

*These notes refer to the Scotland Act 1998 (c.46)
which received Royal Assent on 19th November 1998*

SCOTLAND ACT 1998

EXPLANATORY NOTES

SCHEDULES

Schedule 5

Part II: Preliminary paragraphs

Head C: Trade and Industry

Section C2: Insolvency

Details of Provisions

The reserved matters are:

- (a) *Winding up of business associations.* In general, matters relating to the winding up of business associations are reserved, subject to certain exceptions.

For this purpose “business association” is defined as having the same meaning as in Section C1 (Business associations), subject to the qualification that it does not include any person whose estate may be sequestrated under the Bankruptcy (Scotland) Act 1985, such as a partnership, or any public body established by or under an enactment. Sequestration or winding up of those bodies will not be reserved.

The expression “winding up” is also defined, in relation to business associations, as including the winding up of solvent, as well as insolvent, business associations.

The matters which are reserved, in relation to business associations, are:

- i. the modes of, the grounds for and the general legal effect of winding up, and the persons who may initiate winding up;
- ii. liability to contribute to assets on winding up;
- iii. powers of courts in relation to proceedings for winding up, other than the power to sist proceedings;
- iv. arrangements with creditors; and
- v. procedures giving protection from creditors.

These reservations have the effect that all matters leading to the commencement of the winding up of business associations, and matters relating to the commencement itself of the winding up, are reserved. Thus, the circumstances in which a business association may be wound up voluntarily or by the courts; the grounds on which a petition for winding up may be presented; the persons who may initiate a winding up; the powers of the courts on hearing a petition for winding up; the definition of the commencement of the winding up; and the liability of persons (such as shareholders) to contribute to the assets on a winding up, are all reserved. This ensures that, so far as possible, the law relating to the winding up of business associations will be similar in England and Wales and Scotland.

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Furthermore, matters relating to arrangements with creditors entered into by business associations (such as company voluntary arrangements) or procedures which give such associations protection from creditors (such as administration orders) are also reserved.

However, there is excepted from these reservations, in relation to business associations:

- i. the process of winding up. In other words, matters relating to the winding up process itself after it has commenced are not reserved. This includes the person having responsibility for the conduct of a winding up or any part of it, and his conduct of it or that part;
- ii. the effect of winding up on diligence. Diligence is the process under Scots law whereby court judgements are enforced against a debtor's assets. Under Scots law, diligences done within a certain time of the commencement of winding up are equalised so that all creditors are treated equally in the ranking of their claims; and
- iii. the avoidance and adjustment of prior transactions on winding up. Thus, it is open to the Scottish Parliament to legislate in respect of transactions concluded before the winding up of a business association, to provide for them to be rendered void, or for some other appropriate remedy. The need for that could arise, for instance, where such a transaction has been concluded for less than full value, or has the effect of giving a preference to a particular creditor, to the prejudice of the general body of creditors. Such matters would be dealt with in the course of a winding up and are excluded from the reservation.

[S.I. 2001/1456](#) also added further exceptions in relation to business associations which are social landlords, namely:

- i. the general legal effect of winding up;
- ii. procedures for the initiation of winding up;
- iii. powers of courts in relation to proceedings for winding up; and
- iv. procedures giving protection from creditors,

but only in so far as they relate to a moratorium on the disposal of property held by a social landlord and the management and disposal of such property. Social landlords are defined as being registered companies or industrial and provident societies which have their registered office in Scotland and which satisfy certain conditions, namely that they do not trade for profit and are established for the purpose of, or have among their objects and powers, the provision, construction, improvement or management of houses for letting or for occupation by members of the body or hostels. This exception was made for the purpose of enabling the Scottish Parliament to legislate about such matters in Schedule 8 to the [Housing \(Scotland\) Act 2001 \(asp 10\)](#).

- (b) *Preferred or Preferential Debts.* There are also reserved matters relating to preferred or preferential debts for the purpose of the Bankruptcy (Scotland) Act 1985, the Insolvency Act 1986 and any other enactment relating to the sequestration of the estate of any person or to the winding up of business associations, the preference of such debts against other such debts and the extent of their preference over other types of debt.

Certain types of debts, such as taxes which the debtor has collected on behalf of the Crown and sums due to employees, are given a special priority in the bankruptcy or sequestration of individuals and other persons, and in the winding up of business associations, in the sense that they are paid in advance of other debts. What is reserved are matters relating to such debts and the extent of their priority over other debts.

- (c) *Regulation of insolvency practitioners.* Matters relating to the regulation of insolvency practitioners are reserved.

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Under Part XIII of the Insolvency Act 1986, which applies to Great Britain, a person who acts, for example, as a liquidator in a winding up or as trustee in the sequestration of a person's estate or as a trustee under a trust deed for an individual's creditors is required to be qualified to act as an insolvency practitioner.

These matters are reserved, even although the Scottish Parliament has legislative competence over the appointment and powers of liquidators or a person having responsibility for the conduct of a winding up.

- (d) *Co-operation of insolvency courts.* Matters relating to the co-operation of insolvency courts are reserved.
- (e) *Floating Charges and Receivers.* Matters relating to floating charges and receivers are not reserved, except in relation to preferential debts, regulation of insolvency practitioners and co-operation of insolvency courts.

The circumstances in which receivers may be appointed and the effect of their appointment, are not reserved. However, matters relating to the qualifications which a receiver must have before he may act as such are reserved under the reservation relating to the regulation of insolvency practitioners.