PROPOSING AN ALTERNATIVE TO BANKRUPTCY: PART XV IN RESTROSPECT

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I. Introduction and Background to Part XV

With the arrival and subsequent repercussions of the 1987 worldwide sharemarket crash, the instances of businesses and individuals alike facing insolvency in New Zealand has escalated at an unprecedented rate. A large number of these insolvencies ultimately resulted in bankruptcy for individuals under the Insolvency Act 1967. Accompanying the growth in bankruptcies was a desire to avoid the restrictions and utilise alternatives to satisfy the demands of creditors. One such alternative is a proposal under Part XV of the Insolvency Act or an arrangement under Part X of the Bankruptcy Act 1966 (C'th). Utilisation of proposals as an alternative to bankruptcy has mirrored the growth in insolvencies in New Zealand if the number of judicial decisions is taken as the measure.

This article investigates and critically evaluates proposals filed under Part XV of the Insolvency Act 1967. Proposals were first introduced with the 1967 consolidation and amendment to the Insolvency Act 1956. Part XV of the Insolvency Act provides the procedure for securing creditor acceptance and gaining court approval of a proposal. Essentially a proposal is a document filed by an insolvent person (one unable to pay their debts as they fall due) as an alternative to bankruptcy proceedings being taken against them. The proposal sets out the manner in which debts will be paid or satisfied (s 140). The insolvent person, in making the proposal to his or her creditors, details the assets and liabilities and proposed debt repayment terms, and files a copy of this in the appropriate High Court Registry. Having signed the proposal the insolvent must obtain the endorsement of a trustee to act on his or her behalf. This person becomes the Provisional Trustee and must carry out the duties of this position as set out in s 141. Of fundamental importance is the calling of the meeting of creditors, and determining their votes on the proposal as presented or modified by resolution. This vote requires both a majority in number of creditors and 75 percent in value of those who vote to accept the proposal. If acceptance is forthcoming the trustee applies for court approval of the proposal (s 142).

Finally, for the proposal to be effective, it must be approved by the courts and then the insolvent must fulfil the provisions of the proposal (s 143). The court is required to hear any objection to the proposal by any of the creditors as set out in s 143(1) and (2). The court then plays a pivotal role in determining whether the proposal will be given legal effect. The court may refuse to approve the proposal on three major grounds and must refuse to give approval on a fourth ground. The court may refuse approval if the provisions of Part XV have not been complied with, or the terms of the proposal are not reasonable or not calculated for the general benefit of creditors, or for any reason it is of the view that it is not expedient

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that the proposal should be approved. The court may not approve a proposal if it does not provide for the payments in priority as for the distribution of the property of a bankrupt and the trustee's proper fees and expenses. Once approved, the proposal is binding on all creditors and the insolvent has avoided the need for adjudication in bankruptcy (s 144).

After approval a proposal may be varied or cancelled by application to the court (s 145). The legislative requirements are essentially the same as in Part X of the Bankruptcy Act 1966 (C'th), although this statute contains more detailed and specific provisions than the Insolvency Act.[1]

Why are proposals important? The major reason for the legislative provision of proposals was outlined succinctly by Barker J in *Re Falconer*:[2]

> I am of the view that the dominant purpose of the legislation is to provide the opportunity for a person in financial difficulties to make proposals to his creditors which, if they accept, will give him a chance to trade his way out of financial difficulty without the stigma of bankruptcy.

Thus the proposal is an important consideration for the insolvent person if they wish to continue in business and avoid the stigma of being labelled a bankrupt or "financial leper". Many high profile business persons have been subject to bankruptcy proceeding in recent times in New Zealand, and with a number of insolvents successfully implementing their proposals where the debts are in the tens of millions of dollars, this avenue for "retaining commercial status" cannot be ignored.

Obviously, any research cannot evaluate proposals that are placed before creditors and fail to meet with their approval, and the creditors' refusal is not taken to the courts for consideration. Consequently this article presents an analysis of proposals placed before the courts, either for approval or for clarification on matters of procedure. With very few court decisions before 1980 the period of coverage spans 1980 to 1994. Judicial decisions during this period are examined with respect to the content of the proposals, the factors that supported a successful proposal and the reasons underlying unsuccessful proposals. Consistency within the judicial decision-making is also evaluated where the contents of the judgments permit. This article provides guidance for intending proposal applicants in the light of important factors identified by the courts.

II. Previous Analysis of Part XV Proposals

Prior research in New Zealand has been minimal, although recently the exposure of Part X arrangements in Australia in the literature has gathered momentum. There has been one earlier study in New Zealand[3] which evaluated whether the "public interest" should be taken into account by the court in deciding whether or not to approve a proposal. In this study, Heath concluded in the following manner:[4]

> In my view, it is contrary to the clear words of s 143(3) and to the spirit of Part XV to import an overriding public interest element as a factor to consider on an application to approve a proposal.

1 See J Farmer, *Creditor and Debtor Law in Australia and New Zealand*, (3rd edn 1986), ch 14.
2 [1981] 1 NZLR 266, at 271.
3 P Heath, 'Proposals under the Insolvency Act: Is the public interest relevant?', (1991) NZLJ 52.
4 Ibid 54.

At present my views are clearly contrary to the weight of judicial authority. It remains to be seen whether, in a case in which the issue is critical, the Court will adopt the approach discussed in the cases I have mentioned.

The literature retains a focus on the theoretical justification of proposals (or Part X arrangements), although recently there has been a detailed analysis of when use of the Part X arrangement may be appropriate. Consideration of the legislation's intentions and overall scheme and purpose is another vital aspect to the analysis. In this respect, Bigmore[5] outlines the statutory procedure for Part X arrangements, and the avenues for creditors to attack these arrangements.

One of the areas attracting litigation in New Zealand and Australia involves the procedures for voting and the chairman's role in determining the right to vote at the meeting of creditors. Keay[6] reviews the Australian legislation and frequently conflicting authorities, concluding that the issue has been clarified from an academic viewpoint but many practical issues remain unresolved. As will be illustrated later in the article, the New Zealand courts have encountered similar difficulties with proposals under Part XV of the Insolvency Act.

Recently, Keay and Kennedy[7] provided a succinct analysis of the issues for insolvency advisers to resolve when determining whether or not to seek bankruptcy over the alternatives. In Part One, the authors reviewed the options available to debtors in the Australian context; that is, evasion of the situation, moratorium provisions, private informal arrangements, bankruptcy and Part X arrangements. In Part Two, the authors reviewed the implications of pursuing the bankruptcy alternative, with the obligations on the bankrupt, and the effects on the bankrupt's family, associates, property and creditors. This is contrasted to the Part X arrangement, and the advantages and disadvantages of pursuing this alternative. The authors provide suggestions of the components to be included in a Part X arrangement placed before creditors.

