

INSOLVENCY AMENDMENT BILL (NO. 2)

AS REPORTED FROM THE COMMITTEE OF THE WHOLE HOUSE

This bill was formerly part of the Banking and Insolvency (Netting and Payments Finality) Bill as reported from the Commerce Committee. The committee of the whole House has divided the bill into 4 separate bills as follows:

- The Companies Amendment Bill (No. 2), comprising Part 1
 - The Corporations (Investigation and Management) Amendment Bill, comprising Part 2
 - This bill, comprising Part 3
 - The Reserve Bank of New Zealand Amendment Bill, comprising Part 4.
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No. 162—3C

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KEY TO SYMBOLS USED IN REPRINTED BILL

AS REPORTED FROM A SELECT COMMITTEE

Struck Out (Unanimous)

Subject to this Act,

Text struck out unanimously

New (Unanimous)

Subject to this Act,

Text inserted unanimously

(Subject to this Act,)

Words struck out unanimously

Subject to this Act,

Words inserted unanimously

Rt Hon Bill Birch

INSOLVENCY AMENDMENT (NO. 2)

ANALYSIS

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1. Short Title	
29. New sections substituted	93DA. When mutuality required for transactions under recognised multilateral netting agreements
28. Date of adjudication	93DB. Application of set-off under section 93 to transactions subject to netting agreements
28A. Date of adjudication to be recorded	93E. Transactions under netting agreement and voidable preferences
30. Assignee to advertise adjudication	93F. Set-off under netting agreement not affected by notice under section 58
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A BILL INTITULED

An Act to amend the Insolvency Act 1967

BE IT ENACTED by the Parliament of New Zealand as follows:

5 **1. Short Title**—This Act may be cited as the Insolvency Amendment Act (No. 2) 1999, and is part of the Insolvency Act 1967 (“the principal Act”).

10 **29. New sections substituted**—The principal Act is amended by repealing section 28, and substituting the following sections:

 “**28. Date of adjudication**—The date of adjudication for the purposes of this Act is,—

15 “(a) If a person is adjudicated bankrupt on a debtor’s petition, the date on which, and the time at which, the petition is filed; or

“(b) If a person is adjudicated bankrupt on a creditor’s petition, the date on which, and the time at which, the Court order is made.

“28A. **Date of adjudication to be recorded**—(1) If—

“(a) A person is adjudicated bankrupt on a debtor’s petition, the Registrar must record in the debtor’s petition the date on which, and the time at which, the petition was filed; or 5

“(b) A person is adjudicated bankrupt on a creditor’s petition, the Court must record in the order of adjudication the date on which, and the time at which, the order was made. 10

“(2) If any question arises as to whether an act was done or a transaction was entered into or effected before or after the date of adjudication, that act or transaction is, in the absence of proof to the contrary, deemed to have been done or entered into or effected, as the case may be, after that date.” 15

30. Assignee to advertise adjudication—Section 31 of the principal Act is amended by omitting the word “thereof”, and substituting the words “of adjudication”. 20

31. New sections inserted—The principal Act is amended by inserting, after section 93, the following sections:

“93A. **Definitions relating to set-off under netting agreement**—In this Act, unless the context otherwise requires,— 25

“ ‘Bank’ means the Reserve Bank of New Zealand:

“ ‘Bilateral netting agreement’ means an agreement that provides, in respect of transactions between 2 persons to which the agreement applies,—

“(a) That on the occurrence of an event specified in the agreement, all or any of those transactions must (or may, at the option of a party) be terminated and— 30

“(i) An account taken of all money due between the parties in respect of the terminated transactions; and 35

“(ii) All obligations in respect of that money satisfied by payment of the net amount due from or on behalf of the party having a net *(debt)* debit to or on behalf of the party having a net credit; or 40

5 “(b) That each transaction is to be debited or credited to an account with the effect that the rights and obligations of each party that existed in respect of the relevant account prior to the transaction are extinguished and replaced by rights and obligations in respect of the net *(debt)* debit due on the relevant account after taking into account that transaction; or

10 “(c) That amounts payable by each party to the other party are to be paid or satisfied by payment of the net amount of those obligations by the party having a net *(debt)* debit to the party having a net credit;—

15 but does not include any bilateral netting agreement *(between a party and a clearing house in respect of transactions that are subject to a multilateral netting agreement:)* that is part of a multilateral netting agreement:

20 “‘Clearing house’ means a person that provides clearing or settlement services in respect of financial transactions between parties to a multilateral netting agreement:

Struck Out (Unanimous)

25 “‘Multilateral netting agreement’ means an agreement that is contained in, or is subject to, the rules of a clearing house and that provides, in respect of transactions to which it relates, that all debits and credits arising between the parties are to be brought into account through, or in accordance with the rules of, the clearing house so that all amounts payable by or to each party are satisfied by—

30 “(a) Payment by or on behalf of each party having a net debit to or on behalf of the clearing house (whether as agent or as principal) or a party having a net credit; and

35 “(b) Receipt by or on behalf of each party having a net credit from or on behalf of the clearing house (whether as agent or as principal) or a party having a net debit:

New (Unanimous)

- “‘Multilateral netting agreement’ means an agreement that provides for the settlement, between more than 2 persons, of payment obligations arising under transactions that are subject to the agreement, and that provides, in respect of transactions to which it relates, that debits and credits arising between the parties are to be brought into account so that amounts payable by or to each party are satisfied by—
- “(a) Payment by or on behalf of each party having a net debit to or on behalf of a clearing house (whether as agent or as principal) or a party having a net credit; and
- “(b) Receipt by or on behalf of each party having a net credit from or on behalf of a clearing house (whether as agent or as principal) or a party having a net debit:

- “‘Netted balance’ means any amount calculated under a netting agreement as the net *(debt) debit* payable by or on behalf of a party to the agreement to or on behalf of another party to the agreement in respect of all or any transactions to which the netting agreement applies:
- “‘Netting agreement’ means a bilateral netting agreement or a recognised multilateral netting agreement:
- “‘Recognised clearing house’ means a clearing house declared under **section 310** of the Companies Act 1993 to be a recognised clearing house:

Struck Out (Unanimous)

- “‘Recognised multilateral netting agreement’ means a multilateral netting agreement in respect of which the clearing house is a recognised clearing house.

