

General Scheme

Small Company Administrative Rescue Process and Miscellaneous Provisions Bill 2021

This document has no legal effect. It contains proposals for the Small Company Administrative Rescue Process. Draft legislation will be prepared on the basis of these proposals, for presentation to the Oireachtas and enactment.

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Chapter 1 – Preliminary and general

Head 1 – Short title and commencement

Provide that:

- (1) This Act may be cited as the Companies (Small Company Administrative Rescue Process) Act 2021.
- (2) This Act shall come into operation on such day or days as the Minister may appoint by order or orders either generally or with reference to any particular purpose or provision and different days may be so appointed for different purposes or different provisions.

Explanatory note:

This Head is a standard provision. Since the enactment of the Companies Act 2014, the policy has been to maintain that citation. Therefore, this General Scheme is prepared with the intention that the final Act will be integrated into the Companies Act 2014 as a new Part 10A, without the need to change that citation.

Head 2 - Interpretation

Provide that:

For the purpose of this Part -

“court” means the court chosen in accordance with Head 16;

“period of the process” means the time from the passing of a resolution to appoint a process advisor in accordance with Head 9 to the conclusion of the process and which shall be for a period not exceeding 70 days contingent on no applications being made to court;

“excludable debt” refers to any:

- (a) liability of the debtor arising out of any tax, duty, levy or other charge of a similar nature owed or payable to the State, or
- (b) the debtor liability of the debtor arising under the Social Welfare Consolidation Act 2005.

“process advisor” means a person qualified under Head 8;

“micro company” means a company as defined by section 280D of the Act of 2014 but excluding any company regulated by the Central Bank;

“small company” means a company as defined by section 280A of the Act of 2014 but excluding any company regulated by the Central Bank;

“small company administrative rescue process” means the process provided for under Part 10A of the Companies Act.

Explanatory note

This is a standard provision. While the final Act will be integrated into the Companies Act 2014 and as such the definitions of the Companies Act will automatically apply to the new Part 10A, there is also requirement for local definitions specific to this Part. Further definitions may become necessary during the drafting process.

Chapter 2 – Appointment of process advisor

Head 3 – Eligibility criteria

Provide that:

- (1) Subject to the provisions of this Part, a company shall be eligible to enter the small company administrative rescue process provided it satisfies the following criteria –
 - (a) that the company is a small or micro company within the meaning of this Part;
 - (b) that the company is, or is likely to be, unable to pay its debts,
 - (c) that no resolution subsists for the winding up of the company,
 - (d) that no order has been made for the winding up of the company, and
 - (e) that the company has not availed of the small company administrative rescue process in the preceding 5 calendar years.

- (2) For the purposes of this section, a company is unable to pay its debts if -
 - (a) it is unable to pay its debts as they fall due,
 - (b) the value of its assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities, or
 - (c) the circumstances set out in section 570(a), (b) or (c) are applicable to the company.

Explanatory note

This head sets out the eligibility criteria for companies seeking to avail of the Small Company Administrative Rescue Process.

Firstly, the process is only available to small and micro companies as defined in Head 1. Research demonstrates that the cost associated with examinership may be prohibitive for such companies thus creating a barrier in terms of access to rescue for them.

Secondly, in keeping with existing entry requirements to examinership subsection (1)(b) provides that a company must be unable or likely to be unable to pay its debts. Subsection (1)(c) and (d) also mirror the entry criteria for examinership and provide that a company may not enter the Small Company Administrative Rescue Process in circumstances where there is a resolution or order for the winding up of the company. This mirrors section 509 of the Companies Act.

Subsection (2) provides the circumstances within which a company is deemed unable to pay its debts. Again, this mirrors the equivalent provision in section 509(3) provided for in examinership.

Head 4 – Pre entry requirements

Provide that:

- (1) A company that is eligible to use the small company administrative rescue process shall, before passing a resolution to commence the process, comply with this section.
- (2) A director of a company to which subsection (1) applies shall make a full inquiry into the affairs of the company and prepare a statement as to the affairs of the company in the prescribed form, by statutory declaration which statement shall be submitted to the process advisor.
- (3) The statement referred to in subsection (2) shall show –
 - (a) particulars of the company's assets, debts and liabilities,
 - (b) the names, residences and occupations of the company's creditors,
 - (c) the securities held by those creditors respectively,
 - (d) the date when those securities were respectively given, and
 - (e) such further or other information as may be prescribed.
- (4) Following receipt of the statement referred to in subsection (2), the process advisor shall hold a meeting with the directors of the company and
 - (a) advise, on the basis of the statement of affairs, whether there is a reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern and the company is therefore suitable for entry to the small company administrative rescue process, which advice the process advisor shall confirm in writing to the directors of the company, and
 - (b) where the advice is that there is a reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern, shall provide the company with a report in accordance with Head 5, and such report shall be based on the statement of affairs provided by the company.
- (5) Where any untrue statement has been included in the statement of affairs referred to in subsection (3), any director of the company who is in default shall be guilty of a category 2 offence.
- (6) In any proceedings against a person in respect of an offence under subsection (5), it shall be a defence to prove that, having exercised all reasonable skill and care, the defendant had reasonable grounds for believing and did, up to the time of the issue of the document concerned, believe that the statement concerned was true.
- (7) Where a process advisor is of the opinion that the facts disclosed in accordance with subsection (2) would warrant further inquiries with a view to proceedings under sections 610 and 611 or section 722, he or she shall –
 - (a) report such matters in accordance with Head 57, and
 - (b) note such matters in his or her report.

Explanatory note

This section details the steps a company must take in advance of passing a resolution to enter the small company administrative rescue process.

Subsection (2) provides that the company must prepare a written statement of the company's affairs which details information in relation to its creditors, debtors, liabilities and assets. Further information may be prescribed by the Minister in accordance with section 2 of the Companies Act.

In accordance with subsection (3), this statement must be made by statutory declaration. This is to impress upon the directors of the company preparing the statement the importance of completing this exercise accurately and honestly. Subsection (3) models section 431(1) in relation to the statement of affairs prepared by a receiver.

Subsection (4) provides that when the process advisor receives the statement, he or she must determine, on the basis of the information supplied by the company directors, whether or not the company has a reasonable prospect of survival. Once the process advisor forms their opinion, they must meet with the company and advise them of this fact. Such information must also be confirmed in writing.

Subsection (5) provides that where a company provides false or misleading information to the process advisor, the company and every officer of it in default shall be guilty of a category 2 offence and shall be liable:

- (a) on summary conviction, to a class A fine or imprisonment for a term not exceeding 12 months or both, or
- (b) on conviction on indictment, to a fine not exceeding €50,000 or imprisonment for a term not exceeding 5 years or both.

This is considered an appropriate penalty given that entry to the small company administrative rescue process is contingent on the information provided at this point.

Subsection (6) provides a defence in relation to the offence provided at subsection (5).

Subsection (7) is modelled on section 447 of the Companies Act which concerns the prosecution of criminal offences committed by officers and members of the company. It provides that the process advisor must report behaviour he or she consider requiring further investigation by the Director of Public Prosecutions or the Director of Corporate Enforcement.

Head 5 – Process Advisors Report

Provide that:

- (1) A statement by the process advisor that in his or her opinion, and on the basis of the statement of affairs provided to him or her in accordance with Head 4, he or she is satisfied that there is a reasonable prospect of survival of the company and the whole or any part of its undertaking as a going concern, shall be accompanied by a report.
- (2) The report of the process advisor shall comprise the following:
 - (a) the names and addresses of the officers of the company,
 - (b) that the company is a small or micro company,
 - (c) that the company is, or is likely to be, unable to pay its debts,
 - (d) that no resolution subsists for the winding up of the company,
 - (e) that no order has been made for the winding up of the company,
 - (f) that the company has not availed of the small company administrative rescue process in the preceding five calendar years,
 - (g) the names of any other bodies corporate of which the directors of the company are also directors,
 - (h) a statement as to the affairs of the company, showing in so far as it is reasonably possible to do so, particulars of the company's assets and liabilities (including contingent and prospective liabilities) as at the latest practicable date, the names and addresses of its creditors, the securities held by each of them and the dates when the securities were given to each of them,
 - (i) his or her opinion as to whether any deficiency between the assets and liabilities of the company has been satisfactorily accounted for or, if not, as to whether there is evidence of a substantial disappearance of property that is not adequately accounted for,
 - (j) his or her opinion as to whether the company, and the whole or any part of its undertaking, would have a reasonable prospect of survival as a going concern and a statement of the conditions which he or she considers are essential to ensure such survival, whether as regards the internal management and controls of the company or otherwise,
 - (k) his or her opinion as to whether the formulation, acceptance and confirmation of proposals for a compromise or scheme of arrangement would offer a reasonable prospect of survival of the company, and the whole or any part of its undertaking as a going concern,
 - (l) his or her opinion as to whether an attempt to continue the whole or any part of the undertaking would be likely to be more advantageous to the members as a whole than a winding up of the company,
 - (m) recommendations as to the course he or she thinks should be taken in relation to the company including, if warranted, draft proposals for a compromise or scheme of arrangement,
 - (n) details of the extent of funding required to enable the company continue trading for the duration of the process and the sources of that funding,
 - (o) his or her recommendations as to which liabilities incurred before the presentation of the petition should be paid,
 - (p) information relating to the procedure involved in, and general effect of, including the likely costs, using the small company administrative rescue process,

- (q) recommendation as to the relevant court in accordance with Head 15,
- (r) information relating to the fee arrangements and other considerations of appointment,
- (s) such other matters as he or she thinks relevant, and
- (t) such information as may be prescribed.

Explanatory note

This Head mirrors section 511 of the Companies Act 2014 in relation to the report provided by the independent expert in examinership. In addition to this, the process advisor is required to confirm that the company meets the eligibility criteria set out at Head 3. It also provides that the process advisor provides practical details on the process, general costs and fee arrangements.

This part of the process is akin to a pre-appointment consultation and ensures that the directors of the companies are fully aware of the effect of passing a resolution to appoint a process advisor. At this point of the process, the process advisor is acting in a consultancy capacity having not yet been formally appointed and is merely providing professional advice.

Head 6 - Effect on receiver or provisional liquidator on appointment of process advisor

Provide that:

- (1) Where, at the date of the passing of a resolution to appoint a process advisor, a receiver stands appointed to the whole or any part of the property or undertaking of that company, the company may seek direction from the court as to the status of the receiver's appointment.
- (2) The court may make such order as it thinks fit, including an order as to any or all of the following matters:
 - (a) that the receiver shall cease to act as such from a date specified by the court;
 - (b) that the receiver shall, from a date specified by the court, act as such only in respect of certain assets specified by the court;
 - (c) directing the receiver to deliver all books, papers and other records, which relate to the property or undertaking of the company (or any part of it) and are in his or her possession or control, to the process advisor within a period to be specified by the court;
 - (d) directing the receiver to give the process advisor full particulars of all his or her dealings with the property or undertaking of the company.
- (3) Where, at the date of the passing of a resolution to appoint a process advisor, a provisional liquidator stands appointed to that company, the company may seek direction from the court as to the status of the liquidator's appointment.
- (4) The court may make such order as it thinks fit, including an order as to any or all of the following matters:
 - (a) that the provisional liquidator shall cease to act as such from a date specified by the court;
 - (b) directing the provisional liquidator to deliver all books, papers and other records, which relate to the property or undertaking of the company (or any part of it) and are in his or her possession or control, to the process advisor within a period to be specified by the court;
 - (c) directing the provisional liquidator to give the process advisor full particulars of all his or her dealings with the property or undertaking of the company.
- (5) The court shall not make an order under subsection (2)(a) or (b) or subsection (4)(c) unless the court is satisfied that there is a reasonable prospect of the survival of the company, and the whole or any part of its undertaking.
- (6) Where the court makes an order under subsection (2) or (4), it may, for the purpose of giving full effect to the order, include such conditions in the order and make such ancillary or other orders as it deems fit.
- (7) Any application made under this section shall be on notice to the creditors of the company.

Explanatory note

This Head governs the effect on a pre-existing receiver or provisional liquidator of a resolution appointing a process advisor. It is modelled on section 522 of the Companies Act.

Subsections (1) and (2) provide that, if a receiver stands appointed to a company in respect of which a process advisor has been appointed, the court may make any order it sees fit, including requiring the receiver to cease to act or to act only in respect of certain assets. The receiver can also be directed to deliver books, papers and records relating to the company property to the process advisor and to give the process advisor full details of all his or her dealings with the property of the company.

Subsections (2) and (3) provide that if a provisional liquidator is appointed to a company in respect of which a process advisor has been appointed, the court may make any order it sees fit, including directing the provisional liquidator to provide information, books, papers and records to the process advisor along with full particulars of his or her dealings with the company. To make an order under this section directing the receiver or provisional liquidator to cease to act, or directing the receiver to act only in respect of certain assets, the court must be satisfied that the company has a reasonable prospect of survival.

Under subsection (5) when considering whether the company has a reasonable prospect of survival, the court will have due regard to the process advisor's report under Head 5.

Subsection (6) provides that the court may make such ancillary orders as it thinks fit.

Finally, subsection (7) provides that any application made under this section shall be made on notice to creditors.

Head 7 – Duty to act in utmost good faith

Provide that:

- (1) Where a director of the company has -
 - (a) failed to disclose any information available to him or her which is material to the exercise by the process advisor of his or her functions under this Part, or
 - (b) in any other way failed to exercise utmost good faith,the director shall be guilty of a category 2 offence.