III. The Importance of Proposals

As stated by Barker J in *Re Falconer*, the dominant purpose for permitting a proposal is to allow an insolvent person to trade their way out of financial difficulty without the stigma of bankruptcy, subject to the procedures required by the legislative framework. For a proposal to have the chance of success there must be advantages for both the debtor and the creditors. The potential advantages for the debtor and creditors are summarised in Table1,[8] although these may not be present in every proposal application.

The potential advantages suggest that in many instances, it would be in the interest of both the creditors and the debtor to implement a proposal, subject to the provisions of the Insolvency Act. However, there is the issue of whether a third group should be considered, that is, the general public. Should the public interest be a factor in the determination of whether

5 GT Bigmore, 'Part X Arrangements', (1992) 66 The Law Institute Journal, July 609.

6 AR Keay, 'Can the Chairman's Decision Concerning the Right to Vote at a Part X Meeting be Reviewed?', (1993) 1 Insolvency Law Journal 35.

7 AR Keay and P Kennedy, 'To Bankrupt, or Not to Bankrupt? The Question Faced by All Insolvency Advisers: Part One', (1993) 1 Insolvency Law Journal 187. AR Keay and P Kennedy, 'To Bankrupt, or Not to Bankrupt? The Question Faced by All Insolvency Advisers: Part Two', (1994) 2 Insolvency Law Journal 13.

8 Adapted and extended from Keay and Kennedy, Part Two, ibid.

a proposal should succeed? This question was considered by Heath, who resolved that there should be no overriding public interest factor. The issue arises by virtue of section 143(3)(c), which provides:

> The Court may refuse to approve the proposal if it is of the opinion - ... that for any reason it is not expedient that the proposal should be approved.

Heath contends that what is expedient (that is suitable, advisable, more politic than just) is conceptually different to what is just and equitable. The courts may determine that it is more suitable for a proposal to go ahead on efficiency grounds, but it may be more just for bankruptcy proceedings to commence. Heath would permit the courts to determine the advisability of approving the proposal but not whether it is just and equitable to grant approval. Consequently, Heath's thesis is that whatever the court may ascertain to be in the general public's interest could not be used to outweigh what may be seen as advisable or suitable in the debtor's and creditors' interests. Subject to the provisions for presenting a proposal within the legislation, and that the terms of the proposal are reasonable and for the benefit of the general body of creditors, then whatever the creditors collectively and the debtor resolve to do, the court should approve this course of action.

Table 1: The advantages of proposals for debtors and creditors

Advantages for the debtor	**Advantages for creditors**
Selection of the provisional trustee (s141).	Independent control of the debtor's assets by the provisional trustee.
Avoiding the stigma of bankruptcy.	Avoiding the cost of court proceedings under a bankruptcy.
Avoiding the costs of court bankruptcy proceedings.	Earlier receipt and higher amount of distribution than under bankruptcy.
Avoiding the publicity of bankruptcy.	Contributions from friends, relatives, employers, to assist in the debtor's avoidance of bankruptcy.
Subject to the terms of the proposal, property acquired after proposal is complete and enforceable is not affected.	Creditors may be able to continue trading with the debtor.
Avoiding the limitations placed on a bankrupt, such as leaving New Zealand and running a business.	Debtor may be able to continue in business or employment to the benefit of creditors.
Avoiding the examination of a bankrupt under s 69.	Greater flexibility than with a bankruptcy administration.
Subject to the terms of the proposal, the debtor will not be required to contribute to his or her creditors from his or her income.	More co-operation from the debtor through their personal involvement in the proposal and in disclosing their assets.
Reduced exposure to criminal liability	Finalisation of the distribution process may be quicker than with bankruptcy administration.

Heath posits that private arrangements subject to court approval should not require an assessment of whether the public is best served by the terms of the proposal. There is sound argument that on application of the scheme and purpose approach to interpreting the Insolvency Act, proposals are an alternative to the "public nature" of bankruptcy. To buttress this argument, there is no provision included in the statutory scheme inferring that the public interest can be used to usurp the wishes of the debtor and the general body of creditors.

In the next section of this article, the proposals which have come before the courts have raised the issue of an overriding public interest element, which the weight of early judicial authority imposed as a gloss on the legislation. More recently, the Court of Appeal refocussed the emphasis on the creditors' commercial appraisal of the proposal.[9] A clear statement on this issue by way of an additional provision or clarification to the existing legislation would assist in resolving the debate. There are nevertheless laudable arguments to support consideration of the public interest with applications for approval of proposals. Otherwise debtors and creditors may formulate arrangements which are mutually beneficial but fail to provide for any recompense to the general public which frequently has directly or indirectly suffered from the debtor's actions. Furthermore, creditors with provable debts of up to 25 percent of the total value of provable debts may strongly disagree with the terms of the proposal yet have no avenue for redress - they will be bound by the proposal once it has been approved by the courts (s 144).

IV. The Case History 1980 to 1994

The following schedule of cases (in judgment delivery date order) provides a basis for analysis of the issues in preparing a proposal and advancing it from creditor approval to court approval and eventual implementation.[10]

Table 2: Schedule of Proposal Cases under Part XV: 1980 to 1994 Inclusive

Case Name	Successful	Unsuccessful	Technical issues	Important Observations
1. *Re Falconer* [1981] 1 NZLR 266, Barker J.	Approved			Discussion on s 139 excluding partnerships, and lack of clarity in legislation.
2. *Re Richards, ex parte Bell*, unreported, Hardie Boys J, 23 December 1980, HC, B.2/78.		Declined	Proposal of 6	
3. *Re Duncan Holdings, Re Bennetts*, unreported, Hardie Boys J, 1 February 1982, HC, M.306/81.	Approved		Minor adjustment made to proposal under s 143(6).	Public interest is relevant (p 9).
4. *Re Chard* [1985] 2 NZLR 612, Vautier J.		Declined	Required separate applications (p 614).	Procedures for accepting creditors' proofs (p 616).

continued ...

