIMITED UNDER PART XIV OF THE COMPANIES ACT 1993**

**TAKE NOTICE** that Mr \_\_\_\_\_, director of \_\_\_\_\_ Limited (the Company) and proponent of a compromise under Part XIV of the Companies Act 1993, hereby in accordance with of clause 2 of Schedule 5 of the Companies Act 1993 (the 5<sup>th</sup> Schedule) hereby convenes an assembly of creditors or classes of creditors as the case may be in accordance with clause 1(a) of the 5<sup>th</sup> Schedule.

1. The meeting will take place at [address].

2. The time and date of the meeting will be: the XX day of May 2009 at XX am / pm.

**TAKE NOTICE** that the business to be transacted at the meetings of classes of creditors is to consider the Proposal for Compromise as set out in the document entitled **“Proposed compromise with creditors of the Company pursuant to Part XIV Companies Act 1993 as proposed by the directors of the company forming the basis of a resolution to be put to creditors.”** (Schedule XX) together with such information as is set out in the Information Memorandum (Schedule XX).

The resolutions to be put to each class of creditor are as follows:

**Resolution 1**

It is resolved that the Proposal for Compromise the terms of which are set out in Schedule XX be adopted.

**Resolution 2**

It is resolved that the membership of the Committee of Creditors be XX, XX and XX.

**TAKE NOTICE** that there is attached as Schedule XX a voting paper together with such instructions as are necessary for completion of the voting paper.

**TAKE NOTICE** that voting will only take place in the assembly of creditors convened under clause 1(a) of the 5<sup>th</sup> Schedule. Creditors unable attend are entitled to be represented by proxy. A proxy form is attached as Schedule XX.

\_\_\_\_\_ LIMITED

**CREDITORS' MEETING: BALLOT PAPER**

I \_\_\_\_\_ [name] of  
\_\_\_\_\_ [name of creditor] hereby being duly  
authorised to vote at a meeting of creditors of the company known as  
\_\_\_\_\_ Limited vote as follows:

RESOLUTION 1

**That the terms of the Proposal as set out in:**

Tick one	
	Agree
	Disagree
	Abstain

RESOLUTION 2

That the membership of that committee be one representative from the following: XX,  
XX

Tick one	
	Agree
	Disagree
	Abstain

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 201Y  
\_\_\_\_\_ signature

**To be returned no later than the \_\_\_\_\_<sup>th</sup> day of \_\_\_\_\_ 201Y to:**

I hereby appoint \_\_\_\_\_ as proxy to vote on my behalf in  
respect to the above resolution. In the event that the terms of the proposal are varied I  
hereby empower the holder of my proxy to accept such variation on my behalf.

Note: Persons who may be appointed proxy are:

Mr \_\_\_\_\_, director or such other person as you know will attend the meeting,  
being

Mr \_\_\_\_\_

\_\_\_\_\_ LIMITED  
PROPOSAL FOR COMPROMISE UNDER PART XIV OF THE COMPANIES ACT 1993

**Name and address of the proponent**

The proponent is the board of directors of \_\_\_\_\_ Limited ('the Company'). The board comprises the sole director Mr \_\_\_\_\_. Mr \_\_\_\_\_ has appointed Mr Robert B Walker Chartered Accountant to facilitate the compromise proposal on the board's behalf.

**Contact details**

\_\_\_\_\_ Chartered Accountant can be contacted as follows.

Phone        04 \_\_\_\_\_  
E mail        \_\_\_\_\_  
Address      PO Box XXX Wellington

**Terms of the proposal**

This proposal is to be put to a meeting of the class of creditors known as the unsecured, unpreferred creditors as set out in Schedule A. The terms of the proposal are as set out in the attached document. This proposal is subject to amendment by creditors at the meeting held to vote on its acceptance. The proposal, as suitably modified, will be put to secured creditors (Schedule B creditors) and preferred but unsecured creditors (Schedule C creditors). Voting within each class of creditors will take place contemporaneously.

**Information memorandum**

The attached information memorandum needs to be read in conjunction with this proposal. It provides certain information required to be provided in accordance with Part XIV of the Companies Act 1993, including:

- Contact details of persons involved.
- Terms of the proposal.
- Reasons for the proposal.
- Consequences for creditors.

**Proposal is binding**

To be approved the proposal needs to be supported by 75%, by number and value, of creditors voting on the proposal within each class of creditors. The proposal, if approved, will bind the creditors.