Explanatory note

This Head provides that those using the small company administrative rescue process have a duty to act in utmost good faith. This means they have a statutory duty to act honestly.

Subsection (1) provides that where a director of a company fails to give information available to him or her which is required by the process advisor to carry out his or her functions, then the officer will be guilty of category 2 offence. It further provides that a director shall also be guilty of a category 2 offence where he or she in any other way failed to exercise utmost good faith throughout the process.

Head 8 – Qualification of Process Advisor

Provide that:

- (1) A person shall not be qualified to be appointed or act as a process advisor of a company unless he or she would be qualified to act as its liquidator.
- (2) A person who acts as a process advisor when he or she is not qualified to do so under subsection (1) shall be guilty of a category 2 offence.

Explanatory note

Section 633 of the Companies Act 2014 sets out the qualifications for appointment as liquidator or provisional liquidator. There are 5 categories of persons who qualify to act as a liquidator:

1. Members of a prescribed accountancy body,
2. Practising solicitors,
3. Member of another professional body recognised by IAASA for the purposes of this section,
4. Persons entitled to act as a liquidator under the laws of another EEA state,
5. Persons with practical experience of windings up and knowledge of the relevant law ('grandfathering' provision). (This provision expired on 2017.)

Under the Companies Act, only an individual who is qualified to act as a liquidator may act as an examiner. In order to ensure alignment of qualification amongst practitioners of the various insolvency processes, a process advisor must also be an individual qualified to act as a liquidator.

Subsection (2) provides that where a person acts as a process advisor without the appropriate qualification, he or she shall be guilty of a category 2 offence. This is in keeping with section 634(4) of the Companies Act with regard to liquidators.

Head 9 – Commencement

Provide that:

- (1) Where a process advisor provides a statement in the report under Head 5 and confirms that there is a reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern, a meeting of the board of directors shall be convened at which the following resolutions shall be proposed –
 - (a) formally appoint the process advisor,
 - (b) issue a notice of the suspension of payments for the period of the process,
 - (c) commence or continue discussions with creditors, andsuch resolutions shall be passed as soon as is practicable and not more than 7 days following the date of receipt of the process advisor’s report.

- (2) A resolution to appoint a process advisor shall –
 - (a) be filed with the office of the relevant court in accordance with Head 10,
 - (b) be notified to creditors in accordance with Head 11,
 - (c) be delivered to the Registrar in accordance with Head 13, and
 - (d) be publicly advertised in accordance with Head 14.

Explanatory note

Head 9 deals with a company’s obligations once a process advisor confirms that it has a reasonable prospect of survival in accordance with Head 5.

Subsection (1) provides that on receipt of the process advisor’s report, directors of the company must convene a meeting of the board of directors and pass resolutions to formally appoint the process advisor, issue a notice of the suspension of payments of debt for the period of the process and to commence or continue discussions with creditors.

Subsection (2) provides that a resolution to appoint a process advisor must be notified to the relevant court, creditors, Companies Registration Office and be publicly advertised in accordance with the relevant Heads listed.

Head 10 – Notification to relevant court

Provide that:

- (1) Where a company has passed resolutions in accordance with Head 9, the process advisor shall –
 - (a) file such resolutions with the office of the relevant court, and
 - (b) such resolutions shall be accompanied by a copy of the process advisor's statement and report referred to in Head 5,
as soon as is practicable and not more than 48 hours after the passing of such resolutions.

- (2) If default is made in complying with this section, the process advisor shall be guilty of a category 3 offence.

Explanatory note

Head 10 provides that the resolutions passed in accordance with Head 9, including to appoint a process advisor, must be filed with the office of the relevant court. The resolutions must be filed within 48 hours of the passing of the resolutions and be accompanied by the process advisor's report and statement referred to in Head 5.

Subsection (2) provides that where a process advisor fails to do this, he or she shall be guilty of category 3 offence. A person guilty of a category 3 offence shall be liable, on summary conviction, to a class A fine or imprisonment for a term not exceeding 6 months or both.

The Small Company Administrative Rescue Process has limited court involvement where creditors are engaged in the process and positively disposed to a rescue plan. However, there are certain issues which will require an application to court, for example, in the event a company seeks to restrain proceedings or repudiate a contract. By filing notice with the court, this means there is an existing file and future applications will be more seamless. This is a practical step and is not intended to confer any supervisory function or authority on the court at this point.

Head 11 – Notification to creditors

Provide that:

- (1) Where a company has passed resolutions in accordance with Head 9 -
 - (a) the process advisor shall give notice in the prescribed form of –
 - (i) the suspension of payment of debts,
 - (ii) the payments necessary to the continuance of the business, and
 - (iii) the appointment of the process advisor, and
 - (b) such notice shall be accompanied by a copy of the process advisor’s statement and report referred to in Head 5 and request for information in subsection (2), as soon as is practicable and not more than 48 hours after the passing of such resolutions, in accordance with this section.
- (2) The process advisor shall send a request for information in the prescribed form, and such form shall request, inter alia, the following -
 - (a) Confirmation of the nature of the creditor’s claim,
 - (b) Documentation to support the creditor’s claim,
 - (c) Details of credit terms,
 - (d) Details of any security held over the assets of the company and any retention of title claims,
 - (e) Details of any related party transactions with the company,
 - (f) Information the creditor considers material to the preparation of a rescue plan in accordance with Head 30, and
 - (g) Such further details which may be prescribed.
- (3) Subject to subsection (4) notice shall be sent to -
 - (a) Revenue Commissioners,
 - (b) Employees of the company
 - (c) Creditors of the company and
 - (d) Any other persons who may be prescribed.
- (4) Notice shall be sent –
 - (a) By electronic means where an email address for electronic communications has been furnished, or
 - (b) Where no such address has been furnished or where a failed delivery notification is received, by registered post to -
 - (i) in the case of a person, the address at which the person ordinarily resides or in a case which an address for correspondence has been furnished, to that address,
 - (ii) in the case of company at its registered office, and
 - (iii) every other body corporate and every unincorporated body at its principal office or place of business.
- (5) A process advisor shall retain records demonstrating, as may be required, that notice was issued in accordance with this section.
- (6) If default is made in complying with this section, the company concerned and any officer of it who is in default shall be guilty of a category 3 offence.

- (7) The Minister may, if he or she considers it appropriate, by regulations make further provision for all or any of the following in relation to notification requirements under this section –
- (a) the detail to be contained in such notice, and
 - (b) the documentation to accompany such notice.

Explanatory note

Head 11 deals with notice requirements in respect of creditors. The intent of this provision is to ensure that those with an interest in the company are fully aware of what is happening and have access to all relevant information at an early stage in the process.

Subsection (1) sets out the information the company is required to give notice of to the creditors. Notice must be given in the prescribed form with 48 hours of passing a resolution in accordance with Head 9. The notice must also be accompanied by the process advisor's report and statement referred to in Head 5.

Subsection (2) provides that a process advisor must write to all creditors and afford them the opportunity to provide information in relation to the nature of their claim and to provide any information they think the process advisor should have before preparing a rescue plan for the company. This provides creditors with an opportunity to raise concerns with the process advisor at an early stage and provides the process advisor with a more complete overview of the company's affairs.

Subsection (3) details who this notice must be sent to and provides that further persons may be prescribed.

Subsection (4) provides that notice must be sent by email where an email address has been provided or by registered post in circumstances where an email address has not been provided or where a failed delivery notification is received. Issuing the notice by email or by registered post acts as a safeguard for creditors.

Subsection (5) provides that a company must retain documentation to demonstrate that the notice was issued in accordance with subsection (4).

Subsection (6) provides that where there is a default in complying with the notice obligations of this section the company and any officer in default shall be guilty of a category 3 offence.

Finally, subsection (7) provides the Minister with regulation making power to amend the detail of the notice requirements and further provide for the detail of the notice and documentation to accompany the notice. This allows for flexibility should there be any operational issues arising.

Head 12 - Supplemental provisions in relation to Head 11

Provide that:

- (1) Where a creditor receives a request in accordance with Head 11, he or she shall -
 - (a) confirm receipt of such request in writing, as soon as is practicable and no more than 7 days from receipt of the request, and
 - (b) comply with the request for information no more than 14 days from receipt of the request.

- (2) Where a creditor fails to comply with subsection (1)(a) within 7 days, the process advisor shall -
 - (a) by electronic means where an email address for electronic communications has been furnished, or
 - (b) where no such address has been provided or where a failed delivery notification is received, by registered post to -
 - (i) in the case of a person, the address at which the person ordinarily resides or in a case which an address for correspondence has been furnished, to that address,
 - (ii) in the case of company at its registered office, and
 - (iii) every other body corporate and every unincorporated body at its principal office or place of business, and

issue a reminder and request confirmation of receipt within 72 hours.

- (3) Where a creditor fails to comply with a request under subsection (2), the creditor shall be deemed to have received the request.

- (4) Where creditors have provided information in accordance with Head 11(2), such information shall be taken into consideration by the process advisor when preparing his or her rescue plan in accordance with Head 30.

- (5) Where a process advisor is of the opinion that the information disclosed in accordance with Head 11(2) would warrant further inquiries with a view to proceedings under sections 610 and 611 or section 722, he or she shall report such matters in accordance with Head 57.

- (6) A process advisor shall retain records demonstrating as may be required that a request for information was issued in accordance with this section.

- (7) If default is made in complying with this section a process advisor shall be guilty of a category 3 offence.

Explanatory note

Head 12 provides for supplementary information in relation to Head 11.

Subsection (1) provides that where a creditor receives a request for information from a process advisor, he or she shall confirm receipt of this request as soon as is practicable and no more than 7

days from receipt. It also sets out that a creditor has 14 days within which to provide the information requested.

Subsection (2) provides that where a creditor does not comply with the requirement set out in subsection (1)(a) and fails to confirm receipt of the notice, there is an obligation on the process advisor to issue a reminder. The stringent notification requirements are seen as essential in the Small Company Administrative Rescue Process as there is no State entity with overall responsibility for coordinating the process.

Subsection (3) provides that where a creditor fails to confirm receipt of the notice following receipt of the reminder, he or she shall be deemed to have received it.

Where creditors provide the process advisor with information in accordance with Head 11(2), subsection (4) provides that the process advisor must take such information into account when preparing a rescue plan for the company in accordance with Head 30.

Subsection (5) provides that where the process advisor is of the opinion that any of the facts disclosed by creditors as part of this process warrant further investigation under sections 610, 611 or 722, he or she is obliged to report this in accordance with Head 57.

Subsection (6) provides that the process advisor must retain documents to demonstrate that he or she complied with their obligations under this section.

Subsection (7) provides that where a process advisor fails to comply with this section, he or she shall be guilty of a category 3 offence in accordance with subsection (5).

Head 13 – Notice to Registrar

Provide that:

- (1) Where a company has passed a resolution to appoint a process advisor, the process advisor shall, within 48 hours of the passing of the resolution, deliver to the Registrar a notice of such appointment in the prescribed form.

- (2) If default is made in complying with this section, the company and every officer of it in default shall be guilty of a category 3 offence.

Explanatory note

Head 13 provides that a resolution passed to appoint a process advisor must be delivered to the Registrar within 48 hours of the passing of the resolution.

Where default is made in complying with this section, a company and any officer in default will be guilty of a category 3 offence.

Head 14 – Publication of appointment of process advisor

Provide that:

- (1) Where a company has passed a resolution to appoint a process advisor, the process advisor shall cause notification of his or her appointment to be publicly advertised in accordance with this section.
- (2) Notice shall be advertised in the prescribed form on the company's website (and such information shall be in a prominent and easily accessible place on it) within 48 hours of the passing of a resolution to appoint a process advisor in accordance with Head 9 and such notice shall remain on the website for the period of the process.
- (3) The process advisor shall, within 48 hours after the date of the passing of the resolution, cause notice of the resolution to be issued to Iris Oifigiúil for publication.
- (4) The process advisor shall retain records demonstrating as may be required that notice was issued in accordance with this section.
- (5) If default is made in complying with this section, the process advisor shall be guilty of category 3 offence.

Explanatory note

Head 14 provides that a company must publicly advertise the appointment of a process advisor. The intent of the Head is to ensure those with an interest in the company are aware of its entry to the Small Company Administrative Rescue Process. General advertisement of the appointment acts as a further administrative safeguard by making this information readily available to creditors publicly.

Subsection (2) provides that notice must be advertised in a prominent position on the company's website within 48 hours of passing a resolution in accordance with Head 9. This notice must be in the prescribed form. It is intended that the notice on the website shall clearly state that a process advisor has been appointed, give contact details for the process advisor and plainly detail the process involved i.e. an indicative timeline for creditors noting when they should expect to hear from the process advisor, etc.

Subsection (3) provides that the process advisor must cause the notice to be published in Iris Oifigiúil within 48 hours of passing a resolution in accordance with Head 9.

Subsection (4) provides that the process advisor must keep documentation which proves that the notice was correctly advertised.

Subsection (5) sets out the category of offence where the process advisor fails to comply with this Head.

Head 15 – Court

Provide that:

- (1) For the purposes of this Part, it shall be at the discretion of the process advisor in consultation with the directors of the company to determine whether the circuit or high court shall be the relevant court.
- (2) All references to the court in this Part shall, as respects powers and jurisdiction with respect to a small company administrative rescue process, be read in accordance with the decision under subsection (1).