9 See *Farmer v Rowley* [1992] 2 NZLR 195 (CA).

10 Important cases appear in bold type.

Case Name	Successful	Unsuccessful	Technical issues	Important Observations
5 *Re Nicholson*, unreported, Tomkins J, 5 April 1984, HC, M.555/83.	Approved		Minor amendment to proposal (p 2).	Alterations to the insolvent's contributions need not be of substance (p 3).
6 *Ballin v Market Gardeners Ltd & ors*, unreported, Roper J, HC, 22 August 1984, M.284/84.			Time should have been granted to allow for a proposal (p 3)	
7. *Re Taylor*, unreported, Sinclair J, 11 April 1985, HC, B.136/84.		Declined	Priority of payments incorrect (s 143(5)).	Debtor did not appear (p 2).
8 *Re Lewin*, unreported, Henry J, 3 February 1986, HC, A 1375/84	Approved		Approved proposal earlier on 4 April 1984	Variation permitted if required (p 4). Debts to be proved as for bankruptcy (p 2)
9. *Re Shaxon*, unreported, Sinclair J, 25 July 1988, HC, B.454/88.	Both Approved		Affidavit over assets and liabilities (p 4)	On overall appreciation proposal was for benefit of the creditors (p 7).
10. *Re Trott*, unreported, Tompkins J, 14 April 1989, HC, B.1471/88; Re Joy, unreported, Tompkins J, 14 April 1989, HC, B 1472/88.	Both Approved		Joint debts, contingent liabilities, and expediency issues discussed	A monumental financial disaster (p 42), not culpable misconduct (p 27), creditors receive more and earlier.
11 *Re Fidow* [1989] 2 NZLR 431, Fisher J.		Declined	Failed to satisfy voting requirements.	Deteriorating financial position (p 442). Public interest important (p 444) Need for finality (p 445).
12. *Re Kelliher*, unreported, Williamson J, 24 July 1989, HC, B.12/89.	Both Approved			No misconduct and reasonable and expedient proposals (p 8).
13. *Re Nathan*, unreported, Robertson J, 14 August 1989, HC, B.53/89.		Declined	Proposal was technically correct (p 19)	No recovery of any substance (p 20). Public entitled to protection; need for deterrence (p 21). Perceptions created not to be ignored (p 22).
14 *Re Henry, ex parte Diners Club (NZ) Ltd*, unreported, Master Towle, 30 August 1989, HC, B.1992/88.		Declined	Not reasonable or for the benefit of creditors (p 6)	Level of debt astronomical by NZ standards (p 6).
15. *Re Riddiford*, unreported, Neazor J, 21 September 1989, HC, B.91/89.	Approved		The fact the proposal was not advertised was not fatal (p 36).	Forgiveness of debt assessable income (p 47). Comments on why approved (pp 47-51).
16 *Re Alty*, unreported, Holland J, 16 November 1989, HC, B.105/89.	Approved		Debtor required to contribute more (p 3).	Minor amendment not of substance.
17. *Re Davison*, unreported, Holland J, 13 December 1989, HC, B 412/89.		Declined	Voting major creditor denied - fundamental to success (p 7)	Expedient includes public interest and overall justice. Court discretion not very elegantly expressed (p 9).

Case Name	Successful	Unsuccessful	Technical issues	Important Observations
18. *Smith v Taylor*, unreported, Somers, Hardie Boys, Heron JJ, 13 February 1990, CA, CA.33/90. (Appeal from case 7 above.)		Appeal Declined		No substance in proposal, opportunity for composition (p 3).
19. *District Commissioner of Inland Revenue v Bain* (1990) 12 NZTC 7, 292, Williamson J.		Declined	Unpaid GST is a debt entitled to priority (p 7,295).	Not relevant that the District Commissioner was better off under a proposal than upon bankruptcy (p 7,295).
20. *Re Davies*, unreported, Thomas J, 9 March 1990, HC, B.273/89.			Interlocutory matters - seven day adjournment.	Concern proceedings used to avoid bankruptcy and stigma (p 2).
21. *Re Guest, ex parte BNZ Finance Ltd*, [1990] 3 NZLR 700, Holland J.		Declined	Chairman to decide if proposal accepted (p 705). Re Chard not followed. Required percentages absent.	Public interest - consider behaviour of insolvent, size of debts of opposing creditors (p 712).
22. *Re McGarry, unreported*, Grieg, J, 10 May 1990, HC, B.2320/89.	Approved		Review of the history and procedure for proposals (p 2).	Greater recovery than bankruptcy; no misconduct; opposing creditor seeking vengeance (p 13).
23. *Taylor v National Mutual Finance*, unreported, Fisher J, 8 June 1990, HC, B.127/89.			Stay granted to suspend adjudication pending proposal.	
24. *Taylor v National Mutual Finance*, unreported, Fisher J, 28 June 1990, HC, B.127/89. (Further to case 23 above.)		Declined	No provisional trustee's report (p 9).	Should not need to ferret around papers to ascertain proposal (p 9). Desire speed and finality (p 12). Proposal lacked clarity (p 13).
25. *Re Burrowes*, unreported, Williamson J, 29 June 1990, HC, B.100/90, B.101/90.	Both Approved			Appearance of shaking off but not paying debts criticised - approve with caution (p 5).
26. *Re Gates, ex parte Nebulite Aluminium*, unreported, Master Williams, 22 August 1990, HC, B.71/90.			Adjournment to formalise proposal (p 7).	
27. *Re Adams-Schneider, ex parte RJI Ltd*, unreported, Master Williams, 24 September 1990, HC, B.178/90.		Declined		Dispute over the value of debts immaterial as over 42 percent oppose delay to make a proposal (p 10).
28. *Guest v Duffy* [1991] 1 NZLR 183 (CA), Richardson, Casey, Hardie Boys, JJ. (Appeal from case 21 above.)		Declined	Crucial time to determine votes is when votes are called for and taken (p 187).	Required majority not achieved for either applicant (p 189).

Case Name	Successful	Unsuccessful	Technical issues	Important Observations
29. *Re Guest, ex parte BNZ Finance Ltd*, [1991] 1 NZLR 477 (HC), Master Gambrill. (Further to case 28 above.)		Declined		With the lengthy delay, quantum of debt, desirability of finality and public interest, petitioning creditor to proceed (p 482).
30. *Re Guest, ex parte BNZ Finance Ltd*, [1991] 1 NZLR 250 (HC), Hillyer J. (Further to case 29 above.)		Declined	Practice and procedural issues discussed.	Court must consider whether the course taken is conducive of or detrimental to commercial morality and the interests of the general public (p 254).
31. *Re Hart* [1991] 2 NZLR 219, Smellie J.		Declined	Court ought to approve a proposal unless one of the reasons for refusal in s 143(3) exists (p 224).	Onus on opposing creditor (s 143(3)(a) and (b) but for the court's independent judgment whether it is expedient in the public interest for (c) (p 225). Proposal had unrealistically high dividend, default almost inevitable, vague, unable to determine when the insolvent was in default (p 226).
32. *Re Hucklebridge*, unreported, Tipping J, 16 November 1990, HC, B.55/89.			Adjourned for opportunity for new proposal (p 2).	Likely to succeed with a more precise proposal (p 2).
33. *Re Davies*, unreported, Thomas J, 19 November 1990, HC, B.273/89. (Further to case 20 above.)		Declined	Proposal used as means to avoid a bankruptcy order (p 8).	Proposal significantly different to that approved by creditors (p 7).
34. *Re PH Lowndes*, unreported, Wylie J, 10 December 1990, HC, B.1879/90.	Approved		Minor change to wording permitted (p 18).	Five year repayment plan, employer contributing, not to be judged solely on size of liabilities (p 14).
35. *Re McDonald*, unreported, Tipping J, 1 March 1991, HC, B.223/90 & B.561/90.	Both Approved			Not required to alter proposal to include contribution from earnings (p 6).
36. *Re Farmer* [1991] 4 PRNZ 628 (HC), Tompkins J.			Application for directions: Proof of debts and trustees duties discussed.	Cannot take account of proof of debt / voting letter after meeting has concluded (p 638).
37. *Re MA Lowndes*, unreported, Barker J, 10 May 1991, HC, B.2161/90. (Not the same insolvent as in case 34 above.)	Approved		Deliberate and imprudent failure to advertise not fatal (p 14); member of legal profession not permitted special privacy (p 18).	Return more than bankruptcy (five to six cents as to nil), employment as solicitor important, permitted some personal incentive in proposal. No need to stigmatise behaviour (pp 13-15).