**Details by which the proposal will be varied**

If approved, the compromise can be varied by a unanimous resolution by the creditors committee. This is subject to over-rule by a full meeting of creditors. A full meeting of creditors can vary the compromise in accordance with the 5<sup>th</sup> Schedule to the Companies Act 1993.

## OUTLINE OF PROPOSAL FOR COMPROMISE

\_\_\_\_\_ LIMITED  
("Company")

### Proposed compromise with creditors of the Company pursuant to Part XIV Companies Act 1993 as proposed by the directors of the company forming the basis of a resolution to be put to creditors

In consideration of the following matters, unsecured creditors listed in Schedule A currently owed money by the company will agree to a moratorium on that indebtedness on terms that:

*Either* [**Reschedule debt**]

1. The sums due to those creditors listed in Schedule A as at 31 March 201Y will no longer be at call but will be repayable in [one year *or* by installment [detail] from the date of the proposal] (the repayment date(s)).

*Either*

2. The sums payable on the repayment date(s) will carry interest at a rate of X%, compounding annually.

*Or*

2. Interest of other late payment penalties will be remitted by the creditors listed in Schedule A and all such interest or penalties will be suspended unto the repayment date(s).
3. The Company retains the entitlement to repay indebtedness earlier than the repayment date(s).

*Or* [**Issue shares**]

1. The Company will issue shares ranking equally with all other shares in issue on the basis of [1 share] for each dollar of debt owed by the Company as set out in Schedule A.
4. Mr \_\_\_\_\_ Chartered Accountant will be appointed as Special Advisor to the Company for the purpose of restructuring of its affairs in conjunction with the director Mr \_\_\_\_\_ .
5. Payment of the fees of the Special Advisor are to take priority in accordance with the fee budget set out in Schedule B.

6. Aside from the special arrangement set out in clause 3 of the Proposal, the Company will continue to pay such costs as are necessarily incurred from the purpose of [continuing to trade].
7. A Committee of Creditors be established and that the membership is that listed in the third resolution as set out in the Notice of Meeting.
8. The compromise is conditional upon:
  - Mr \_\_\_\_\_, proposing director and general manager agreeing to continuing to work of the Company.
  - The continuing supply of goods and services to the Company by creditors, landlords and other suppliers.
  - All encumbrances held by [the director(s) family or other interests] over assets necessary to operate the business will be extinguished with effect from the date the compromise is approved.
9. [If relevant] The Company will agree to prepare a variance report of projected cash flows at the end of each natural quarter.
10. If the business of the Company does not reach a level of [profitability or cash flow] to the satisfaction of the creditor's committee within a period of 12 months, the Compromise will terminate. The Company may be put into liquidation for which purpose the proposing director, Mr \_\_\_\_\_, undertakes to ensure that sufficient votes are controlled to enable a liquidator to be appointed on that date by way of a shareholders resolution. [The liquidator may immediately call for \_\_\_\_\_ Limited to repay its outstanding debts to creditors notwithstanding what is elsewhere agreed in the meeting to consider this proposal.]

*[Note: the last sentence of clause 10 will not be possible if shares are issued in lieu of unsettled debt.]*

11. The Committee of Creditors by unanimous resolution at a properly constituted meeting of the Committee are able to vary the terms of the compromise as it sees fit. Any creditor can seek to over-rule such variation by convening a meeting of creditors in accordance with the 5<sup>th</sup> Schedule to the Companies Act 1993, provided the creditor meets the incidental costs of doing so. For this purpose all creditors have a right to be provided with names and addresses of all creditors. Otherwise the compromise can be varied by a creditors meeting held in accordance with the 5<sup>th</sup> Schedule to the Companies Act. Such a meeting can be convened by a member of the Committee of Creditors at the Company's expense or otherwise by any other creditor at their own expense.

**Schedule A**  
**Unsecured and unpreferred creditors entitled to vote**

Name of creditor	Value of debt	%

**Schedule B**  
**Fee Budget**





Table 1 presents a summarised financial position for the Company for the years 31 March 201X and 201Y. This is drawn from the statutory financial statements for the Company. These are available on request.

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#### FUTURE PROSPECTS FOR THE BUSINESS AND CRITICAL SUCCESS FACTORS

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#### FORECAST FINANCIAL INFORMATION

Table 2 presents a quarterly forecast cash flow for the year to 31 March 201Z.

#### AN OVERVIEW OF THE COMPROMISE PROCESS

The compromise process is prescribed in Part XIV of the Companies Act 1993. Any compromise proposal is accepted entirely at the discretion of the creditors.

