Improvement of Corporate Insolvency Law

Legislative Proposals

Consultation Document

List of questions for consultation

Q1) Do you support the proposal to adopt a prescribed form of statutory demand, which would contain key information as described in paragraph 2.7 as well as a statement of the consequences of ignoring the demand?

We support the proposal to adopt a prescribed form of statutory demand ("SD") with key information and a statement of consequences to minimize any grey area. However, given SD is a legal document with severe consequences which could be issued by any private party without legal training, careless mistake or potential abuse must be prevented. Therefore, we suggest SD should accompany with an Affidavit (also in prescribe form) verifying that the debt is due and payable, unless the SD is based on a Judgment Debt. Please find attached as **Annexure 1** a copy of Form 509H (Creditor's Statutory Demand For Payment of Debt) and Form 7 (Affidavit Accompanying Statutory Demand) currently used in Australia for easy reference.

However, we must also be mindful of the creditors' interests. If a creditor serves a debtor with a SD and it requires an affidavit, the creditor takes the risk of being legally challenged for making a false declaration if the debt is disputed by the debtor, which is not unusual at least as a delaying tactic. That would put onerous burden and cost onto the creditor to defend the affidavit, in addition to defending the debt.

Q2) Do you think that the section 228A procedure, whereby the directors of a company may commence a voluntary winding-up of the company without first having the members of the company resolve to do so,

should be maintained or repealed?

We believe section 228A procedure should be maintained. We have seen numerous cases where company's shareholders are in disputes which lead to deadlock but the directors are stuck in the circumstances and had no choice but to continue trading on the business while knowing the company is insolvent and continue to incur debts. Directors should owe their duties to the general body of creditors when a company is insolvent and hence they should be given the option to discharge their duties by putting the company into liquidation as a last resort.

Q3) If the section 228A procedure is to be maintained, do you agree to the proposed improvement measures as set out in paragraph 2.14 to reduce the risk of abuse of the procedure?

In order to reduce the risk of abuse of the section 228A procedure, we believe that the commencement of liquidation and the appointment of provisional liquidator must occur simultaneously because directors' power must cease upon commencement of liquidation. Furthermore, given the obligation and power of provisional liquidators and their ease of appointment under section 228A procedure, the requirements to be met before a person can serve as a provisional liquidator must be higher than that of liquidators appointed under other creditors' voluntary liquidation procedures. For instance, the liquidators appointed under section 228A procedure must be experienced insolvency practitioners (registered accountants or practicing solicitors as per current legislation).

Q4) Do you agree to replacing the existing requirement of holding the first creditors' meeting on the same or the next following day of the members' meeting with the requirement of holding the first creditors' meeting on a day not later than the fourteenth day after the day on which the members' meeting is held in a creditors' voluntary winding-up case?

Yes, we agree with the replacement and the fourteenth day limit

requirement.

Q5) Do you support the proposal on prescribing a minimum notice period for calling the first creditors' meeting in a creditors' voluntary winding-up case? If so, do you consider a period of seven days appropriate?

Yes, we support the proposal on prescribing a minimum notice period. However, we believe a minimum period of ten days (instead of seven days) would be more appropriate to allow creditors to consider their position and seek professional advice.

Q6) Do you agree to the proposal on limiting the powers of the liquidator appointed by the company during the period before the holding of the first creditors' meeting in a creditors' voluntary winding-up case?

Yes, we agree to the proposal and have no further comments to add.

Q7) Do you agree to the proposed restrictions on the exercise of the directors' power before a liquidator is appointed in a creditors' voluntary winding-up case?

We do not agree with simple restrictions on the exercise of the directors' power. We believe that the powers of directors must cease once the company enter into liquidation. Therefore, there must be mechanism in place to avoid shareholders putting the company into liquidation without an interim / provisional liquidator being appointed; and at the same time allowing directors to continue making decisions for and managing the company. Company directors are not trained insolvency practitioners and it is not fair to them if they may be held responsible for their decisions made while trading on an insolvent company. We propose that if the shareholders resolve to put the company into liquidation at the members' meeting, they must also nominate and

appoint (by simple majority) an independent and professional liquidator for taking over the powers of the Board of Directors and the control of the company.

Q8) Do you agree with the proposed technical amendments relating to the commencement of winding-up as set out in Annex C?

Yes, we agree with the proposed technical amendments as listed in Annex C (No. 1 – 4) under sub-heading "Commencement of Winding-Up" **except** for No. 3 where we proposed the minimum notice period for calling the first creditors' meeting to be ten days which is in line with Q.5 above.