Case Name	Successful	Unsuccessful	Technical issues	Important Observations
38. *Re Fletcher, ex parte Commercial Holdings Ltd*, unreported, Master Hansen, 23 May 1991, HC, B 2346/90.		Declined	Seeking adjournment to offer proposal.	Debt outstanding for some time, bankruptcy proceedings served, last ditch attempt to avoid reality (p 2).
39. *Re Tupara, ex parte Gisborne District Law Society*, unreported, Anderson J, 23 May 1991, HC, B 1/91.				Granted time to prepare a proposal - not receiving particular leniency as a solicitor (p 4).
40. *Rijnbende v BNZ Finance*, unreported, Master Hansen, 27 June 1991, HC, B.2287/90.		Declined		Would not grant delay to present proposal, no response to requests for details (p 2).
41. *Re Luey, ex parte Defiance Flour Mills Ltd*, unreported, Ellis J, 12 August 1991, HC, B.608/90.		Declined	Arrangement lacked legal precision but need not be fatal. To remove provision for insolvent's allowance is 'of substance' (p 6)	Provision for insolvent's allowance serious defect and renders inexpedient to approve (p 4). Will not refuse approval solely due to family members supporting votes (p 5).
42. *Re Craig, unreported, Ellis J*, 19 September 1991, HC, B 17/91, B.18/91.	Both Approved		Section 145 could be used if security for creditor unavailable (p 5).	No realistic alternative to agreeing to the proposal (p 4) Secured creditor to claim security notwithstanding s 144.
43. *Re Farmer*, unreported, Hillyer J, 1 October 1991, HC, B 812/90, B 813/90 (Further to case 36 above.)		Both Declined	Creditors were entitled to notification of meeting (p 16)	Provisions of Act not complied with, and insolvents' offer not as good as could be (p 19).
44. *Re Wilson, unreported*, Grieg J, 15 October 1991, HC, B.345/91.	Approved		Technical issues immaterial (p 7).	Dividend more than under bankruptcy; maintaining employment important Sharemarket crash was the cause; conduct not requiring stigma of bankruptcy (p 8).
45. *Re Inglis*, unreported, Neazor J, 24 October 1991, HC, B.265/91.	Approved		Creditor may prove debt after meeting (p 3).	Modification to a 36 month period at creditors' meeting approved by the court (p 4).
46 *Farmer v Rowley* [1992] 2 NZLR 195 (CA), Richardson, Hardie Boys, McKay JJ. (Appeal from case 43 above.)	Both Approved		Refusal to approve must be related to particular paragraph in s 143(3) (p 199). Court should not reactivate acceptance process and it is not the court's function to promote enhancement of a Part XV proposal (p 203)	In determining if reasonable, the court exercises independent judgement but must be influenced by the commercial judgment of creditors who approved the proposal and should normally give effect to their wishes (pp 200, 202, 205). No public interest considerations to weigh against proposal (pp 201, 208).

Case Name	Successful	Unsuccessful	Technical issues	Important Observations
47. *Re Whiteman, ex parte UDC Finance*, unreported, Barker J, 9 April 1992, HC, B.1030/91, B.304/92.		Declined	Subsidiaries need not be assumed to vote in order to preserve their parents' interests (p 12).	Creditors may receive nothing, further investigation of debtor under bankruptcy is possible (p 13).
48. *Re Taylor, ex parte Greenwood*, unreported, Thomas J, 9 June 1992, HC, B.511/92			One month given for opportunity to file proposal (p 3).	Opposing creditors urged to accept proposal in lieu of bankruptcy (p 3).
49. *Re de Boam*, unreported, Grieg J, 22 July 1992, HC, B 163/91.	Approved		Advertising not a statutory requirement (p 3).	Direction for advertising and affidavit from trustee given as part of approval (p 4).
50. *Re Stoddart*, unreported, Robertson J, 27 July 1992, HC, B.1175/92.	Approved		No advertising of meeting (p 3)	Arose from one bad investment opportunity, all creditors identified, the bad investment did not arise from insolvent's occupation, bankruptcy would seriously affect work (pp 3-4).
51. *Whiteman v UDC Finance Ltd* [1992] 3 NZLR 684 (CA), Cooke P, Hardie Boys and McKay JJ. (Appeal from case 47 above.)		Declined	No requirement for class voting, no fraud or mistake to taint vote (p 691).	Original assessment of scheme in High Court not wrong (p 689). Court may determine if majority obtained, but if it determines it has not been, the matter is ended (p 691).
52. *Re Whiteman, ex parte UDC Finance*, unreported, Master Hansen, 13 August 1992, HC, B.304/92. (Further to case 51 above.)		Declined		Application for further adjournment to consider Court of Appeal decision refused (p 2).
53. *Re Williams*, unreported, Williamson J, 25 August 1992, HC, B.24/92.	Approved		Details from meeting determined to be adequate (p 5).	Court to be careful before rejecting the commercial judgment of majority of creditors. Investigation under bankruptcy not required (p 6).
54. *Re Taylor* (1992) 4 NZBLC 102,875, Thomas J. (Further to case 48 above.)			Adjourned bankruptcy proceedings - stay (p 102,879) Proposal not before court.	Bankruptcy sought in vindictive manner and would realise nothing. Proposing a seven year five cent repayment (pp 102, 877-8)
56. *Re Russell, ex parte Exotic Building Supplies Ltd*, unreported, Williams J, 17 September 1992, HC, B.1207/92.		Declined	Declined application for stay of the bankruptcy in order to prepare a proposal (p 4).	
57. *Re Moyle, ex parte Tanner Sawmills Ltd*, unreported, Thorp J, 22 September 1992, HC, B.721/92.		Declined	Position advised to creditors at meeting substantially different to that disclosed but not fatal (p 5).	Failed to get the majority by number: both 50 percent for and against so approval was not possible (p 6).