The Companies Act outlines a procedure which revolves around a creditors meeting. The proponent, which in this case is the board of The Company, is required to convene a meeting of creditors. There are a number of formalities to attend to in terms of providing information to the creditors and organising the meeting.

In general the proposal will be accepted if 75% (being a super-majority) of creditors by number and value vote in favour. At this point all of the creditors will be bound by the compromise. Each creditor will have a single vote per person and a value based vote such as the value of their claim bears to the overall value of claims against the Company.

The Companies Act requires that the interests of creditors with differing rights are recognised. Where creditors have differing rights of such magnitude that they constitute a different class, then the proposal needs to be approved within that class by a separate vote. A clear distinction between classes of creditors is whether the creditor is secured or not. Another class distinction that it may be wise to recognise is that between preferred, but unsecured, creditors and ordinary creditors. These distinctions have been recognised in the convening of meetings for consideration of the compromise proposal.

The Companies Act does not provide for it, but a condition of the proposal can be that a committee of creditors can be established to represent the interests of the creditors. It is not essential to have the process approved by the Court. So as to avoid any doubt this step may be taken, if the creditors committee so determine.

#### SPECIFIC DETAIL OF THE PROPOSAL

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#### PRO-FORMA FORECAST STATEMENT OF FINANCIAL POSITION

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## ADVANTAGES AND DISADVANTAGES OF A COMPROMISE FOR CREDITORS

The main advantage for creditors in the compromise is that they get the chance to recover their debts due from trading the business into the future. Some creditors also get the opportunity to continue selling to the business.

It is highly likely that in the event the business is forced to shut down then unsecured creditors will not recover any of the sums due to them. In addition to the likely decline in asset values from going concern value upon liquidation, there are a number of persons who would be preferred on liquidation. These include the Inland Revenue, the staff and the liquidator. Such sums as are or will be due to these persons are not known. It is possible, however, that such sums would exceed realisations.

The advantage, then, for unsecured creditors in the proposal is that they stand to recover some or all of their claims by the continued trading of the business.

The disadvantages for the creditors relate to the rights that they surrender by allowing the proposal to proceed. Creditors have a number of rights which can be exercised directly or through a liquidator in the event of a company being put into liquidation. These rights include:

- Taking action to avoid priorities of charge or payment.
- Taking action against directors for breach of duties of one sort or another.

Certain transactions into which a company enters can be voided in certain circumstances. This can result in those who have been paid paying having such sums clawed back for redistribution to other creditors. Claims of this nature are generally time sensitive – meaning that such claims become either impossible or less easy to enforce as time passes. The longer a compromise goes, the less easy it will be to access proceeds of avoidance.

Many potential claims against directors for a variety of reasons are time sensitive by virtue of the Limitation Act. However, for practical purposes that is not likely to be a material factor in the considering the advantages and disadvantages of the proposal. It should be noted that the act of arranging a compromise would be raised in mitigation for a claim of director's breach of duty as the compromise is a way of attending to the interests of creditors which the case law suggests is the obligation of a director upon insolvency.

For those creditors who may be preferred in liquidation, their preferential rights may be impaired by a compromise.

The position with respect to tax and GST write off for the bad debts will need to be considered in each case. It is possible, however, that the existence of the compromise and the associated forecasts invalidates any one creditor's claim for a bad debt write off.

Liquidation entails an investigation of the affairs of the Company for a variety of reasons not least the obligation that is imposed on liquidators to report breaches of the Crimes Act, the Companies Act and the Financial Reporting Act in accordance with section 258A of the Companies Act. In the event that the Company's compromise is successful such inquiry will not take place.

#### DIRECTOR'S INTERESTS

The director will maintain his rights as shareholder in the Company.

In the event that sufficient cash is realized some or all of the director's current account will be settled.

The director benefits by escaping any potential personal responsibility that arises in a liquidation for the current state of affairs.

#### PERSONNEL INVOLVED IN THE COMPROMISE

The sole director responsible for the compromise is Mr \_\_\_\_\_. His contact details are as follows:

**Phone**

**Address**

**E mail**

The Board of The Company has appointed \_\_\_\_\_ Chartered Accountant of Wellington to facilitate the compromise proposal. His contact details are as follows:

**Phone** 04

**Address** PO Box XXX Wellington

**E mail**

\_\_\_\_\_ 2010

The Directors  
\_\_\_\_\_ Limited

\_\_\_\_\_ LIMITED (THE COMPANY): PROPOSED COMPROMISE

**Introduction**

The purpose of this letter is to outline our role in the proposed compromise for the Company, including seeking authority to act.