Explanatory note

Head 15 deals with the court jurisdiction. It provides that it shall be at the discretion of the process advisor in consultation with the directors of the company whether the circuit or high court shall have jurisdiction to hear matters in relation to the company concerned. The court chosen in accordance with this section shall be the court to which all applications are made throughout the process.

Head 16 – Court’s power to stay proceedings or restrain further proceedings

Provide that:

- (1) This section applies to a company to which a process advisor has been appointed.
- (2) Where this section applies the court may, on the application of any of the persons referred to in subsection (3),
 - (a) stay proceedings or restrain further proceedings against the company, or
 - (b) provide that the following provisions shall have effect -
 - (i) no proceedings for the winding up of the company may be commenced or resolution for winding up passed in relation to the company and any resolution so passed shall have no effect;
 - (ii) no receiver over any part of the property or undertaking of the company shall be appointed, or, if so appointed before the presentation of a petition shall, subject to Head 6, be able to act;
 - (iii) no attachment, sequestration, distress or execution shall be put into force against the property or effects of the company, except with the consent of the process advisor;
 - (iv) where any claim against the company is secured by a mortgage, charge, lien or other encumbrance or a pledge of, on or affecting the whole or any part of the property, effects or income of the company, no action may be taken to realise the whole or any part of that security, except with the consent of the process advisor;
 - (v) no steps may be taken to repossess goods in the company’s possession under any hire-purchase agreement (within the meaning of Head 24), except with the consent of the process advisor;
 - (vi) where, under any enactment, rule of law or otherwise, any person other than the company is liable to pay all or any part of the debts of the company—
 - (I) no attachment, sequestration, distress or execution shall be put into force against the property or effects of such person in respect of the debts of the company; and
 - (II) no proceedings of any sort may be commenced against such person in respect of the debts of the company;
 - (vii) no order for relief shall be made under section 212 against the company in respect of complaints as to the conduct of the affairs of the company or the exercise of the powers of the directors prior to the passing of the resolution.

for the period of the process or such other period as the court sees fit, having regard to subsection (6).

- (3) The persons referred to in subsection (2) are:
 - (a) the company,
 - (b) the directors of the company, and
 - (c) the process advisor.
- (4) Applications made under subsection (2) shall be made on notice to all relevant parties.

- (5) The court shall not make an order under subsection (2) without having afforded each creditor of the company who has indicated to the court his or her desire to be heard in the matter an opportunity to be so heard.
- (6) The court shall not make an order under this section unless it is of the opinion that there is a reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern and such opinion shall be informed by the report of the process advisor under Head 5 and such other matters as the court sees fit.

Explanatory note

Unlike examinership, commencement of the Small Company Administrative Rescue Process does not afford a company an automatic period of protection from creditors. However, a company may apply to the court for a stay on proceedings and thus avail of the court's protection.

Subsection (2) provides for two options for companies in respect of an application for a stay on proceedings. Paragraph (a) is modelled on section 451 as it relates to Part 9 Schemes of Arrangement. It will be suitable for companies seeking to stop an individual creditor from enforcing a debt which could jeopardise the rescue plan. Paragraph (b) is modelled on section 520(4) as it relates to examinership and provides for a full suite of court protection for the period of the process.

Subsection (3) sets out the persons who may make an application under this section.

Subsection (4) provides that applications under this section must be made on notice to all relevant parties.

Subsection (5) provides for the rights of creditors to be heard in relation to an application made.

Subsection (6) provides that the court will not make an order under this section unless the company has a reasonable prospect of survival.

Chapter 3 – Powers of the Process Advisor

Head 17 – Powers of a process advisor

Provide that:

- (1) Any provision of this Act relating to the rights and powers of a statutory auditor of a company and the supplying of information to and co-operation with such auditor shall, with the necessary modifications apply to a process advisor.
- (2) Notwithstanding any provision of this Act relating to notice of general meetings, a process advisor shall have power to convene, set the agenda for, and preside at meetings of the board of directors and general meetings of the company to which he or she is appointed and to propose motions or resolutions and to give reports to such meetings.
- (3) A process advisor shall be entitled to reasonable notice of, to attend and be heard at, all meetings of the board of directors of a company and all general meetings of the company to which he or she is appointed.
- (4) For the purpose of subsection (3) “reasonable notice” shall be deemed to include a description of the business to be transacted at any such meeting.
- (5) A process advisor has the power referred to in subsection (6) where he or she becomes aware of any actual or proposed act, omission, course of conduct, decision or contract by or on behalf of –
 - (a) the company to which he or she has been appointed,
 - (b) that company’s officers, employees, members or creditors, or
 - (c) any other person,in relation to the income, assets or liabilities of the company which, in the process advisor’s opinion, is or is likely to be to the detriment of the company, or any interested party.
- (6) That power of the process advisor is to take whatever steps are necessary, subject to the right of parties acquiring an interest in good faith and for value in such income, assets or liabilities, to halt, prevent or rectify the effects of such act, omission, course of conduct, decision or contract

Explanatory note

This Head sets out in detail the powers of the process advisor and is based on section 524 of the Companies Act 2014. It states that any provision of the Act which applies to the rights and powers of a statutory auditor and the supplying of information to and co-operation with such auditor will apply to a process advisor (with the necessary modifications).

Under subsections (2) and (3), the process advisor has the power to convene, set the agenda for and preside at meetings of the board of directors and general meetings of the company and may also

propose motions or resolutions and give reports to such meetings. They are entitled to receive notice of and be heard at all meetings of the board of directors and general meetings of the company.

Under subsections (5) and (6), the process advisor may take whatever steps are necessary to halt, prevent or rectify the effects of any act, omission, course of conduct, decision or contract in relation to the income, assets or liabilities of the company which is or is likely to be to the detriment of the company, or any interested party. This power of the process advisor is subject to the right of parties acquiring an interest in good faith and for value in such income, assets or liabilities of the company.

Further powers may be inserted following consultation with Advisory and Parliamentary Counsel during the drafting process.

Head 18 – Production of documents

Provide that:

- (1) It shall be the duty of the officers and agents of a company to which a process advisor has been appointed to –
 - (a) produce to the process advisor all books and documents of, or relating to, any such company which are in their custody or power,
 - (b) attend before the process advisor when required by the process advisor to do so, and
 - (c) otherwise give to the process advisor all assistance in connection with the process advisors functions which they are reasonably able to give.

- (2) If the process advisor considers that a person, other than officer or agent of any foregoing company, is or may be in possession of any information concerning the company's affairs, the process advisor may require that person to –
 - (a) Produce to the process advisor any books or documents in his or her custody or power relating to the company,
 - (b) Attend before the process advisor, and
 - (c) Otherwise give to the process advisor all assistance in connection with the process advisor's functions which that person is reasonably able to give,and it shall be the duty of that person to comply with the requirement.

- (3) If the process advisor has reasonable grounds for believing that a director of any foregoing company maintains or has maintained a bank account of any description, whether alone or jointly with another person or whether in the State or elsewhere, into or out of which money has been paid –
 - (a) Any money which has resulted from or been used in the financing of any transaction, arrangement or agreement particulars of which have not yet been disclosed in the financial statements of the company for any financial year as required by this Act, or
 - (b) Any money which has been in any way connected with any act or omission, or series of acts or omissions, which, on the part of that director, constituted misconduct (whether fraudulent or not) towards that company or its members, the process advisor may require the director to produce to the process advisor all documents in the director's possession, or under his or her control, relating to that bank account and it shall be the duty of the director to comply with that requirement.

- (4) In subsection (3) –

“bank account” includes an account with any person exempt by virtue of section 7(4) of the Central Bank Act 1971 from the requirement of holding a licence under section 9 of that Act;
“director” means –

 - (a) Any present or past director (including any present or past shadow director); and
 - (b) Any person connected, within the meaning of section 220, with such a director.

- (5) Section 795 shall apply for the purposes of this section as it applies for the purposes of Part 13 and, accordingly, for the purpose of this section, references in section 795 to Part 13, or relevant provisions of that Part, shall be read as references to this section.

- (6) In this section –

- (a) Any reference to officers or to agents includes a reference to past, as well as present, officers or agents, as the case may be.
- (b) “agents” in relation to a company, includes –
 - (i) The bankers and solicitors of the company; and
 - (ii) Any persons employed by the company as auditors, accountants, book keepers or taxation advisors, or other persons employed by it in a professional, consultancy or similar capacity, whether those persons are (or were) or are not (or were not) officers of the company.

Explanatory note

This Head governs the production of documents and evidence and is taken from section 526 of the Companies Act. The purpose of the section is to give broad powers to the process advisor in relation to the evidence which may be required and the persons from whom he or she may obtain documentation and information.

Under subsection (3), the process advisor has powers in relation to the investigation of a director's bank accounts, into which money has been paid arising from any transaction, arrangement or agreement between the director and the company which is disclosable in the company's financial statements under the Act but which was not so disclosed, or any money which is connected with any act or omission on the director's part which would amount to "misconduct".

Subsection (5) notes that section 795 of the Act applies for the purposes of this section as it applies for the purposes of Part 13 of the Act. Section 795 gives a saving for privileged legal material.

Subsection (6) provides for the full definition of “officers” and “agents” for the purpose of the section.

Head 19 – No lien over company’s books, records etc.

Provide that:

- (1) Without prejudice to subsection (2) and (3), where a company has passed a resolution in accordance with Head 9 to appoint a process advisor, no person shall be entitled as against the process advisor to -
 - (a) Withhold possession of –
 - (i) any deed, instrument or other document belonging to the company, or,
 - (ii) any accounting records, receipts, bills, invoices, or other papers of a like nature relating to the accounts or trade, dealings or business of the company, or
 - (b) Claim any lien on any document or paper referred to in paragraph (a).

- (2) Where a mortgage, charge or pledge has been created by the deposit of any such document or paper with a person, the production of the document or paper to the process advisor by the person shall not operate to prejudice the person’s rights under the mortgage, charge or pledge (other than any right to possession of the document or paper).

- (3) Where by virtue of this section a process advisor has possession of –
 - (a) Any documents or papers of a receiver, or
 - (b) An documents or papers that a receiver is entitled to examine,the process advisor shall, unless the court otherwise orders, make the document or papers available for inspection by the receiver at all reasonable times.

Explanatory note

Head 19 states that no person shall be entitled as against the process advisor to withhold possession of documents, deeds or records belonging to the company or to claim a lien over any such documents. This mirrors section 527 of the Companies Act 2014. The intent of the section is to ensure that advisors and other third parties cannot withhold possession of files or documents belonging to the company by exercising a lien over them as security for unpaid fees.

Head 20 – Power to apply to court for determination of questions or concerning exercise of powers

Provide that:

- (1) Each of the following:
 - (a) the process advisor;
 - (b) any contributory or creditor of the company;
 - (c) the Director;

may apply to the court to determine any question arising throughout the duration of the process (including any question in relation to any exercise of proposed exercise of any of the powers of the process advisor).

- (2) The court, if satisfied that the determination of the question will be just and equitable, may accede wholly or partially to such an application on such terms and conditions as it thinks fit or may make such other order on the application as it thinks just.

Explanatory note

Head 20 sets out the power to apply to the court for a determination in respect of the exercise of a process advisor's powers. It is drawn from section 631 of the Companies Act 2014.

Head 21 – Incurring of certain liabilities by process advisor

Provide that:

- (1) Any liabilities incurred by the company during the period of the process of the process which are specified in subsection (2) shall be treated as expenses properly incurred, for the purpose of Head 52, by the process advisor.

- (2) The liabilities referred to in subsection (1) are those certified in writing by the process advisor, at the time they are incurred, to have been incurred in circumstances where, in the opinion of the process advisor, the survival of the company as a going concern for the period of the process would otherwise be seriously prejudiced.

Explanatory note

Head 21 mirrors section 529 of the Companies Act 2014. It sets out the general rule that any liabilities incurred by the company from the appointment of the process advisor shall be treated as expenses of the process advisor. This allows the company to continue to trade during the process and encourages creditors, such as suppliers, to continue to engage with the company.

Head 22 – Repudiation

Provide that:

- (1) Where proposals for a rescue plan are to be formulated in relation to a company, a process advisor may, subject to the approval of the court, affirm or repudiate any contract under which some element of performance other than payment remains to be rendered both by the company and the other contracting party or parties.
- (2) Any person who suffers loss or damage as a result of such repudiation shall stand as an unsecured creditor for the amount of such loss or damage.
- (3) In order to facilitate the formulation, consideration or confirmation of a rescue plan, the court may hold a hearing and make an order determining the amount of any such loss or damage mentioned in subsection (2) and the amount so determined shall be due by the company to the creditor as a judgment debt.
- (4) Where the process advisor is not a party to an application to the court for the purposes of subsection (1), the company shall serve notice on the process advisor and the process advisor may appear and be heard on the hearing of any such application.
- (5) The court shall only grant approval for the affirmation or repudiation of any contract where such approval is considered necessary for the survival of the company and the whole or any part of its undertaking as a going concern.
- (6) Where the court approves the affirmation or repudiation of a contract under this section, it may, in giving such approval, including orders as to notice to or declaring the rights of, any party affected by such affirmation or repudiation.

Explanatory note

Head 22 mirrors section 537 of the Companies Act in respect of examinership. It allows the company, subject to court approval, to either formally accept or to reject certain uncompleted contracts to which it is party. Such an option only arises where proposals for a rescue plan are to be formulated in relation to the company.

Under subsection (2), any party to a contract which suffers loss or damage because it is repudiated becomes an unsecured creditor for the amount of such loss or damage.