Case Name	Successful	Unsuccessful	Technical issues	Important Observations
58. *Re Evans*, unreported, Blanchard J, 26 November 1992, HC, B.2143/92.		Declined	Two proposals were required (p 3). (Re Falconer approach endorsed).	
59. *Re Coll*, unreported, Wallace J, 2 December 1992, HC, B.1738/92.	Approved		Charging order creates a charge under s 2 Insolvency Act (p 5). Position of secured creditors in need of clarity in Act (p 9). Farmer v Rowley followed.	Almost certain use of s 50 to restrain opposing justifies approval (p 7). Full disclosure given, not in public interest to impose stigma of bankruptcy. No recklessness by insolvent or delay contemplated (p 12).
60. *Tucker v Brown*, unreported, Holland J, 10 March 1993, HC, M.39/91.		Declined		Proposal suggested but subsequently debtor filed her own bankruptcy petition (p 2).
61. *Re West*, unreported, Penlington J, 23 April 1993, HC, B.5/93.	Approved		Typographical errors corrected under s 143(6) (p 8).	Opposing creditor could not show why not expedient to approve the proposal (p 7).
62. *Re Chambers*, unreported, Blanchard J, 20 May 1993, HC, B.1222/92. (Further to case 55 above.)			Public notice in paper not a substitute for actual notice (p 8). Strict timetable to be observed to produce a final proposal (within eight days) and then consider voting issue (p 15).	Overlooking a substantial creditor's claim indicated a less than conscientious attitude (p 7). Followed the approach in Re Hart. The amount to be retained was not unattainable, and the insolvent had faced up to his obligations (p 12). No comparable benefit from bankruptcy (p 13).
63. *Re Renner, ex parte National Bank of NZ*, unreported, Master Kennedy-Grant, 21 May 1993, HC, B.127/92.			Annulment of bankruptcy order granted - court was misled in error (p 6).	Opportunity to present proposal given that the formalities were met, and it was reasonable and calculated for the general benefit of creditors (p 6).
64. *Re Mitchell, ex parte Bunting*, unreported, Master Kennedy-Grant, 15 September 1993, HC, B.1203/93.		Declined		Likelihood of presenting a proposal illusory and support from creditors unlikely (p 9).
65. *Brown v BNZ* [1994] 2 NZLR 612, Master Towle.	Original Proposal Remained		Creditor not required by s 144 to get prior approval before pursuing Mrs Brown as she was not the insolvent (p 614).	Proposal approved for Mr Brown on 4 Dec. 1992. Mrs Brown had assisted Mr Brown in meeting his obligations; it would not be just and equitable to bankrupt Mrs Brown (p 615).
66. *Re Webster*, unreported, Barker J, 3 March 1994, HC, B.1824/91.		Expert to Review Affairs	Proposal to be varied under s 145 (p 4).	Expert accountant required to investigate financial position and prepare asset valuations (p 5).

Case Name	Successful	Unsuccessful	Technical issues	Important Observations
67. *Re Spencer* (1994) 16 NZTC 11,140, McGechan, J.		Declined	Section 143(4) cannot be used if priorities for payment do not accord as for bankruptcy (p 11,142).	GST is a claim to be paid in priority after preferred wages. Desirable proposal which would be approved if power existed. Section 143(6) cannot cure s 143(4) deficiency (p 11,142).
68. *Re Oliff*, unreported, Williamson J, 29 June 1994, HC, B.11/94.	Approved		Trustee should not also appear as counsel for insolvent (p 6).	
69. *Re Whiteman*, unreported, Tomkins J, 29 August 1994, HC, B.304/92. (Further to case 52 above.)		Declined	Early discharge sought, citing earlier proposal in support.	Same claims made for discharge as for the proposal but unsuccessful (p 6).
70. *Re Fordham*, unreported, Master Gambrill, 19 September 1994, HC, B.64/94.			Absence of details of assets and liabilities - non-compliance (p 3). Opportunity to present a proposal (p 11).	Defect in Act as to what happens to a creditor who assigns their debt, forgoes their legal rights and there is default by the insolvent (p 7).
71. *Adamson v DB Breweries Ltd*, unreported, Eichelbaum CJ, 9 November 1994, HC, B.21/89.	Variation Approved		Variation permitted (s 145(1)(d) to lump sum payments as a result of the debtor losing his job. DB Breweries was "unremittingly hostile" to the debtor (p 3).	Breaches for genuine reasons, trustee was fully informed, good faith shown in effort to make payments while out of work, no breaches for 15 months, only 20 percent sought cancellation (p 3).

V. An Analysis of the Procedure for Court Approval of a Proposal - A Reflection on Judicial Dicta

1. Technical issues and obtaining creditor acceptance

Review of judicial authority on proposals under Part XV indicates that a significant number have failed at the first hurdle - the proposal was not in the prescribed form with the necessary accompanying statement of affairs (s 140(4)). Instances of obtaining an adjournment to formulate a formal proposal have enabled debtors to avoid bankruptcy proceedings (although this has been a temporary measure as a final attempt to avoid reality in some instances). Examples of successful adjournments include *Ballin v Market Gardeners Ltd*, *Re Gates, ex parte Nebulite Aluminium*, *Re Hucklebridge*, *Re Taylor, ex parte Greenwood*, *Re Chambers, ex parte Russell McVeagh McKenzie Bartlett* and *Re Renner, ex parte National Bank of NZ*. A failure to respond to requests for further details will undermine an insolvent's efforts to be granted an adjournment in order to receive time to present a proposal; see *Rijnbende v BNZ Finance*.

Other proposals have failed to satisfy the various requirements of the Insolvency Regulations 1970 and the Insolvency Rules 1970. Examples include a failure to present separate proposals for each applicant (*Re Chard*

and *Re Evans*) and accompanying affidavits concerning the insolvent's assets and liabilities (*Re Shaxon*). Recently in *Re Fordham*,[11] no details of assets and liabilities were provided. Such a fundamental error should never occur with the substantial body of precedent available to specify the prescribed form. The proposal should be clear without placing the onus on the court to ascertain its substance by ferreting around the masses of detail (*Taylor v National Mutual Finance*[12]). Nevertheless, in some instances technical issues may be overlooked when the court is in favour of approving the proposal, provided it has the legislative power to correct the proposal under s 143(6).[13]

The role of the provisional trustee has also introduced areas of litigation, which partially reflects the lack of clarity in the principal Act. Sections 141 and 142 are the pertinent sections in this regard. The role of the provisional trustee is set out in section 141. Failure to obtain the required voting majorities has been a catalyst for numerous cases, with examples including: *Re Fidow*, *Re Adams-Schneider, ex parte RJI Ltd*, *Guest v Duffy*,[14] and *Re Moyle, ex parte Tanner Sawmills Ltd.*

Advertising of the creditors' meeting is an issue which has been left to regulation; it is not a statutory requirement but may be required as part of approving the proposal (*Re de Boam*). Judicial opinion has favoured a liberal and lenient approach, where a failure to advertise need not be fatal to the success of a proposal if it can be shown that creditors have not been disadvantaged (for example, refer to *Re Riddiford*). A fortiori, a deliberate and imprudent failure to advertise was not fatal to approving the proposal as in *Re MA Lowndes*. However, disadvantaging a major creditor will be fatal to a proposal (*Re Davison*). Creditors are entitled to be notified of all meetings called by the trustee (*Re Farmer*[15]).