**Background**

The Company has reached a position where it is unable to meet its debts as they fall due.

The directors have three possible approaches to dealing with the Company's insolvency:

- To put the Company into liquidation.
- To ask the bank to put the Company into receivership.
- To arrange a compromise.

The first two options are problematic. In both the first and second case it is likely that liquidation will destroy any value that the Company has in its assets.

A compromise has been suggested and, in principle, the directors are happy to proceed with this option.

**Our role**

[We note that we have been introduced to you by the X Limited. It is important to appreciate that we consider our first responsibility to be the X Limited. We do not envisage there being any conflict arising from this loyalty. However, in the event that X Limited's interest conflicts with yours as directors, other creditors or the Company itself we will identify this to you with a view to resolution].

We will act as facilitators to the compromise proposal. In this capacity we will do the following:

- We will formulate the documentation for the compromise proposal, including the incorporation of financial information.
- We will negotiate with certain creditors to the extent that is necessary.

- We will attend the assembly of creditors and prepare minutes of decisions made.
- We will assist you, on a best endeavours basis, to review the financial forecasts for inclusion in the documentation. We accept no responsibility for these documents and no indication shall be given to any person that such responsibility is in any way accepted.

### **Your role**

You are the official with the formal role in proposing the compromise. That is, you are proponent for the compromise proposal. In that capacity you retain overall responsibility for the content of the proposal documentation. We will use our best endeavours to ensure that the information is realistic and reasonably accurate. However, as the information is derived from you and you retain ultimate right of approval, we can accept no financial responsibility in respect to the any representations made to you or anyone else.

In particular, you are solely responsible for financial information, past and future, included in the [Information Memorandum].

In undertaking a compromise it is crucial that all liabilities are identified and properly valued. It is your responsibility to undertake this task. So far as practical, we will assist you in determining the quantum of liabilities. We will not undertake an audit or other forms of due diligence.

We will provide continuing services to the Company as required. In particular we will review results and advise the creditors committee of our views.

### **Fees**

We will charge fees to a value of up to \$XX per hour for the author of this letter, up to \$XX per hour for senior staff or those cast in that role, and up to \$XX per hour for junior staff. We reserve the right to charge less as we see fit.

We draw your attention to the fees resolution service offered by the NZ Institute of Chartered Accountants in the unlikely event that there is a dispute over fees.

You need to appreciate that a compromise may entail encountering difficult legal issues which are beyond our competence to deal with. We reserve the right to seek legal advice as appropriate. You will be responsible for meeting the cost which arises. Any need for legal advice will be notified to you before any expense is incurred.

### **Work Papers and other Materials**

We will retain ownership of and intellectual property rights to all generic documents and papers originated by ourselves. We believe it appropriate in the circumstances that all completed documentation and working papers should be available to be inspected by creditors subject to the compromise so far as this is consistent with statutory rights held by those creditors and others. We expect you to concur with this view.

If we can be of further assistance, please advise.

Yours faithfully

\_\_\_\_\_

Accepted by:

\_\_\_\_\_ [name]

Dated: \_\_\_\_\_

\_\_\_\_\_ 2010

\_\_\_\_\_  
Chartered Accountant  
PO Box  
**WELLINGTON**

\_\_\_\_\_ **LIMITED: PROPOSED COMPROMISE**

Thank you for your letter of \_\_\_\_\_ outlining the various matters which need to be considered in formulating a compromise in respect to the Company.

We understand that there may be risks associated with initiating the process. However, we believe it is in the best interests of all stakeholders that a compromise is proposed.

We accept that we are the principals responsible for the making of the proposal to the creditors. For this purpose we appoint you, \_\_\_\_\_, to be our advisor in preparing the plan to be put to the creditors.

In respect to the financial and other information, we accept that such is solely our responsibility. However, we expect you to have exercised due professional care in its compilation so far as you are involved.

We appreciate that creditors, including the Crown and the bank, must be approached before a proposal is put to establish whether it is likely to be accepted or not. For this purpose we wish for you to act as our agents. We accept that approaching the creditors in this way may result in those creditors taking debt recovery action of their own.

Save for the above we accept the terms and conditions of your letter of \_\_\_\_\_ and we have signed a copy of that letter to indicate our assent. We confirm that we have the authority to do so and have entered a minute to the formal record of board meetings to that effect.

Yours faithfully

\_\_\_\_\_