Subsection (3) follows on from the previous subsections by providing that the courts may hold a hearing and make an order determining the amount of any loss or damage sustained by a party through the company repudiating a contract. Where the court makes such an order, the amount will become a judgment debt.

Under subsection (4), a process advisor is entitled to notice of any application to the court under this section and may also appear and be heard at the court hearing of the application.

Subsection (5) provides that the court will only give its approval for the repudiation or affirmation of a contract where it considers that such approval is necessary for the survival of the company.

Finally, subsection (6) operates to give maximum flexibility to the court to enable it make whatever order it sees fit to give effect to the company's proposed affirmation or repudiation of the contract, as appropriate.

Head 23 – Excludable debt

Provide that:

- (1) An excludable debt shall be included in a proposal for a rescue plan unless the creditor concerned objects on one of the following grounds –
 - (a) Where tax returns are outstanding,
 - (b) Where there is an ongoing tax audit or intervention,
 - (c) Where taxes are under appeal,
 - (d) Where there is a history of non-compliance with tax obligations, or
 - (e) Such other grounds as may be prescribed.
- (2) Where a process advisor proposes to include an excludable debt in a proposal for a rescue plan, he or she shall, without delay, notify the creditors concerned of that fact, which notification shall be accompanied by a request in writing that the creditor confirm, in writing, whether or not the creditor objects, for the purpose of this section, to the inclusion of the debt in a rescue plan and such objection shall specify one or more of the grounds referenced in subsection (1).
- (3) A creditor shall comply with a request under subsection (2) within 14 days of receipt of the notification under that subsection.
- (4) Where a creditor does not comply with subsection (3) the creditor shall be deemed to have consented to the inclusion of that debt in a proposal for a rescue plan.
- (5) Where a creditor consents or is deemed to have consented, in accordance with this section, to the inclusion of an excludable debt in a proposal for a rescue plan, that creditor shall be entitled to vote at any creditors' meeting called to consider that proposal.

Explanatory note

Head 23 provides for the treatment of excludable debts under the Small Company Administrative Rescue Process. The concept of excludable debt is drawn from section 92 of the Personal Insolvency Act 2012. However, unlike the Personal Insolvency Act where excludable creditors must opt in, here they must opt out on the basis of the grounds provided for in this section.

Subsection (1) provides that an excludable debt shall be included in proposals for a rescue plan unless the creditor opts out on one of the prescribed grounds.

Subsection (2) provides that where a process advisor proposes to include an excludable debt in a rescue plan, he or she must write to the creditor concerned and seek their confirmation as to whether or not they object to the inclusion of the debt.

Subsection (3) provides that the creditor must respond to this request within 14 days.

Subsection (4) provides that where a creditor does not comply with this request, they shall be deemed to have consented to the inclusion of the debt.

Subsection (5) provides that where a creditor is deemed to have consented to the inclusion of the debt, they shall be entitled to vote on the subsequent proposals for the rescue plan.

Head 24 – Power to deal with charged property, etc.

Provide that:

- (1) Where, on application by the process advisor, the court is satisfied that -
 - (a) the disposal (with or without other assets) of any property of the company concerned which is subject to a security which, as created, was a floating charge, or
 - (b) the exercise by the process advisor of his or her powers in relation to such property,

would be likely to facilitate the survival of the whole or any part of the company as a going concern, the court may by order authorise the process advisor to dispose of the property, or exercise his or her powers in relation to it, as the case may be, as if it were not subject to the security.

- (2) Where, on application by the process advisor, the court is satisfied that the disposal (with or without other assets) of -
 - (a) any property of the company concerned subject to a security other than a security to which subsection (1) applies, or
 - (b) any goods in the possession of the company concerned under a hire-purchase agreement,

would be likely to facilitate the survival of the whole or any part of the company as a going concern, the court may by order authorise the process advisor to dispose of the property as if it were not subject to the security or to dispose of the goods as if all rights of the owner under the hire-purchase agreement were vested in the company.

- (3) Where property is disposed of under subsection (1), the holder of the security shall have the same priority in respect of any property of the company directly or indirectly representing the property disposed of as he or she would have had in respect of the property subject to the security.

- (4) An order under subsection (2) shall include a condition that –
 - (a) the net proceeds of the disposal of the property or goods concerned; and
 - (b) where those proceeds are less than such amount as may be determined by the court to be the net amount which would be realised on a sale of the property or goods concerned in the open market by a willing vendor, such sums as may be required to make good the deficiency,

shall be applied towards discharging the sums secured by the security or payable under the hire-purchase agreement.

- (5) Where a condition imposed in pursuance of subsection (4) relates to 2 or more securities, that condition operates to require the net proceeds of the disposal and, where paragraph (b) of that subsection applies, the sums mentioned in that paragraph to be applied towards discharging the sums secured by those securities in the order of their priorities.

- (6) A certified copy of an order under subsection (1) or (2) in relation to a security shall, within 7 days after the date of the making of the order, be delivered by the process advisor to the Registrar.

- (7) If the process advisor, without reasonable excuse, fails to comply with subsection (6), he or she shall be guilty of a category 4 offence.
- (8) References in this section to a hire-purchase agreement include references to –
- (a) a conditional sale agreement;
 - (b) a retention of title agreement; and
 - (c) an agreement for the bailment of goods which is capable of subsisting for more than 3 months.

Explanatory note

Head 24 allows the court to authorise the process advisor to dispose of property and is drawn from section 530 of the Companies Act 2014. Subsections (1) and (2) enable the process advisor to dispose of assets which are subject to fixed or floating charges or hire-purchase agreements where such a disposal is likely to facilitate the survival of the whole or any part of the company as a going concern.

If the assets are disposed of under subsection (1), i.e. if they are subject to a floating charge, the holder of the charge will be deemed to have a corresponding security over any property of the company directly or indirectly representing the property disposed of. However, the proceeds received from the sale of property secured by a fixed charge, or of retained-title goods under subsection (2) shall be used to pay off whatever loans or debts they secure. This is an essential safeguard to ensure that the just entitlements of those who hold the charge or title in question are not compromised. If the proceeds of a disposal of property under subsection (2) are being used to pay off 2 or more loans or debts secured, this shall be done in order of the priority of the securities concerned.

Under subsection (6), the process advisor is required to notify the Registrar of the making of a court order authorising him or her to dispose of charged company property. Failure to comply with this requirement will be a category 4 offence under subsection (7).

Head 25 – Resignation of process advisor

Provide that:

- (1) Process advisor of a company may, by notice in writing that complies with subsection (3) served on the company and stating their intention to do so, resign from the position as process advisor to the company.
- (2) The resignation shall take effect on the date on which the notice is so served or on such later date as may be specified in the notice.
- (3) A notice under subsection (1) shall contain either—
 - (a) a statement to the effect that there are no circumstances connected with the resignation to which it relates that the process advisor concerned considers should be brought to the notice of the members or creditors of the company, or
 - (b) a statement of any such circumstances as mentioned in paragraph (a).
- (4) Where a notice under subsection (1) is served on a company—
 - (a) the process advisor concerned shall, within 14 days after the date of such service, send a copy of the notice to the Registrar and the office of the relevant court, and
 - (b) subject to subsection (6), the company shall, if the notice contains a statement referred to in subsection (3)(b), not later than 14 days after the date of such service, send a copy of the notice to every creditor in accordance with subsection (5).
- (5) The notice referred to in subsection (4)(b) shall be sent –
 - (a) by electronic means where an email address for electronic communications has been furnished, or
 - (b) where no such address has been provided or where a failed delivery notification is received, by registered post to -
 - (i) in the case of a person, the address at which the person ordinarily resides or in a case which an address for correspondence has been furnished, to that address,
 - (ii) in the case of company at its registered office, and
 - (iii) every other body corporate and every unincorporated body at its principal office or place of business.
- (6) Copies of a notice served on a company under subsection (1) need not be sent to the persons specified in subsection (4)(b) if, on the application of the company concerned or any other person who claims to be aggrieved, the court is satisfied that the notice contains material which has been included to secure needless publicity for defamatory matter and orders that that thing need not be done.
- (7) The court may order the company's costs on such an application to be paid in whole or in part by the process advisor concerned notwithstanding that they are not a party to the application.
- (8) Where there are circumstances connected with the resignation that the process advisor concerned considers would warrant further enquiries with a view to proceedings under sections 610 and 611 or section 722, he or she shall report such matters in accordance with Head 57.

- (9) Where the process advisor who fails to comply with this section shall be guilty of a category 3 offence.

Explanatory note

This Head sets out the general conditions that apply when a process advisor resigns from the position. It specifies the content of a statement which must be served on the company. This provision is drawn from section 400 as it relates to the resignation of statutory auditors.

Subsection (1) states that the process of advisor may resign from the position as process advisor if they serve a notice in writing on the company which complies with subsection (3) and states their intention to resign.

Subsection (2) states that the resignation shall take effect on the date on which the notice is served or on such later date as is specified in the notice.

Subsection (3) states that the notice referred to under subsection (1) shall contain either: (a) a statement to the effect that there are no circumstances connected with the resignation of the process advisor that they consider should be brought to the notice of the members or creditors of the company; or (b) a statement of any such circumstances.

Subsection (4) states that where a notice under subsection (1) is served on a company: (a) the process advisor shall send a copy of the notice to the Registrar and the office of the relevant court within 14 days of the date they served such notice on the company; and (b) subject to subsection (6), if the notice contains a statement of relevant circumstances as referred to in subsection (3)(b), the company shall, not later than 14 days after receiving the notice, send a copy of the notice to every creditor.

Subsection (5) provides for the manner in which the notice referred to in subsection (4)(b) is to be sent to creditors.

Subsection (6) states that copies of a notice served on a company under subsection (1) need not be sent to the persons specified in subsection (4)(b) if, on the application of the company concerned or any other person who claims to be aggrieved, the court is satisfied that the notice contains material which has been included to secure needless publicity for defamatory matter and orders that that thing need not be done.

Subsection (7) states that the court may order the company's costs to be paid, in whole or in part, by the process advisor.

Subsection (8) provides that where the process advisor is of the opinion that there are circumstances connected with his or her resignation that he or she considers would warrant further enquiries under sections 610, 611 or 722, he or she is obliged to report this in accordance with Head 57.

Subsection (9) states that a person who fails to comply with this section shall be guilty of a category 3 offence.

Head 26 – General provisions as to process advisors – filling of vacancy, etc.

Provide that:

- (1) Where a process advisor –
 - (a) dies,
 - (b) becomes incapable through ill-health or otherwise, of performing the functions of a process advisor as respects the company,
 - (c) resigns from the role of process advisor as respects the company,
 - (d) is no longer entitled to perform the functions of a process advisor under this Act,the company shall, as soon as is practicable after becoming aware of the fact, appoint another process advisor for the purpose of this Part.
- (2) The company shall notify all creditors of the appointment of a new process advisor and such notice shall be sent within 48 hours of such appointment –
 - (a) by electronic means where an email address for electronic communications has been furnished or
 - (b) where no such address has been provided or where a failed delivery notification is received, by registered post to -
 - (i) in the case of a person, the address at which the person ordinarily resides or in a case which an address for correspondence has been furnished, to that address,
 - (ii) in the case of company at its registered office, and
 - (iii) every other body corporate and every unincorporated body at its principal office or place of business.
- (3) A process advisor shall be described by the style of “the process advisor” of the particular company in respect of which he or she is appointed and not by his or her name.
- (4) The acts of a process advisor shall be valid notwithstanding any defects that may afterwards be discovered in his or her appointment or qualification.
- (5) A process advisor shall be personally liable on any contract entered into by him or her in the performance of his or her functions (whether such contract is entered into by the process advisor in the name of the company concerned or in his or her own name as process advisor or otherwise) unless the contract provides that he or she is not to be personally liable on such contract.
- (6) The process advisor shall, in respect of that personal liability, be entitled to indemnity out of the assets of the company concerned.
- (7) Nothing in subsection (7) or (8) shall be taken as limiting any right to indemnity which the process advisor would have apart from either subsection, or as limiting the process advisor’s liability on contracts entered into without authority or as conferring any right to indemnity in respect of that liability.

- (8) A company which has appointed a process advisor, or an interested party may apply to the court for the determination of any question arising out of the performance or otherwise by the process advisor of his or her functions.

Explanatory note

Head 26 contains general provisions of a procedural and technical nature relating to the actions of the process advisor. Provision is made for the resignation, removal, replacement, title and validation of actions of process advisors.

It draws from section 532 of the Companies Act 2014 with some nuancing to reflect the fact that the process advisor is appointed by way of passing of a resolution by the company directors rather than the court.

Head 27 – Report by process advisor

Provide that:

- (1) A process advisor shall –
 - (a) As soon as practicable after he or she is appointed, formulate proposals for a [rescue plan] in relation to the company concerned,
 - (b) Without prejudice to any other provision of this Act, perform such other functions as the court may direct the process advisor to perform.

- (2) The process advisor shall supply a copy of his or her report under this section –
 - (a) To the company concerned within 42 days of his or appointment,
 - (b) To any interested party on written application being made to him or her in that behalf, and
 - (c) To the office of the relevant court

- (3) The process advisor shall, as soon as may be after it is prepared, supply a copy of his or her report under this section to the Director of Corporate Enforcement.

- (4) If the court, on application to it in that behalf, directs that that supply may be the subject of such omission, there may be omitted from any copy of the report supplied under subsection (2)(b) to an interested party such parts of it as are specified in the direction of the court.