New (Unanimous)

“ ‘Recognised multilateral netting agreement’ means a multilateral netting agreement that is contained in, or is subject to, the rules of a recognised clearing house.

5 “93B. **Application of set-off under netting agreement**—

(1) **Sections 93A to 93G** apply—

“(a) To a netting agreement—

“(i) Made in or evidenced by writing; and

10 “(ii) In respect of which the application of **sections 93A to 93G** has not been expressly excluded; and

“(iii) Whether made before or after the commencement of this section; and

15 “(b) To all obligations under a netting agreement (whether those obligations are payable in New Zealand currency or in some other currency).

New (Unanimous)

“(2) **Sections 93A to 93G** apply despite—

20 “(a) Any disposal of rights under a transaction that is subject to a netting agreement in contravention of a prohibition in the netting agreement; or

“(b) The creation of a charge or other interest in respect of the rights referred to in **paragraph (a)** in contravention of a prohibition in the netting agreement.

25 “93c. **Calculation of netted balance**—If a person who is a party to a netting agreement is bankrupt,—

“(a) Any netted balance payable by or to the bankrupt must be calculated in accordance with the netting agreement; and

Struck Out (Unanimous)

30 “(b) That netted balance constitutes the amount that may be claimed in the bankruptcy or is payable to the bankrupt, as the case may be, in respect of all transactions that are subject to the netting agreement.

New (Unanimous)

“(b) That netted balance constitutes the amount that may be claimed in the bankruptcy or is payable to the bankrupt, as the case may be, in respect of the transactions that are included in the calculation.

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Struck Out (Unanimous)

“93D. **Set-off under netting agreement and set-off under section 93**—(1) **Section 93c** applies whether or not any transactions under a netting agreement constitute mutual credits or mutual debts to which section 93 applies.

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“(2) **Section 93c** does not apply to a transaction under a bilateral netting agreement if—

“(a) A party to the bilateral netting agreement is acting as agent or trustee for another person in respect of that transaction; and

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“(b) That other person has not authorised the party to enter into that transaction as that person’s agent or trustee.

“(3) Any netted balance calculated under a netting agreement in accordance with **section 93c** is to be treated as an amount to which section 93 applies if the bankrupt and the other party to the netting agreement also have mutual credits or mutual debts between them that are not subject to the netting agreement.

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New (Unanimous)

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“93D. **Mutuality required for transactions under bilateral netting agreements**—**Sections 93A to 93G** apply to transactions that are subject to a bilateral netting agreement only if those transactions constitute mutual credits or mutual debts.

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“93DA. **When mutuality required for transactions under recognised multilateral netting agreements**—

(1) **Sections 93A to 93G** apply to transactions that are subject to a recognised multilateral netting agreement, whether or not those transactions constitute mutual credits or mutual debts.

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New (Unanimous)

“(2) Despite subsection (1), sections 93A to 93G do not apply to transactions that are subject to a recognised multilateral netting agreement if—

- 5 “(a) Those transactions do not constitute mutual credits or mutual debts; and
- “(b) A party to any of those transactions is acting as a trustee for another person; and
- 10 “(c) The party acting as trustee is not authorised by the terms of the trust of which the party is a trustee to enter into the transaction.

“93DB. **Application of set-off under section 93 to transactions subject to netting agreements**—(1) Section 93 does not apply to transactions that are subject to a netting agreement to which sections 93A to 93G apply.

“(2) However, a netted balance is to be treated as an amount to which section 93 applies if the bankrupt and the other party to the netting agreement also have mutual credits or mutual debts between them that are not subject to the netting agreement.

“93E. **Transactions under netting agreement and voidable preferences**—(1) Nothing in sections 93A to 93G prevents the operation of section 56 in relation to any transaction to which a netting agreement applies.

25 “(2) For the purposes of section 56, the following are obligations incurred:

- 30 “(a) A transaction entered into by a bankrupt under a netting agreement if the effect of the transaction is to reduce any netted balance payable by or to the bankrupt;
- “(b) A netting agreement entered into by a bankrupt *(if)* to the extent that the effect of entering into the netting agreement is to reduce any amount that was owing by or to the bankrupt at the time the bankrupt entered into the agreement.

35 “93F. **Set-off under netting agreement not affected by notice under section 58**—The filing of a notice under section 58 in respect of a transaction *(under)* that is subject to a netting agreement does not affect the operation of **section 93c** in respect of the transaction, and that section continues to apply

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to the transaction until the transaction is set aside under section 58.

“93G. Disclaimer of onerous property and termination of netting agreement not permitted—The Assignee must not—

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“(a) Disclaim, under section 75 or section 78, any property of a bankrupt that relates to a transaction under a netting agreement:

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“(b) Terminate a netting agreement under section 76.”

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New (Unanimous)

“(b) Terminate, under section 76, a netting agreement or any contract of a bankrupt that constitutes a transaction under a netting agreement.”

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