The role of the chairman at the creditors' meeting in determining voting eligibility has caused divergence in judicial opinion. Initially the procedure laid out by Vautier J in *Re Chard* was applied, but in *Re Guest, ex parte BNZ Finance*,[16] Holland J held that the chairman determined voting eligibility and whether or not the proposal was accepted by the creditors. In *Guest v Duffy*,[17] voting eligibility determination was held to occur when votes were called for and taken. However, in the light of the recent decision in *Re Inglis*, it is difficult to reconcile allowing creditors to prove their debt after the meeting with the requirements of s 141(3), and determining the required majorities for approval in s 142(3). The court may determine if the required majorities have been obtained but if it determines they have not been, then that is the end of the issue; *Whiteman v UDC Finance Ltd.* In ascertaining the legal validity of debts, Tompkins J held in *Re Farmer* that there could be no account taken of the proof of debt or voting letter after the meeting had concluded. Debts are to be proved in the same manner as for bankruptcy (*Re Lewin*).

Corporate entities may be assumed to vote in their own interests and not to protect their parent companies, according to Barker J in *Re Whiteman, ex parte UDC Finance*. On appeal, the Court of Appeal determined that

11 Decision given on 19 September 1994.
12 Unreported, Fisher J, 28 June 1990, HC, B.127/89.
13 See *Re Wilson*, unreported, Grieg J, 15 October 1991, HC, B.345/91.
14 See also the subsequent decisions concerning the insolvent Guest.
15 Unreported, Hillyer J, 1 October 1991, HC, B.812/90, B.813/90.
16 [1990] 3 NZLR 700.
17 [1991] 1 NZLR 183 (CA).

class voting by creditors is not required by the Act, and only instances of fraud and mistake may call into question whether the votes may be accepted. Family members or close associates, whose votes may be essential to gaining the required majorities in support of the proposal from the creditors, will not of itself lead to the court refusing to approve the proposal (see for example *Re Trott* and *Re Joy, Re Luey, ex parte Defiance Flour Mills Ltd*). The position of secured creditors in the proposal process is in desperate need of clarity, in the view of Wallace J in *Re Coll*.

The trustee, upon completion of the creditors meeting, must file a report to the court setting out, inter alia, the determinations of the meeting and whether the proposal was accepted; failure to do so will cause the proposal to fail (*Taylor v National Mutual Finance*[18]). As noted in *Re Oliff*, the trustee should remain independent and the trustee's appearance as counsel for the insolvent was disapproved of by the court.

2. The approach of the Courts to granting approval of proposals

Once the technical formalities of the scheme are satisfied and creditor approval has been obtained, the debtor frequently encounters the onerous task of persuading the court that approval should not be refused under section 143. To satisfy s 143(3)(a) requires the insolvent and the trustee to comply with the provisions of sections 140 to 142 inclusive. Divergence in judicial opinion is highlighted by the approach taken to granting or refusing approval of a proposal under sections 143(3)(b) and (c). One important area is the public interest factor, whic h received attention in the early case of *Re Duncan Holdings, Re Bennetts*. Furthermore, judicial opinion in *Re Shaxon* favoured that an overall appreciation of the benefits for creditors be taken.

The following factors have been identified as important to the success of a proposal under s 143(3)(b):

(1) No culpable misconduct by the insolvent (*Re Trott* and *Re Joy, Re McGarry*).

(2) Creditors receive more with the proposal than under bankruptcy (*Re Trott* and *Re Joy, Re Riddiford, Re McGarry, Re MA Lowndes, Re Wilson*).

(3) Creditors will receive payment earlier with the proposal than under bankruptcy (*Re Trott* and *Re Joy*).

(4) The nature of insolvent's business suggested no better proposal could be expected (*Re Riddiford*).

(5) Provision for some entrepreneurial incentive is permitted where this is the method by which creditors will be paid and such payment would not be possible should the insolvent be made bankrupt (*Re Riddiford, Re MA Lowndes*).

(6) Creditors need to firmly resolve what they want and further delays would only cause prolonged debate (*Re Riddiford*).

(7) The insolvent agrees to contribute more to creditors to a level deemed appropriate by the court (*Re Alty*).

(8) The opposing creditor is seeking vengeance or acting vindictively (*Re McGarry, Re Taylor*).

18 Op cit n 12.

(9) The repayment period is longer than required under bankruptcy (*Re PH Lowndes, Re Taylor*).

(10) The employer is contributing to the insolvent's repayments, a factor which could not be enforced under bankruptcy (*Re PH Lowndes*).

(11) Maintaining employment as a professional person is fundamental to repayment (*Re MA Lowndes, Re Wilson*).

(12) There is no realistic alternative or comparable benefit to approving the proposal (*Re Craig, Re Chambers*).

(13) If the commercial judgment of creditors is in favour of the proposal, the court should normally give effect to this (*Farmer v Rowley, Re Williams*).

(14) The livelihood of the insolvent is unrelated to the cause of the insolvency, with bankruptcy likely to impinge on the insolvent's occupation (*Re Stoddart*).

(15) An investigation under bankruptcy is not required (*Re Williams*).

(16) The amount retained by the insolvent from his earnings is reasonable (*Re Chambers*).

Factors which have contributed to the failure of a proposal to satisfy s 143(3)(b) include:

(1) The recovery and the proposal itself do not contain any substance (*Re Nathan, Re Davison*).

(2) The proposal is not reasonable or for the benefit of creditors (*Re Henry, ex parte Diners Club (NZ) Ltd*).

(3) The level of debt is astronomical by New Zealand standards (*Re Henry*, but compare this finding to the earlier decision in *Re Trott* and *Re Joy*).

(4) There is an unrealistically high dividend (*Re Hart*).

(5) Default by the insolvent is almost inevitable (*Re Hart*).

(6) The proposal is vague and the court is unable to determine when the insolvent would be in default (*Re Hart*).

(7) The proposal before the court is significantly different to that agreed to by the creditors (*Re Davies*[19]).

(8) An investigation of the insolvent is desirable, which requires bankruptcy (*Re Whiteman, ex parte UDC Finance*).

If the proposal survives scrutiny under s 143(3)(b), it may still fail to receive approval if, in the opinion of the court, it is not expedient (suitable or advisable) that the proposal should be approved. The following factors and comments have been identified as important to determining the expediency of approving a proposal under s 143(3)(c):

(1) The public interest is relevant to determining expediency (*Re Duncan Holdings* and *Re Bennetts, Re Fidow, Re Davison, Farmer v Rowley*).

(2) A need for finality, emphasised by a deteriorating financial position, will not assist expediency (*Re Fidow*).