- (5) The court may, in particular, on such application, direct that there may be omitted from such a supply of a copy of the report any information the inclusion of which such a copy would be likely to prejudice the survival of the company or the whole or any part of its undertaking as a going concern.

Explanatory note

Head 27 derives from section 534 of the Companies Act 2014. It requires the process advisor to formulate rescue proposals for the company as soon as practicable after his or her appointment,

Subsection (2) provides that the process shall supply these proposals to the company concerned within 42 days of his or her appointment and to any interested party who requests a copy in writing. Subsection (3) provides that the report must also be furnished to the Director of Corporate Enforcement.

Subsections (4) and (5) set out the courts power to direct the omission of information from the report should it be likely to prejudice the survival of the company if made available. This allows for the redaction of commercially sensitive information etc.

Head 28 – Procedure where process advisor unable to secure arrangement or formulate proposals for compromise or scheme of arrangement or rescue plan

Provide that:

- (1) If a process advisor is not able to –
 - (a) Enter into an agreement with the interested parties and any other persons concerned in the matter, or
 - (b) Formulate proposals for a rescue plan in relation to the company concerned,the process advisor shall issue a report in writing, to the directors of the company in accordance with subsection (2) and notify the persons specified in subsection (5).
- (2) The report of the process advisor shall include the following -
 - (a) Reasons as to why a rescue plan could not be facilitated, and
 - (b) Recommendations as to the next steps to be taken by the company directors up to and including the winding up of the company.
- (3) The recommendations of the process advisor made in accordance with subsection (2) (b) shall not be binding on the company.
- (4) Notwithstanding subsection (3), where a process advisor recommends that the company be wound up and the directors of the company concerned continue to trade, such decision by the directors may be taken into account by the court when determining civil liability for fraudulent or reckless trading of the company in the course of any subsequent winding up of the company within 6 months in accordance with section 610.

Explanatory note

Head 28 deals with circumstances whereby the process advisor is unable to secure an arrangement or rescue plan. It provides that in such circumstances the process advisor is required to report this fact to the directors of the company.

Subsection (2) sets out the details which must be included in the process advisor's report. Such report must include the reason as to why a rescue plan could not be facilitated and a recommendation as to the next steps for the directors.

Subsection (3) provides that the recommendation of the process advisor is not binding on the company. However, in accordance with subsection (4) where the process advisor recommends that the company be wound up and the directors choose to continue to trade and there is a subsequent insolvent liquidation within 6 months of such recommendation, this fact may be taken into consideration by the courts when making a determination in respect of reckless trading.

Head 29 – Content of process advisor’s report

Provide that:

A process advisor’s report under Head 27 shall include:

- (a) The proposals placed before the required meetings;
- (b) Any modification of those proposals adopted at any of those meetings;
- (c) The outcome of each of the required meetings;
- (d) A statement of the assets and liabilities (including contingent and prospective liabilities) of the company as at the date of his or report;
- (e) A list of the creditors of the company, the amount owing to each such creditor, priority accorded under section 621 and 622 to any such creditor, or any other statutory provision or rule of law;
- (f) A list of the officers of the company;
- (g) The process advisor’s recommendations;
- (h) Such other matters as the process advisor deems appropriate.

Explanatory note

Head 29 gives detail as to what the process advisor’s report must include. This mirrors section 536 of the Companies Act 2014 in relation to an examiner’s report.

Head 30 – Proposals for a rescue plan

Provide that:

- (1) Proposals for a rescue plan under this Part in relation to a company shall -
 - (a) specify each class of members and creditors of the company,
 - (b) specify any class of members and creditors whose interests or claims will not be impaired by the proposals,
 - (c) specify any class of members and creditors whose interests or claims will be impaired by the proposals,
 - (d) provide equal treatment for each claim or interest of a particular class unless the holder of a particular claim or interest agrees to less favourable treatment,
 - (e) provide for the implementation of the proposals,
 - (f) if the process advisor considers it necessary or desirable to do so to facilitate the survival of the company, and the whole or any part of its undertaking, as a going concern, specify whatever changes should be made in relation to the management or direction of the company,
 - (g) if the process advisor considers it necessary or desirable to do so to facilitate such survival, specify any changes he or she considers should be made in the constitution of the company, whether as regards the management or direction of the company or otherwise,
 - (h) include such other matters as the process advisor deems appropriate.
- (2) A statement of the assets and liabilities (including contingent and prospective liabilities) of the company as at the date of the proposals shall be attached to each copy of the proposals to be submitted to meetings of members and creditors under Head 31.
- (3) There shall also be attached to each such copy of the proposals a description of the estimated financial outcome of a winding up of the company for each class of members and creditors.
- (4) For the purpose of this section and Head 42 to 46, a creditor's claim against a company is impaired if the creditor receives less in payment of his or her claim than the full amount due in respect of the claim at the date of passing of the resolution for the appointment of the process advisor.
- (5) For the purpose of this section and Head 42 to 46 a member's claim against a company is impaired if –
 - (a) the nominal value of his or her shareholding in the company is reduced, or
 - (b) where the member is entitled to a fixed dividend in respect of his or her shareholding in the company, the amount of that dividend is reduced, or
 - (c) the member is deprived of all or any part of the rights accruing to him or her by virtue of his or her shareholding in the company, or
 - (d) the percentage of his or her interest in the total issued share capital of the company is reduced, or
 - (e) the member is deprived of his or her shareholding in the company.

Explanatory note

This Head sets out the requirements as to what must be included in the proposals for a rescue plan prepared by a process advisor under this Part. It directly mirrors section 539 of the Companies Act 2014 in respect of proposals for a compromise or scheme of arrangement prepared by an examiner under Part 10.

Under subsection (2), a statement of the assets and liabilities (contingent and prospective liabilities included) of the company as at the date of the process advisor's proposals must be attached to the copy of the proposals which will be submitted to the meetings of members and creditors under Head 31.

Subsection (3) makes it necessary to provide the process advisor's estimate of what would be the outcome if the company were to be wound up insofar as each class of member or creditor is concerned. This ensures creditors are aware of the alternative to the process advisor's recommendation and thus enables them to make an informed decision.

Subsection (4) contains, in effect, a definition of what is meant by a creditor's claim against a company being impaired. This also applies for the purposes of Head 42 - 46. A creditor's claim against a company is impaired if he receives less in payment of his claim than the full amount due in respect of the claim at the date of the presentation of the petition for the appointment of the process advisor.

Subsection (5) contains an equivalent provision in respect of members.

Subsection (6) follows on from this and provides a definition for what is meant by the interests of a member of a company being impaired.

Head 31 – Convening of creditors or members meetings

Provide that:

- (1) Where a process advisor has prepared a rescue plan in accordance with Head 30, he or she shall convene –
 - (a) the appropriate meetings of the creditors or the class concerned of them, or
 - (b) the appropriate meetings of the members or the class concerned of themfor the purpose of considering the plan no later than 42 days after his or her initial appointment.
- (2) Reference in subsection (1) to the appropriate meeting of creditors or members as the case may be, are references to either –
 - (a) separate meetings of the particular creditors, or members (as appropriate) who fall into the separate classes that, under the general law, are required to be constituted for the purpose of voting on the rescue plan, or,
 - (b) where, under the general law, no such separate classes are required to be constituted for that purpose, a single meeting of the creditors or members (as appropriate).

Explanatory note

Head 31 provides that where a process advisor has prepared a rescue plan in accordance with Head 30, he or she shall convene the appropriate meetings of creditors and members to consider the proposals. Such meetings must take place no later than 42 days after the appointment of the process advisor.

Head 32 – Notice requirements

Provide that:

- (1) Where a process advisor convenes a meeting in accordance with Head 31, he or she shall give notice in writing to every person entitled to attend such meeting of the time and place appointed for the meeting in such form as may be prescribed not less than 7 days before the day appointed for such meeting.
- (2) Notice shall be sent –
 - (a) By electronic means where an email address for electronic communications has been furnished, or
 - (b) Where no such address has been furnished or where a failed delivery notification is received, by registered post to -
 - (i) in the case of a person, the address at which the person ordinarily resides or in a case which an address for correspondence has been furnished, to that address,
 - (ii) in the case of company at its registered office, and
 - (iii) every other body corporate and every unincorporated body at its principal office or place of business.
- (3) The process advisor shall retain records demonstrating as may be required that notice was issued in accordance with this section.
- (4) Where a meeting is convened by notice in accordance with this section, the proceedings of the meeting shall, unless the court otherwise orders, be valid notwithstanding that some members, contributories or creditors, as the case may be, may not have received the notice sent to them.
- (5) If default is made in complying with this section, the process advisor shall be guilty of a category 3 offence.

Explanatory note

Head 32 sets out the notice requirements for meetings convened in accordance with Head 31. It provides that all those entitled to attend must receive at least 7 days' notice of the meeting. The notice must be sent by email where an email address has been provided or by registered post in circumstances where an email address has not been provided or where a failed delivery notification is received. These stringent notification requirements are intended to act as safeguards for creditors.

Head 33 – Documents to be included with notice of creditors and members meeting

Provide that:

- (1) Every notice issued in accordance with Head 32 shall be accompanied by the following documents –
 - (a) a copy of the report made in accordance with Head 27,
 - (b) an explanation of the effect of the rescue plan,
 - (c) statement outlining any material interests of the directors of the company and the effect of the compromise to the extent it is different to like interests of other persons,
 - (d) general and special form of proxy and neither the name nor description of the process advisor or any other person shall be printed or inserted in the body of any instrument of proxy before it is so sent,
 - (e) information in relation to the procedure for objecting to the rescue plan, and
 - (f) any such further information as may be prescribed under regulations in accordance with subsection (3).

- (2) Where a process advisor fails to comply with subsection (1) he or she shall be guilty of a category 3 offence.

Explanatory note

Head 33 provides for the documents which must be included with the notice of a meeting issued in accordance with Head 32.

Head 34 – Location of meeting

Provide that:

- (1) Every meeting shall be held at such place as is, in the opinion of the process advisor, the most convenient for the majority of the creditors, contributories or members or all, as the case may be.

- (2) Different times or places may be named for the meetings of creditors and for those of contributories and for those of members.

Explanatory note

Head 34 provides that every meeting shall be held in a place that is convenient to the majority of the creditors, contributories or members. Different times or places may be named for the meetings of these different categories.

It is consistent with the Rules of the Superior Court in respect of examinership and section 692 of the Companies Act 2014 with regard to the general rules as to meetings of members, contributories and creditors of a company in liquidation.

Head 35 – Chairperson

Provide that:

At a meeting convened by the process advisor, the process advisor or, if the process advisor is unable to act, someone nominated by him or her shall be chairperson.

Explanatory note

Head 35 provides that if a meeting is summoned by the process advisor, he or she shall be the chairperson and if the process advisor is unable to act as chairperson, someone nominated by him or her shall be the chairperson.

It is consistent with the Rules of the Superior Court in respect of examinership and section 694 of the Companies Act 2014 with regard to the general rules as to meetings of members, contributories and creditors of a company in liquidation.

Head 36 – Proceedings at meetings

Provide that:

- (1) The chairperson of a meeting may, with the consent of the meeting, adjourn it from time to time and from place to place but the adjourned meeting shall be held at the same place as the original meeting unless in the resolution for adjournment another place is specified.
- (2) Other than on the matter of adjournment, a meeting may not act for any purpose, unless there are present or represented at the meeting –
 - (a) In the case of a creditors' meeting, at least 3 creditors entitled to vote or all of the creditors entitled to vote if the number entitled to vote shall not exceed three, or
 - (b) In the case of a meeting of contributories or members, at least 2 contributories or members as the case may be.
- (3) If within 30 minutes from the time appointed for the meeting a quorum of creditors, contributories or members, as the case may be, is not present or represented, the meeting shall be adjourned to the same day in the following week at the same time and place or to such other day or time or place as the chairperson may appoint.
- (4) However, the day so appointed by the chairperson shall be not less than 7 nor more than 10 days after the day from which the meeting was adjourned.

Explanatory note

Head 36 provides for the proceedings at meetings.

Subsection (1) provides that the chairperson may adjourn the meeting with the consent of the meeting.

Subsection (2) states that at least 3 creditors are required to be present, and in the case of a meeting of contributories or members, at least 2 contributories or members are required to be present at the meeting before it may act for any purpose.

Subsection (3) provides that, if within 30 minutes the quorum is not present, the meeting shall be adjourned to the same day in the following week at the same time and place, or to such other day or time or place as the chairperson may appoint.

Subsection (4) provides that this day shall not be less than 7 days and not more than 10 days from when the meeting was adjourned.

It is largely consistent with the Rules of the Superior Court in respect of examinership and section 697 of the Companies Act 2014 with regard to the general rules as to meetings of members, contributories and creditors of a company in liquidation.

Head 37 - Duties of chairperson

Provide that:

- (1) The chairperson of the meeting shall cause –
 - (a) Minutes of the proceedings at the meeting to be drawn up and signed by him or her, and
 - (b) A list of the creditors, contributories or members present at the meeting to be made and kept in such form as may be prescribed and such list shall be signed by him or her.

- (2) If the chairperson fails to comply with subsection (1) (a) or (b), he or she shall be guilty of a category 3 offence.

Explanatory note

Section 37 provides for the duties of the chairperson. It mirrors section 700 of the Companies Act 2014.

Head 38 – Proxies

Provide that:

- (1) A creditor, a contributory, or a member may vote either in person or by proxy.
- (2) An instrument of proxy shall be in the prescribed form.
- (3) A creditor, a contributory or member may appoint any person a special proxy to vote at any specified meeting or adjournment thereof.
- (4) A creditor, a contributory or a member may appoint any person a general proxy.
- (5) A creditor, a contributory or a member may appoint the process advisor to act as his or her general or special proxy.

Explanatory note

Head 38 sets out the rules relating to proxies. Subsections (3) and (4) provide that a creditor, contributory or a member may appoint any person as a specified proxy or a general proxy. It is drawn from section 701 of the Companies Act 2014.

Head 39 – Supplemental provisions in relation to Head 38

Provide that:

- (1) Every instrument of proxy shall be lodged no later than four o'clock in the afternoon of the day before the meeting or adjourned meeting at which it is to be used.
- (2) No person who is a minor shall be appointed a general or special proxy.
- (3) In the case of a creditor who is incapable of writing because of blindness or other physical infirmity, an instrument of proxy of the creditor may, subject to subsection (4), be accepted if the creditor has attached his or her signature or mark to the proxy in the presence of a witness and that witness has added to the creditor's signature the witness's description and residence.
- (4) Subsection (3) only applies if –
 - (a) All insertions of proxy are in the handwriting of the witness, and
 - (b) The witness has certified, at the foot of the instrument of proxy, that all such insertions have been made by the witness at the request and in the presence of the creditor before the creditor attached his or her signature or mark.
- (5) Where a company is a creditor, any person who is duly authorised under the seal of that company to act generally on behalf of that company at meetings of creditors, members and contributories may fill in and sign the instrument of proxy on that company's behalf and appoint himself or herself to be that company's proxy.
- (6) The instrument of proxy so filled in and signed by such person shall be received and dealt with as a proxy of that company but this is without prejudice to Head 38.

Explanatory note

Head 39 contains provisions which are supplemental to Head 38. Subsection (1) provides that the instrument of proxy must be lodged before four o'clock on the day before the meeting or adjourned meeting at which it is to be used.

It is taken from section 702 of the Companies Act 2014.

Head 40 – Representation of bodies corporate at meetings held during small company rescue process

Provide that:

For the avoidance of doubt, section 185 applies to any meeting of a company held during the small company rescue process.

Explanatory note

Head 40 is drawn from section 703 of the Companies Act 2014. It clarifies the application, in the case of a Small Company Administrative Rescue Process, of the general rule regarding representation of bodies corporate at meetings which is contained in section 185 in Part 4 of the Act.

Head 41 - Retention of records

Provide that:

Where a process advisor is appointed by a company, the process advisor shall retain records in such form or manner as may be prescribed for a period of not less than 6 years after the completion of the activity to which the record relates.

Explanatory note

Head 41 provides for the treatment of records by the process advisor. It is drawn from section 170 of the Personal Insolvency Act 2012 and is a necessary general provision to ensure that records are kept in accordance with the General Data Protection Regulations.

Head 42 - Consideration by members and creditors of proposals

Provide that:

- (1) This section applies to a meeting of members or creditors or any class of members or creditor called to consider proposals for a rescue plan in relation to a company to which a process advisor has been appointed.
- (2) Save where expressly provided otherwise in this section, this section shall not authorise, at such meeting, anything to be done in relation to such proposals by any member or creditor.
- (3) At a meeting to which this section applies a modification of the rescue plan may be put to the meeting but may only be accepted with the consent of the process advisor.
- (4) Proposals shall be deemed to have been accepted by a meeting of members or creditors or of a class of members or creditors when a majority in value of the claims represented at that meeting have voted, either in person or by proxy, in favour of the resolution for the proposals.
- (5) Subject to Head 43, a rescue plan shall be binding on -
 - (a) all the members or class or classes of members, as the case may be, affected by the proposal,
 - (b) all the creditors or the class or classes of creditors, as the case may be, affected by the proposal, and
 - (c) the company concerned,where it is accepted by at least one class of creditors whose interests or claims would be impaired by implementation of the proposals and 21 days pass from the date of the meeting where such proposals were approved, and no objection is filed in accordance with Head 45.
- (6) Nothing in subsection (4) shall, in the case of a member or creditor who abstains from voting, or otherwise fails to cast a vote, in respect of the proposals, be read as permitting such an abstention or failure to be regarded as a casting by that person of a vote against the rescue plan.
- (7) Where a State authority is a creditor of the company, such authority shall be entitled to accept proposals under this section notwithstanding –
 - (a) that any claim of such authority as a creditor would be impaired under the proposals, or
 - (b) any other enactment.
- (8) In subsection (7) “State authority” means the State, a Minister of the Government, a local authority or the Revenue Commissioners.
- (9) Section 192 shall apply to any resolution to which subsection (4) relates which is passed at any adjourned meeting.

Explanatory note

Head 42 is drawn from section 540 of the Companies Act 2014. It provides for the consideration by members and creditors of a proposal for a rescue plan. Subsection (1) provides that this section applies to a meeting of members or creditors or any class of same called to consider proposals for a rescue plan.

Subsection (2) provides that save where expressly authorised otherwise in this section, this section shall not authorise anything to be done to the proposals by either the creditors or the members.

Subsection (3) provides that at the meeting of creditors, or members as the case may be, a modification may be put to the meeting but may only be accepted with the consent of the process advisor.

Subsection (4) provides for how the proposals are accepted. It provides that proposals shall be deemed to be accepted where a majority in value of the claims represented at the meeting vote in favour of them. This is slightly different to the comparable requirement in examinership which requires that a majority in value and number of the claims represented must accept the proposal. This has been amended to provide more flexibility for small and micro companies.

Subsection (5) provides for a cross class cram down. Again, this is drawn from comparable provisions in examinership but nuanced to provide flexibility for small and micro companies. It provides that a rescue plan shall be binding on all members and creditors where it is accepted by one class of impaired creditor and 21 days pass without any creditor triggering an objection to the plan in accordance with head 45. Where such an objection is triggered, it will be for the court to confirm the plan.

Subsection (6) provides that where a creditor or member does not vote, their abstention shall not be counted as a vote against the rescue plan.

Subsection (7) provides that where a State authority is a creditor they shall be entitled to accept proposals even though the proposals may impair their claim.

Subsection (8) provides for a definition of State authority for the purpose of subsection (7).

Subsection (9) provides that section 192 of the Companies Act applies to any resolution in relation to subsection (4) which is passed at an adjourned meeting.

Head 43 – Notification of approval of rescue plan

Provide that:

- (1) Where a rescue plan is approved in accordance with Head 42, notification of such approval shall be issued in accordance with this section.
- (2) Notice of the approval of a rescue plan shall be sent in the prescribed form –
 - (a) By electronic means where an email address for electronic communications has been furnished, or
 - (b) Where no such address has been furnished or where a failed delivery notification is received, by registered post to -
 - (i) in the case of a person, the address at which the person ordinarily resides or in a case which an address for correspondence has been furnished, to that address,
 - (ii) in the case of company at its registered office, and
 - (iii) every other body corporate and every unincorporated body at its principal office or place of business.

to the persons specified in subsection (3) within 48 hours of approval. –
- (3) The persons referred to in subsection (2) are –
 - (a) Revenue Commissioners,
 - (b) Employees,
 - (c) such other persons as may be prescribed.
- (4) Notice of the approval of the rescue plan shall be delivered to the Registrar within 48 hours of approval.
- (5) Notice of the approval of a rescue plan shall be filed with the office of the relevant court within 48 hours of approval.
- (6) The process advisor shall retain records demonstrating as may be required that notice was issued in accordance with this section.
- (7) If default is made in complying with this section, the process advisor shall be guilty of a category 3 offence.

Explanatory note

Head 43 provides that where a rescue plan is approved in accordance with Head 42, this must be notified to the persons outlined in subsection (2).

The notice must be sent by email where an email address has been provided or by registered post in circumstances where an email address has not been provided or where a failed delivery notification is received. These stringent notification requirements are intended to act as safeguards for creditors.

Subsection (4) provides that notice of the approval plan must be filed with the Registrar within 48 hours.

Subsection (5) provides for the notice to be filed with the office of the relevant court within 48 hours.

Subsection (6) provides for the process advisor's obligation to retain records to demonstrate compliance with the section.

Finally, subsection (7) provides that where default is made in complying with this section, the process advisor shall be guilty of a category 3 offence.

Head 44 – Confirmation of rescue plan

Provide that:

- (1) A rescue plan shall become binding 7 days from the date of filing of the confirmation with -
 - (a) the office of the relevant court, and
 - (b) the Registrar

provided no objection is filed within the 21 days referred to in Head 42.

- (2) Where an objection is filed within the 21 days referred to in subsection (1), the provisions of Head 46 apply.

Explanatory note

Head 44 provides that a rescue plan is confirmed 7 days from the date of filing of the confirmation with the office of the relevant court and the Registrar and 21 days pass from the date of such approval without an objection to the plan being filed. This means that where no such objection is triggered, the proposals become binding by operation of law.

Subsection (2) provides that where an objection is lodged, the provisions of Head 46 apply. Head 46 sets out the court's power to confirm proposals for a rescue plan in circumstances whereby there is an objection by a creditor.

Head 45 – Objection to rescue plan

Provide that:

- (1) A creditor or member may, subject to this section, file an objection to a rescue plan.
- (2) Notice of an objection shall be sent in the prescribed form to –
 - (a) the process advisor, and
 - (b) the office of the relevant court.
- (3) An objection shall be made on one or more of the following grounds –
 - (a) the rescue plan unfairly prejudices the interests of the objector,
 - (b) that there was some material irregularity at or in relation to a meeting to which Head 42 applies,
 - (c) that acceptance of the proposals by the meeting was obtained by improper means,
 - (d) that the proposals were put forward for an improper purpose,
 - (e) the provisions with respect to leases in Head 48 apply, or
 - (f) that the sole or primary purpose of the rescue plan is the avoidance of payment of tax due,
 - (g) such other grounds as may be prescribed.
- (4) Any person who voted to accept the rescue plan referred to in Head 42 may not file an objection under this section except on the grounds that -
 - (a) that such acceptance was obtained by improper means; or
 - (b) that after voting to accept the proposals the person became aware that the proposals were put forward for an improper purpose.
- (5) Objections filed in accordance with this section shall be considered by the court in accordance with Head 46.

Explanatory note

Head 45 provides for a creditor’s right to object to a rescue plan.

It sets out the detail for how a creditor is to file an objection and the grounds upon which the objection can be made.

Where an objection is filed, it shall be considered by the court in accordance with Head 46.

Head 46 – Court approval in case of objection

Provide that:

- (1) An objection by a creditor or member under Head 45 shall be set down for consideration by the court as soon as may be after receipt of the objection by the court.
- (2) The following persons may appear and be heard at a hearing under subsection (1)
 - (a) the company concerned;
 - (b) the process advisor;
 - (c) the objecting creditor or member and
 - (d) the directors of the company.
- (3) At a hearing under subsection (1) the court may, as it thinks proper, subject to the provisions of this section and Head 47 –
 - (a) confirm,
 - (b) confirm subject to modifications, or
 - (c) refuse to confirm,

the proposals for the rescue plan (referred to subsequently in this section as “proposals”) insofar as they relate to the objecting creditor or member, as the case may be, and the relevant class of creditor or member.
- (4) Where the court upholds an objection under this section, the court may make such order as it deems fit, including an order that the decision of any meeting be set aside and an order that any meeting be reconvened.
- (5) The court shall not oppose any proposals unless the court is satisfied that -
 - (a) the proposals are unfair and inequitable in relation to the objecting creditor or member whose interests would be impaired by implementation, and
 - (b) the proposals are unfairly prejudicial to the objecting creditor or member.
- (6) Where the court confirms proposals (with or without modification). The proposals shall be binding on the objecting creditor or member concerned, as the case may be, and also on the company.

Explanatory note

Head 46 provides for the court’s role in the approval of a rescue plan where an objection is triggered.

Subsection (1) provides that where an objection to a rescue plan is lodged it shall be considered by the court as soon as possible after receipt.

Subsection (2) provides for those who may be heard by the court.

Subsection (3) provides that the court may confirm, modify or refuse to confirm proposals for a rescue plan.

Subsection (4) provides that the where the court upholds an objection under this section, it may make such order as it sees fit.

Subsection (5) provides that the court shall only confirm proposals under this section where it is satisfied that they are fair and equitable and are not unfairly prejudicial. This draws from section 541 of the Companies Act in relation to examinership.

Finally, subsection (6) provides that where the court confirms proposals they shall be binding on all those concerned.

Head 47 – Supplemental provisions in relation to Head 46

Provide that:

- (1) Where the court confirms proposals under Head 46 it may make such orders for the implementation of its decision as it deems fit.
- (2) A rescue plan, proposals for which have been confirmed under Head 46, shall come into effect from a date fixed by the court, which date (unless the court deems it appropriate to fix a later one) shall be a date falling no later than 21 days after the date of the proposals' confirmation.
- (3) On the confirmation of proposals, a certified copy of any order made by the court under Head 46 shall be delivered by the process advisor, or by such person as the court may direct, to the Registrar.

Explanatory note

Head 47 draws from section 542 of the Companies Act and provides for supplemental provisions in relation to Head 46.

Subsection (1) provides that where the court has confirmed proposals for a rescue plan under Head 46 it may make further orders for the implementation of its decision.

Subsection (2) provides that where the court has confirmed a rescue plan it shall come into effect on a date specified by the court. This date can be no later than 21 days after the date of the confirmation.

Finally, subsection (3) provides that a copy of the court's order must be delivered by the process advisor, or any other person directed by the court, to the Registrar.