19 Unreported, Thomas J, 19 November 1990, HC, B.273/89.

(3) If there is no misconduct by the insolvent, determination of expediency is assisted (*Re Kelliher, Re Guest, ex parte BNZ Finance, Re Coll*).

(4) The public is entitled to protection and perceptions created by allowing a person to continue to operate without bankruptcy cannot be ignored; there should be a deterrence aspect (*Re Nathan*).

(5) A failure to advertise needs evidence to support a finding that it remains appropriate to approve the proposal (*Re Riddiford*).

(6) Overall justice is a component of determining expediency (*Re Davison*).

(7) The size of the debts of the opposing creditors (*Re Guest, ex parte BNZ Finance*).

(8) Will approval be conducive or detrimental to commercial morality and the interests of the general public (*Re Guest, ex parte BNZ Finance*)?

(9) If there is a need to stigmatise the behaviour with bankruptcy, the proposal will not be approved (*Re MA Lowndes, Re Wilson, Re Coll*).

(10) An excessive allowance for the debtor will render a proposal inexpedient to approve (Re Luey, ex parte Defiance Flour Mills *Ltd*).

(11) The opposing creditor needs to convince the court of reasons why it is not expedient to approve the proposal (*Re West*).

The decision of Penlington J in *Re West* is difficult to reconcile to the approach taken by Smellie J in *Re Hart*, where in the latter case Smellie J stated that the court would exercise its own judgment as to whether it is expedient to approve the proposal in the public interest. From a close examination of the judgments in the cases, it has been rare for a proposal to fail solely by virtue of the court determining it to be inexpedient to grant approval. There have been no instances in the analysis of refusal solely on grounds of public interest considerations under s 143(3)(c), although a significant number of decisions have endorsed inclusion of the public interest in determining expediency. Other deficiencies in the proposals before the court have enabled the court to avoid refusing approval solely for reasons of the public interest, preferring the parties to enter bankruptcy proceedings.

3. Requirement for priority of repayments in accordance with bankruptcy procedures

Section 143(4) clearly provides that the proposal must set out the priority of repayment in accordance with the procedure for distribution of the assets of a bankrupt (s 104). In essence, the priorities with proposals will need to incorporate:

(1) Amounts due to secured cred itors;

(2) The trustee's reasonable expenses and fees;

(3) Arrears of wages and salaries to the legislated maximums;

(4) Payments to the Commissioner of Inland Revenue (which includes income tax, FBT and GST);

(5) Wages and salaries not due as a preferred claim, followed by the spouse's wage or salary;

(6) Any interest on debts as provided for in agreements between the insolvent and the creditors; and

(7) A rateable amount for remaining debts of unsecured creditors not repaid as above.

Inclusion of the priority for the trustee's fees and expenses is crucial.[20] GST clearly became a payment in priority in *District Commissioner of Inland Revenue v Bain*, (confirmed in the recent case of *Re Spencer*). The position of secured creditors is unclear and should be included in a review of the Act, according to Wallace J in *Re Coll*.

4. Correction to proposals of an incidental nature

Section 143(6) permits the court to make corrections to a proposal which are not of substance. In *Re Duncan Holdings* and *Re Bennetts*, removal of the name of Duncan Holdings Ltd from the list of creditors as a consequence of the company moving into liquidation was not of substance, in the view of Hardie Boys J. As a result of the sale of a property reducing the amount of interest payable by the insolvent, the court accepted an amendment to the proposal in *Re Nicholson* of a reduction from $500 to $350 per week gross for the maximum period of 17 weeks that the insolvent would be required to meet this payment. In *Re Alty*, the insolvent was directed by the court to contribute a further $5,864.55 representing superannuation scheme contributions and the amended proposal was approved utilising s 143(6). In *Re PH Lowndes*, removal of the words "the difference between" was considered to potentially be an amendment of substance but Wylie J held that the words were a nonsense as they stood. Amendment to the "windfall" provision of the proposal was not permitted as this would be an amendment of substance. Dicta in this decision highlights the fine balance between corrections of a minor nature and those of substance.

The imprecise details of how the insolvent would be permitted to retain an allowance was a matter of substance and therefore could not be altered in *Re Luey, ex parte Defiance Flour Mills Ltd*. Typographical errors may be corrected under s 143(6) where such errors are accidental.[21] If there are errors with respect to priorities as required by s 143(4), then these cannot be cured by s 143(6) in the view of McGechan J in *Re Spencer*. According to His Honour, section 143(4) takes precedence over section 143(6) in the statutory scheme of Part XV; a finding in need of further appraisal with the next review of the Insolvency Act.

5. Effect of court approval of a proposal

Minimal case law has developed in this area. One example is *Re Craig*, where Ellis J proposed that once the proposal was approved, the secured creditor could claim its security notwithstanding the provisions of section 144. In *Brown v BNZ*, Master Towle determined that since the insolvent's spouse was not a party to the insolvent's scheme and had not made any proposal as an insolvent under section 139, then the BNZ did not require court approval under s 144(1)(b)(ii) to commence legal proceedings against the insolvent's spouse. Master Towle held that the word 'debt' in s 144(1)(b)(ii) is to be taken as meaning the 'debt due by the insolvent' in order to provide a sensible interpretation to the provision; a justifiable conclusion in the context of the statutory scheme.

20 See *Re Taylor*, unreported, Sinclair J, 11 April 1985, HC, B.136/84.
21 *Re West*, unreported, Penlington J, 23 April 1993, HC, B.5/93.

6. Cancellation or variation of a proposal

When an insolvent fails to maintain his or her obligations under the proposal, an application for variation or cancellation of the proposal under section 145 may be made to the court. In *Re Richards, ex parte Bell*, the insolvent ceased to be employed and make payments as stipulated in the proposal approved two years earlier. The proposal was cancelled approximately one week after the judgment was delivered by Hardie Boys J.[22] In *Re Craig*, Ellis J was prepared to allow an application for a variation under s 145 if a secured creditor was unable to prosecute its claim for security.

In *Re Webster*, Barker J ordered a variation of the proposal in the light of evidence that the insolvent was involved in employment in a manner different to that envisaged in the proposal, that the creditors were not informed of this change, the unavailability of tax losses from one of the insolvent's companies, and the insolvent's failure to make proper disclosure of his accounts and financial situation. Payments from income were to continue, but an expert investigating accountant was to be appointed to ascertain the financial situation and accuracy of valuations of assets, and the size and nature of the contingent liabilities.

In the recent decision of *Adamson v DB Breweries Ltd*, Eichelbaum CJ determined that the proposal was to be varied under s 145(1)(d) to allow the insolvent to make lump sum payments in settlement (a decision in the insolvent's favour). This followed evidence that the insolvent's breach was significant, but it was a result of losing his job (a genuine reason for breach). The insolvent had kept the trustee fully informed, showed good faith in making an effort to make payments when out of work and there were no breaches for the past 15 months while the proposal was fully operational. Furthermore DB Breweries had shown an "unremittingly hostile" attitude towards the insolvent, and cancellation rather than variation was only favoured by 20 percent of the creditors (of which DB Breweries represented two-thirds).