Head 48 – Provisions with respect to leases

Provide that:

- (1) Subject to subsection (3), proposals for a rescue plan shall not contain, nor shall any modification by the court under Head 46 of such proposals result in their containing, a provision providing for either or both –
 - (a) a reduction in the amount of any rent or other periodical payment reserved under a lease of land that falls to be paid after the date from which the compromise or scheme of arrangement would come into effect under Head 44 or 47, whichever the case may be] or the complete extinguishment of the right of the lessor to any such payments;
 - (b) as respects a failure –
 - (i) to pay an amount of rent or make any periodical payment reserved under a lease of land; or
 - (ii) to comply with any other covenant or obligation of such a lease, that falls to be paid or complied with after the date referred to in paragraph (a), a requirement that the lessor under such a lease shall not exercise, or shall only exercise in specified circumstances, any right, whether under the lease or otherwise, to –
 - (I) Recover possession of the land concerned;
 - (II) Effect a forfeiture of the lease or otherwise enter on the land;
 - (III) Recover the amount of such rent or other payment;
 - (IV) Claim damages or other relief in respect of the failure to comply with such a covenant or obligation.
- (2) Subject to subsection (3), proposals for a rescue plan in relation to a company shall not be confirmed by the court if the proposals contain a provision relating to a lease of, or any hiring agreement in relation to, property other than land and, in the opinion of the court -
 - (a) the value of that property is substantial; and
 - (b) that provision is of like effect to a provision referred to in subsection (1)(a) or (b).
- (3) Subsection (1) or (2) shall not apply if the lessor or owner of the property concerned has consented in writing to the inclusion of the provision referred to in subsection (1) or (2) in the proposals for the compromise or scheme of arrangement.
- (4) In deciding, for the purpose of subsection (2), whether the value of the property concerned is substantial, the matters to which the court shall have regard shall include the length of the expired term of the lease or hiring agreement concerned.

Explanatory note

Head 48 contains provisions with respect to leases and derives from section 544 of the Companies Act. Subsection (1)(a) ensures that a proposal for a rescue plan shall not contain any provision in respect of a lease of land which reduces the amount of any rent or other periodic payment due after the coming into effect of the rescue plan or which cancels the right of the lessor to such payment. The effect of this is to protect a lessor from having to accept reduced rents into the future.

Subsection (1)(b) provides for a situation where there may be a failure by the company to pay any rent or other periodic payment or to comply with any covenant or other obligation under a lease of land. In such a case, the process advisors' proposals cannot contain any restriction which would prohibit the lessor from (i) exercising the right to recover possession of the land; (ii) effecting a forfeiture on the lease or otherwise entering on the land; (iii) recovering the amount of rent or other payment; or (iv) claiming damages or other relief.

Under subsection (2), a proposal will not satisfy the condition that it must not unfairly prejudice the interests of any interested party (and therefore cannot be approved by the court) if the proposal contains a provision in relation to a lease or hiring of property other than land where the value of that property is substantial and that provision in the proposal has the same effect as a provision referred to in subsection (1)(a) or (b) of this section. Subsection (4) gives guidance to the court on how to decide whether the value of a property is "substantial".

Subsection (3) provides by way of exception to subsections (1) or (2) that a lessor may accept (in writing) a reduced rent for a future period, and such acceptance should be included in the compromise or scheme of arrangement.

Chapter 4 – Liability of third parties for debts of a company in a small company administrative rescue process

Head 49 – Application of Chapter 4 of Part 10 of the Act

Provide that:

The provisions of Chapter 4 of Part 10 apply to proceedings under this Part with the substitution of references to “process advisor” for references to “examiner” and any other necessary modifications.

Explanatory note

Head 49 provides for the application of Chapter 4 of Part 10 of the Act to the summary rescue process.

Chapter 5 – Conclusion of small company administrative rescue process

Head 50 – Conclusion of small company administrative rescue process and termination of appointment of process advisor

Provide that:

- (1) The small company administrative rescue process shall conclude –
 - (a) On the coming into effect of a rescue plan under this Part in relation to the company;
or
 - (b) On such earlier date as the process advisor may recommend in circumstances where he or she is unable to formulate proposals for a rescue plan.

- (2) Where the summary rescue process in relation to a company concludes, the appointment of the process advisor shall terminate on the date of such conclusion.

Explanatory note

Head 50 is drawn from section 552 of the Companies Act in respect of examinership. It provides for the conclusion of the Small Company Administrative Rescue Process where a rescue plan comes into effect or on such earlier date as recommended by the process advisor.

Subsection (2) provides that the process advisor's appointment is terminated on conclusion of the process.

Head 51 - Revocation

Provide that:

- (1) The company or any interested party may, within 180 days after the date of confirmation of the rescue plan in relation to the company in accordance with Heads 44 or 46, apply to the court for revocation of that confirmation on the grounds that it was procured by fraud.
- (2) On such application, the court, if satisfied that that confirmation was procured by fraud, may revoke the confirmation on such terms and conditions, particularly with regard to the protection of the rights of parties acquiring interests or property in good faith and for value in reliance on that confirmation, as it deems fit.
- (3) As soon as practicable after the revocation under this section of such a confirmation, a certified copy of the order made by the court shall be delivered to –
 - (a) the Registrar, and
 - (b) the Director of Corporate Enforcement,by such person as the court may direct.

Explanatory note

This Head is modelled on section 533 of the Companies Act. If the company or any interested party discovers that the rescue plan was procured by fraud, then, within 180 days after the confirmation of the rescue plan, it can apply to the court to have the confirmation revoked. If it is so revoked, a certified copy of the order must be sent to the Registrar and the Director of Corporate Enforcement. The court may also direct that it be forwarded to any other person.

Head 52 – Costs and remuneration of process advisors

Provide that:

- (1) The court may from time to time make such orders as it thinks proper for payment of the remuneration and costs of, and reasonable expenses properly incurred by, a process advisor.
- (2) Unless the court otherwise orders, the remuneration, costs and expenses of a process advisor shall be paid and the process advisor shall be entitled to be indemnified in respect thereof out of the revenue of the business of the company to which he or she has been appointed, or the proceeds of realisation of the assets (including investments).
- (3) The remuneration, costs and expenses of a process advisor which have been sanctioned by order of the court (other than expenses referred to in subsection (4)) shall be paid in full and shall be paid before any other claim, secured or unsecured, under any compromise or scheme of arrangement or in any receivership or winding up of the company to which he or she has been appointed.
- (4) Liabilities incurred by the company to which a process advisor has been appointed that, by virtue of Head 21, are treated as expenses properly incurred by the process advisor shall be paid in full and shall be paid before any other claim (including a claim secured by a floating charge), but after any claim secured by a mortgage, charge, lien or other encumbrance of a fixed nature or a pledge, under any compromise or scheme of arrangement or in any receivership or winding up of the company.
- (5) In subsections (3) and (4), references to a claim shall be deemed to include references to any payment in a winding up of the company in respect of the costs, charges and expenses of that winding up (including the remuneration of any liquidator).
- (6) Subject to subsection (7), the functions of a process advisor may be performed by him or her with the assistance of persons appointed or employed by him or her for that purpose.
- (7) A process advisor shall, in so far as is reasonably possible, make use of the services of the staff and facilities of the company to which the process advisor has been appointed to assist the process advisor in the performance of his or her functions.
- (8) In considering any matter relating to the costs, expenses and remuneration of a process advisor the court shall have particular regard to subsection (7).

Explanatory note

Head 52 provides that section 554 of the Act shall apply to the Small Company Administrative Rescue Process. It means that the court may sanction the costs and remuneration of process advisors.

Head 53 – Hearing of proceedings other than in public

Provide that:

The whole or part of any proceedings under this Part may be heard otherwise than in public if the court, in the interests of justice, considers that the interests of the company concerned or of its creditors as a whole so require.

Explanatory note

Head 53 mirrors section 556 of the Companies Act. It provides that any court proceedings in respect of the summary rescue process may be heard privately should the court consider it necessary in the interest of justice or the company or creditors.

Head 54 – Power of court to order the return of assets which have been improperly transferred

Provide that:

- (1) Where, on the application of a process advisor of a company at anytime during the period of the process it can be shown to the satisfaction of the court that –
 - (a) Any property of the company of any kind whatsoever was disposed of either by way of conveyance, transfer, mortgage, security, loan, or in any way whatsoever whether by act or omission, direct or indirect; and
 - (b) The effect of such disposal was to perpetrate a fraud on the company, its creditors or members,

the court may, if it deems it just and equitable to do so, make the following order.

- (2) That order of the court is one requiring any person who appears to have the use, control or possession of such property or the proceeds of the sale of development of it to deliver it or pay a sum in respect of it to the process advisor on such terms or conditions as the court sees fit.
- (3) Subsection (1) shall not apply to any conveyance, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company to which section 604 applies.
- (4) In deciding whether it is just and equitable to make an order under this section, the court shall have regard to the rights of persons who have a bona fide and for value acquired an interest in the property subject of the application.

Explanatory note

It allows the court to make an order to return assets which have been improperly transferred and is taken from section 557 of the Companies Act. If it can be shown to the satisfaction of the court that the effect of the disposal of any property of a company under court protection was to perpetrate a fraud on the company, its creditors or members, the court may order the return of that property or order the payment of a sum in respect of it to the process advisor. These provisions do not apply to assets transferred with a view to giving an unfair preference described under section 604 of the Act. When making a decision under this section, the court is to have regard to the rights of persons who have bona fide and for value acquired an interest in the property in question

Head 55 – Director’s power to examine books and records in small company administrative rescue process

Provide that:

- (1) In this section –
“appropriate person” in relation to the company referred to in subsection (2), means any of the following -
- (a) The company
 - (b) Irrespective of the time at which he or she holds or held such status –
 - (i) A process advisor of the company, or
 - (ii) An officer of the company

“books and records” mean the books and records of the company and, in addition, in the case of a request under subsection (3) made of a process advisor, the books and records of the process advisor.

- (2) The Director of Corporate Enforcement may, where he or she considers it necessary or appropriate, make the following request of an appropriate person of a company or companies (specifying the reason why the request is being made).

- (3) That request is that -
- (a) The appropriate person produce to the Director the books and records for examination, and the appropriate person shall comply with the request., or
 - (b) The process advisor produce to the Director the books and records for examination, and the process advisor shall comply with the request.

- (4) An appropriate person shall

- (a) Produce the books to the Director of Corporate Enforcement,
- (b) Answer any questions concerning the content of the books and the conduct of the particular small company administrative rescue process], and
- (c) Give to the Director of Corporate Enforcement all assistance in the matter as the process advisor is reasonably expected to give.

- (5) An appropriate person shall give to the Director such access and facilities as are necessary for inspecting and taking copies of books and records requested to be produced by him or her under subsection (2).

- (6) A request under subsection (1) may not be made in respect of books relating to a small company administrative rescue process that has concluded more than 6 years prior to the date of the request.

- (7) An appropriate person who –

- (a) Fails to comply with a request under subsection (3),
- (b) Fails to answer any question under subsection 4 (a) or (b),
- (c) Fails to give the Director the assistance referred to in subsection 4 (c) or
- (d) Without lawful excuse, fails to give the Director the access or facilities referred to in subsection (5),

shall be guilty of a category 2 offence.

- (8) Nothing in this section shall be taken as excluding or restricting any statutory rights of the Government, a Minister of the Government or a person acting under the authority of the Government or a Minister of the Government, or the powers of any person under Part 13.

Explanatory note

Head 55 confers power of the Director of Corporate Enforcement to examine the process advisors books. It is drawn from section 653 of the Companies Act which confers comparable power on the Director in respect of liquidators.

An appropriate person is required to produce books to the Director, answer the Director's questions in relation to the books and conduct of the small company administrative rescue process and give all assistance to the Director as they can be reasonably expected to give.

Failure to comply with this section results in a category 2 offence.

Head 56 – Reporting to Director of Corporate Enforcement of misconduct by process advisors

Provide that:

- (1) Where a disciplinary committee or tribunal (however called) of a prescribed professional body –
 - (a) Finds that a member of that body who is conducting or has conducted a small company administrative rescue process has not maintained appropriate records in relation to that activity; or
 - (b) Has reasonable grounds for believing that such a member has committed a category 1 or 2 offence during the course of conducting a small company administrative rescue process,

the professional body shall report the matter, giving details of the finding or, as the case may be, of the alleged offence, to the Director of Corporate Enforcement forthwith.

- (2) If a professional body fails to comply with this section, it, and any officer of the body to whom the failure is attributable, shall be guilty of a category 3 offence.

Explanatory note

Head 56 provides that where a disciplinary tribunal of a professional body finds that a member of the body who acted as a process advisor failed to maintain appropriate records or, there are reasonable grounds for believing that the member committed a category 1 or 2 offence, that professional body is obliged to report such matters to the Director of Corporate Enforcement.

This provision is in keeping with existing provisions of the Companies Act in respect of receivers, examiners and liquidators.

Head 57 – Process advisor to report on conduct of directors

Provide that:

- (1) Following conclusion of a small company administrative rescue process or resignation or a process advisor, the process advisor shall within 4 months from the passing of a resolution to appoint the process advisor provide to the Director a report in the form prescribed by the Minister.
- (2) The Director may require the process advisor –
 - (a) To answer, whether orally or in writing, any question that the Director reasonably puts to the process advisor concerning the context of a report made by the process advisor under subsection (1), the affairs of the company or the conduct of any director of the company who was director during period of the process, and
 - (b) To give such other assistance (as he or she is reasonably able to give) to the Director for the purpose of the Director’s appraisal of such a report or the Director’s examination of any fact or allegation contained in it or which comes to the Director’s knowledge by reason of an answer given under paragraph (a) or otherwise through the Director’s performance of functions under this Act,and the process advisor shall comply with such a requirement.
- (3) The Director’s powers under subsection (2) are in addition to the powers of the Director or any other person under any other provision of this Act.
- (4) A process advisor who fails to comply with subsection (1) or a requirement under subsection (2) shall be guilty of a category 3 offence.

Explanatory note

Head 57 obliges process advisors to report on the conduct of directors to the Director of Corporate Enforcement. It is drawn from section 682 of the Companies Act and is comparable to the obligation placed on liquidators by that section.

Head 58 – Obligation (unless relieved) of process advisor of to apply for restriction of directors

Provide that –

- (1) In this section a reference to a director of the company is a reference to a person who was a director or shadow director of the company at the date of, or within 12 months before, the passing of a resolution to appoint a process advisor.
- (2) In a small company administrative rescue process where this subsection applies, the process advisor shall apply to the relevant court under section 819(1) for a declaration under that provision in respect of each of the directors of the company.
- (3) As respects subsection (2) –
 - (a) That subsection applies unless the Director has relieved the process advisor of the obligation to make the application under section 819(1) in relation to the small company administrative rescue process concerned or a particular director or directors (which power to so relieve is conferred on the Director by this paragraph), and
 - (b) Where the Director relieves the process advisor of that obligation in respect of one or more but not all of the directors as respects whom the process advisor has not been relieved of that obligation.
- (4) An application in respect of a director under section 819(1), in compliance with subsection (2), shall be made not later than the expiry of –
 - (a) 2 months after the date on which the Director has notified the process advisor that the Director has not relieved the process advisor of the obligation to make the application in respect of the director, or,
 - (b) Such greater period of time as the Director may allow for the purposes of the application.
- (5) A process advisor who fails to comply with subsection (2) shall be guilty of a category 3 offence.

Explanatory note

Head 58 imposes an obligation on a process advisor to apply for the restriction of a director. It is drawn from section 683 of the Companies Act.

Head 59 - Application of Chapter 3 of Part 14 of the Principal Act

Provide that:

The provisions of Chapter 3 of Part 14 shall, subject to the necessary modifications and technical amendments, apply to this Part.

Explanatory note

Chapter 3 of Part 14 of the Companies Act provides for the restriction of directors of insolvent companies. It is intended that directors of companies which utilise the Small Company Administrative Rescue Process be subject to the same restriction regime. However, as these directors may not be directors of insolvent companies within the meaning of Chapter 3, there will be a number of technical modifications to be made during drafting of the Bill to cross apply the part.

Head 60 – Prosecution of offences committed by officers and members of company

Provide that:

- (1) If it appears to the process advisor appointed to a company, at any time, that any past or present officer, or any member, of the company has been guilty of any offence in relation to the company, the process advisor shall forthwith report the matter to the Director of Public Prosecutions.
- (2) Where the process advisor reports a matter under subsection (1) to the Director of Public Prosecutions, the process advisor shall –
 - (a) provide to the Director of Public Prosecutions such information, relating to the matter in question, as he or she may require, and
 - (b) give to him or her such access to, and facilities for, inspecting and taking copies of such documents, being documents in the possession or under the control of the process advisor and relating to the matter in question, as he or she may require.
- (3) Where a foregoing report is made by the process advisor, the process advisor shall also report the matter to the Director of Corporate Enforcement.
- (4) Where a matter is reported by the process advisor under subsection (3) to the Director of Corporate Enforcement, the process advisor shall –
 - (a) provide to the Director of Corporate Enforcement such information, relating to the matter in question, as he or she may require, and
 - (b) give to him or her such access to, and facilities for, inspecting and taking copies of such documents, being documents in the possession or under the control of the received and relating to the matter in question, as he or she may require.
- (5) If, where any matter is reported under subsection (1) or (3) to –
 - (a) the Director of Public Prosecutions, or
 - (b) the Director of Corporate Enforcement,the Director of Public Prosecutions or, as the case may be, the Director of Corporate Enforcement considers that the case is one in which a prosecution ought to be instituted and institutes proceedings accordingly, it shall be the duty of each of the following to give all assistance in connection with the prosecution which he or she is reasonably able to give.
- (6) The persons referred to in subsection (5) are the process advisor of the company and –
 - (a) every officer (past or present) of the company, and
 - (b) every agent (past or present) of the company,other than the defendant in the proceedings.
- (7) for the purposes of subsection (6), “agent”, in relation to a company, includes –
 - (a) the bankers and solicitors of the company, and
 - (b) any persons employed by the company as auditors, accountants, book-keepers or taxation advisers, or other persons employed by it in a professional, consultancy or similar capacity, whether those persons are (or were) or are not (or were not) officers of the company.

- (8) If any person fails or neglects to give assistance in the manner required by subsection (5), the court may, on the application of the Director of Public Prosecutions or, as the case may be, the Director of Corporate Enforcement, direct that person to comply with the requirements of that subsection.
- (9) Where any such application is made in relation to a process advisor, the court may, unless it appears that the failure or neglect to comply was due to the process advisor not having in his or her hands sufficient assets of the company to enable him or her so to do, direct that the costs of the application shall be borne by the process advisor personally.

Explanatory note

Head 60 concerns the prosecution of criminal offences committed by officers and members of the company. It is drawn from section 447 of the Companies Act in relation to receivers.

If it appears to the process advisor that any past or present officer or member of the company has been guilty of an offence in relation to the company, the process advisor is obliged to report the matter to the Director of Public Prosecutions (DPP) and to the Director of Corporate Enforcement.

Following on from this, the process advisor must give the DPP and the Director of Corporate Enforcement access to any information or facilities as may be required and if the DPP or the Director of Corporate Enforcement seeks to prosecute the case, the process advisor and all officers and agents of the company (past or present) must give all assistance in connection with the prosecution as he/she is reasonably able to give. This obligation shall not apply where such officer or agent is a defendant in the proceedings. Persons failing to give the assistance described above to the DPP or the Director of Corporate Enforcement can be directed to comply with the requirements of this section in that regard.

Finally, where any application under this section is made in relation to a process advisor, the court may direct that the costs of the application be borne by the process advisor personally unless the failure or neglect to comply was due to the fact that the process advisor did not have access to sufficient assets of the company to enable him or her to so comply.

Chapter 6 Miscellaneous amendments to the Principal Act

Head 61 – Amendment of section 690A of the Principal Act

Provide that:

Section 690A of the Principal Act is amended by

- (1) the deletion of “during the interim period only” in subsection (1);
- (2) the insertion of reference to meeting held under Head 31.

Explanatory note

Head 61 provides for the permanent enactment of section 690A of the Companies Act. Section 690A provides for creditors meetings to be held virtually during an interim period for the duration of the Covid-19 pandemic. This technical amendment will provide for such meetings to be held virtually on a permanent basis and modernises the Companies Act to reflect the reality of business today.

Subsection (2) makes amendment to section 690A to include reference to meetings held under the Small Company Administrative Rescue Process thus ensuring they can be held virtually.

Head 62 – Supplementary amendments in relation to creditors meetings held by electronic means

Provide that:

The temporary amendment made to the Companies Act 2014 by the Companies (Miscellaneous Provisions) (Covid-19) Act 2020 in relation to creditors meetings held by electronic means shall be made permanent.

Explanatory note

Head 62 provides that the temporary amendments made by the Companies (Miscellaneous Provisions) (Covid-19) Act 2020 in relation to creditors meetings shall now be made permanent. This is part of the modernisation of the Companies Act and ensures that creditors meetings can be facilitated virtually on a permanent basis.

This will require technical amendments to the following sections of the Companies Act 2014:

- Section 690A
- Section 691(4A)
- Section 692 (1A)
- Section 695 (1A), (2A)
- Section 697
- Section 701 (1A)
- Section 1103 (aa)

And such other provisions as may be identified during the drafting process.

Head 63 – General meetings by electronic means

Provide that:

The temporary amendments made by the Companies (Miscellaneous Provisions) (Covid-19) Act 2020 in relation to general meetings held by electronic means shall be made permanent.

Explanatory note

Head 63 provides that the temporary amendments made by the Companies (Miscellaneous Provisions) (Covid-19) Act 2020 in relation to general meetings shall now be made permanent. This is part of the modernisation of the Companies Act and ensures that general meetings can be facilitated virtually on a permanent basis.

This will require technical amendments to the following sections of the Companies Act 2014:

- Section 174A
- Section 181 (aa)
- Section 181A
- Section 182 (2A)
- Section 195A
- Section 680 (2A)

And such other provisions as may be identified during the drafting process.

Head 64 – Amendment to section 627 Liquidator’s powers

Provide that:

The table to section 627 is amended by inserting after “other legal proceeding” in 1. (a) and (b) the following:

“, including proceedings before the Workplace Relations Commission and the Labour Court,”.

Explanatory note

This Head provides for an amendment to section 627 to provide clarity that a liquidator has the power to bring or defend any proceedings before the Workplace Relations Commission and the Labour Court in the name and on behalf of the company.

Head 65 - Amendment of section 587 Meeting of creditors

Provide that:

Section 587 is amended in subsection (3) -

- (1) in paragraph (b) by deleting “and”,
- (2) in paragraph (c)(ii) by inserting “, and” after “may be inspected”, and
- (3) after paragraph (c) by inserting the following paragraph:

“(d) inform the creditors of the company of their entitlement to form and participate in a committee of inspection in accordance with section 667.”

Explanatory note

Head 65 provides for amendments to section 587(3) to oblige the company to ensure creditors in a creditors’ voluntary liquidation are made aware of their right to form and participate on a Committee of Inspection which represents the interests of all creditors of a company going into liquidation.

If default is made by the company in complying with, inter alia, subsection (3), the company and any officer of it who is in default shall be guilty of a category 3 offence.

Head 66 - Amendment of section 666 Appointment of committee of inspection in a court ordered winding up

Provide that:

Section 666 is amended by -

(1) Substituting for subsections (1) and (2) the following:

“(1) When a winding-up order has been made by the court, the liquidator –

(a) shall inform the creditors of the company of the entitlement to form and participate in a committee of inspection, and

(b) subsequently may and, if directed to do so by a creditor or creditors representing not less than one-tenth in value of the creditors of the company shall, summon a meeting of the creditors of the company for the purpose of determining—

(i) whether or not a committee of inspection is to be appointed, and

(ii) who are to be the members of the committee if so appointed.

(2) At a meeting summoned in accordance with subsection (1)(b), the creditors may, if they think fit, appoint a committee of inspection consisting of not more than 5 persons appointed under this subsection of which at least one shall be an employees’ representative where the employees elect or appoint such a representative for the purposes of this subsection.”

(2) Inserting after subsection (6) the following subsection:

“(7) If a liquidator, without reasonable excuse, fails to comply with subsection (1)(a), he or she shall be guilty of a category 4 offence.”

Explanatory note

This Head provides for amendments to section 666 to:

- provide for an obligation to be placed on liquidators to ensure creditors in a court ordered liquidation are made aware of their right to form and participate on a Committee of Inspection;
- explicitly provide that where a Committee of Inspection is appointed it shall include not less than one employee creditor member (“employee representative”) to represent employee creditors, should they so elect; and
- where a liquidator, without reasonable excuse, fails to inform creditors of their entitlement to form and participate on such a committee that he/she will be guilty of a category 4 offence.

Head 67 - Amendment of section 667 Appointment of committee of inspection in a creditors voluntary winding up

Provide that:

Section 667 is amended in subsection (1) by inserting after “5 persons appointed under this subsection” the following -

“of which at least one shall be an employees’ representative where the employees elect or appoint such a representative for the purposes of this subsection.”

Explanatory note

This head provides for an amendment to section 667 to explicitly provide that where a Committee of Inspection is appointed it shall include not less than one employee creditor member (“employee representative”) to represent employee creditors, should they so elect.

Head 68 - Amendment of section 668 Constitution and proceedings of committee of inspection

Provide that:

Section 668 is amended -

- (1) In subsection (6) by inserting “subject to subsection (6A)” after “appoint another person to fill the vacancy”.
- (2) By inserting after subsection (6) the following subsection:

“(6A) Where the person who vacated office had been appointed as an employees’ representative, another employees’ representative may, subject to subsection 7, be appointed to fill the vacancy where the employees elect or appoint such a representative.”

Explanatory note

This head provides for amendments to section 668 to provide that where:

- a Committee of Inspection is appointed,
- has an employee representative member, and
- where the employee representative member vacates the role

he/she may be replaced by another employee representative should the employees so elect.

Section 668 applies to a committee of inspection appointed in a court winding up and a creditors’ voluntary liquidation.

Chapter 7 – Amendments to the Industrial and Provident Societies Act 1893

Head 69 – General meetings to be held virtually

Provide that:

The temporary amendments made to the Industrial and Provident Societies Act 1893 by the Companies (Miscellaneous Provisions) (Covid-19) Act 2020, in relation to general meetings shall be made permanent.

Explanatory note

Head 69 provides that the temporary amendments made by the Companies (Miscellaneous Provisions) (Covid-19) Act 2020 in relation to general meetings shall now be made permanent. This will require a technical amendment to section 14B of the Industrial and Provident Societies Act 1893, and such other provisions as may be identified during the drafting process.