7. Proposals and concepts of justice

The cases analysed vividly illustrate the results of investment decisions turning sour following the worldwide sharemarket crash and decline in commercial property values. Failures of businesses also feature prominently. However, the contention that proposals are made by insolvents with substantial debts arising from speculative investments and spectacular financial failures, and which have been accepted by creditors, rather than a facility which is available and likely to succeed for the insolvent with a relatively small deficiency of funds, receives substantial support from the cases reviewed over the period 1980 to 1994.

Specific examples of proposals which were subsequently approved by the courts include *Re Trott* and *Re Joy*, *Re Riddiford*, *Re PH Lowndes*, *Re MA Lowndes*, *Re Wilson*, *Re Stoddart*, *Re Williams*, and *Re Coll*. In these cases, the size of the outstanding debt was large, in the tens of millions in *Re Trott* and *Re Joy*, yet creditor acceptance and court approval was given. The largest recorded level of debts of over $55 million occurred in *Re Henry, ex parte Diner Club (NZ) Ltd*, but the court determined the proposal

22 Judgment was delivered by Hardie Boys J on 23 December 1980 with cancellation of the proposal effective from 1 January 1981.

failed under s 143(3)(b). Exercise of the court's discretion under s 143(3)(c) to refuse approval on grounds of expediency and relating the refusal to the size of debts has been discussed but has not proved exclusively decisive or pivotal to any decision.

Another important observation is the crucial support of family and closely-related or "friendly" creditors for gaining the necessary creditor majorities. Examples of this phenomenon include *Re Trott* and *Re Joy*, where acceptance from the Caxton group of companies was vital to the success of the proposals. Barker J in *Re Whiteman, ex parte UDC Finance Ltd* indicated that subsidiary companies need not be assumed to vote in favour of preserving their parents' interests. On appeal, the Court of Appeal affirmed the decision of Barker J that the statutory scheme does not provide for a requirement of class voting and that votes should effectively only be considered tainted when there is a suggestion of fraud or mistake. There was no evidence to suggest that the votes were tainted.[23]

VI. Have Proposals Been a Successful Alternative to Bankruptcy?

The success of proposals as an alternative to bankruptcy can statistically be viewed in the following manner for the 71 judgments analysed (58 separate cases involving a final decision of the court):

Table 3: Successes and Failures of Proposals under Part XV: 1980 to 1994

Category	Approved		Declined		Adjournment	
	(Number)	(%tage)	(Number)	(%tage)	(Number)	(%tage)
All cases (71)	25	35.2	33	46.5	134	18.3
(Excluding adjournments)	25	43.1	33	56.9	-	-
Separate cases (58)	26	44.8	24	41.4	8	13.8
(Excluding adjournments)	26	52.0	24	48.0	-	-

The above analysis indicates that when the final decision of each of the cases is considered, a future application for court approval of a proposal or variation to an existing proposal, has statistically the same chance of meeting with success as with failure. Furthermore, placing a greater weight on the more recent decisions, the number of proposals failing to receive approval is significant and does not suggest that a decline in unsuccessful applications for approval is imminent, in spite of the burgeoning judicial dicta on proposals under the Insolvency Act.

23 Support of the family and closely related companies was vital to the recent annulment on 28 February 1995 of the bankruptcy of Alan Bond in Australia when an arrangement (equivalent to a Part XV proposal) was made for $A3 million on approximately $A600 million of debt. Payment of less than 0.5 percent has enabled Mr Bond to maintain his "life of luxury" through the assistance of family trusts, reputed to be worth over $A55 million. What is clear in this case is that proposals can enable an insolvent to carry on as if nothing has happened without any public examination of the events leading to the insolvency, and the power that large closely related creditors can have over smaller creditors in forcing acceptance of the proposal within the legislative framework's requirements.

VII. Conclusions and Observations

The case history indicates a flurry of activity concerning proposals following the advent of the 1987 worldwide sharemarket crash. It also reveals a startling number of unsuccessful applications as a result of technical deficiencies in proposals, deficiencies which the insolvent (and their counsel) should have ensured were addressed prior to taking the proposal to the court for approval. Perhaps this high failure rate is a consequence of failing to take legal advice before presenting a proposal to creditors. Jurisprudential guidance has evolved with the influx of proposals, with earlier decisions frequently devoid of useful discussion on the reasons why the proposal was approved or not approved. Procedurally, proposals are susceptible to the problems associated with bankruptcy proceedings, although there are differences in the statutory scheme which significantly influences the style of interpretation.

Debate over the interests of the public in Part XV proposals has caused an apparent change in judicial focus following the analysis by Heath. The Court of Appeal decision in *Farmer v Rowley* refocusses attention to the creditors' judgment on the proposal. In response to Heath's concluding statement, there has not been an instance during the period of analysis of a proposal solely failing in response to the court promoting the public interest under s 143(3)(c).

Bankruptcy proceedings involve the debtor, creditors and the public as three major players in resolving the bankrupt's affairs. This theme is not expressed with any degree of clarity with respect to proposals; an issue that may require careful thought with a review of the legislation. Clearer legislative statements on the purpose of proposals (by way of a purpose section), reference to the priorities that apply to proposals, and regulation guidance on the procedure for creditors' meetings and ascertaining votes are vital. The scope of the term "expedient" in s 143(3)(c), the extent of corrections which are permissible under s 143(6), and simpler expression of the requirements of section 144 should also be placed prominently on the list of items for review when the Insolvency Act receives a revamp to reflect the conditions of the 1990s.

One restriction on reviewing the case law has been the unreliability of the databases to provide comprehensive reference to all instances of proposals before the courts in the period 1980 to 1994. An excellent example of this deficiency in case notes on the databases concerns the proposals filed in *Re Webster* and in *Adamson v DB Breweries*. With both cases, the first reference to the earlier proposals (which were approved by the court), appeared in the subsequent applications for variation and cancellation under section 145.

The results of this study provide a comprehensive review and some insight into proposals that have come before the New Zealand courts in the fifteen year period 1980 to 1994. This should assist future proposal applicants, and provide some evidence of the effectiveness of the legislation. The intentions of the Legislature appear to have been met in most instances; insolvent persons have been able to avoid bankruptcy where this is of benefit to the debtor and the creditors, and frequently this has been in the public interest in the view of the judiciary. A purpose section, and a reorganisation and rewriting programme in similar vein to the process underway on the Income Tax Act in New Zealand and the Tax Law Improvement Project in Australia, (albeit on a lesser scale), are posited as fundamental to the workability of the Insolvency Act twenty five years on from its last reorganisation and consolidation.