Q9) (a) Do you agree to the expansion of the list of disqualified persons from being appointed as a provisional liquidator or a liquidator? If so, do you agree with disqualifying the types of persons as proposed in paragraphs 3.13, 3.15 and 3.16?

We agree to the expansion of the list of disqualified persons but we only agree with disqualifying the types of persons as proposed in paragraphs 3.15 and 3.16.

We do not agree with disqualifying the types of persons as proposed in paragraph 3.13. The different type of persons that may have potential conflict of interest should not simply be included in the list of disqualified persons as law. The validity of their appointment should rather be dealt with on a case-by-case basis.

We have seen numerous cases where liquidators were appointed to a holding company with solvent and insolvent subsidiary companies. Liquidators appoint themselves (or through corporate directors) as new directors of these subsidiary companies to gain control of the Group (with consent from the ultimate shareholders). Some of these subsidiaries may proof to be technically insolvent at a later stage and the liquidators have duty to put these subsidiary companies into Creditors' Voluntary Liquidation, despite the Group as a whole is solvent.

It would not be time and cost effective if there are multiple firms of liquidators administering different subsidiaries within the same Group.

(b) Do you agree to provide clearly that the appointment of a disqualified person as a provisional liquidator or liquidator shall be void and that he shall be liable to a fine if he acts as a provisional liquidator or liquidator?

Yes, we agree that the appointment should be void and s/he shall be liable to a fine. However, the bigger issue here is that the law should also state clearly whether or not the provisional liquidator or liquidator will be indemnified by the estate of the company or will s/he be personally liable for his/her decisions made and/or contracts entered into on behalf of the company. If so, what protection do liquidators have for genuine mistake or misinformed by creditors/shareholders, other than professional indemnity?

(c) Do you agree that the disqualification proposals should also apply to the appointment of a receiver or a receiver and manager of the property of a company with suitable modifications?

We agree that the disqualification proposals should also apply to the appointment of a receiver or a receiver and manager of the property of a company with suitable modifications, on the basis that the types of persons included in paragraph 3.13 are not included in the expanded list of disqualified persons.

Q10) (a) Do you agree that a new statutory disclosure system should be introduced for the appointment of provisional liquidators and liquidators?

Yes, we agree that a new statutory disclosure system should be introduced but we suggest that prescribed forms be used rather than (i) a statement of relevant relationships and (ii) replacement statement for consistency and standardization.

However, there are foreseeable practical difficulties in situations where a person from a large partnership with numerous offices, such

as a Big 4 accounting firm, is requested to act as provisional liquidator or liquidator of a company in a group with a large number of subsidiaries, particularly when the proposed appointment is to be made within a short time (as might be the case e.g. with the appointment of a provisional liquidator).

(b) If yes, do you agree with the details of information required to be disclosed as set out in paragraph 3.21?

Yes, we agree with the details of information set out in paragraph 3.21.

However, again foreseeable practical difficulties for Big 4 accounting firms, please refer to our comments set out in Q10(a).

We also suggest that the definition for "financial advisor" be made clear. Does it cover financial consultant, monitoring accountants, restructuring advisor/consultant? Similar issues also apply to "legal advisor".

(c) Do you agree that a statutory defence as proposed in paragraph 3.24 should be provided for a failure to disclosure?

Yes, we agree that a statutory defence as proposed in paragraph 3.24 should be sufficient. However, the key issues here are (i) whether or not the appointment of provisional liquidator or liquidator remains valid after defence; (ii) if so, what are the consequences to the liquidator for making inaccurate statement(s); (iii) if not, how would the contracts entered into by the liquidator be treated, despite the liquidator was acting in good faith (ie. still binding on the company)?

There must mechanism in place for liquidator acting in good faith to discharge his duties otherwise he may be sued by creditors (or other stakeholders) for damages.

Q11) (a) Do you agree that the existing prohibition on inducement being offered to members or creditors in relation to the appointment of liquidators should be extended to cover inducement being offered to

any person?

Yes, we agree that the existing prohibition on inducement should be extended to cover “any person” because the special nature of liquidation appointments makes the payment or offer of any commission for; or the furnishing of any valuable consideration towards, the introduction of such appointments inappropriate.

(b) Do you agree that the prohibition should also be extended to inducement offered in relation to the appointment of provisional liquidators, receivers, and receivers and managers?

Yes, we agree to the extension.

Q12) Do you agree with the proposal to designate all provisional liquidators who take office upon and after the making of a winding-up order (i.e. section 194 PL) as “liquidators” such that they will be subject to the provisions in the CO which apply to liquidators?

Yes, we agree with the proposal and have no further comments to add.

Q13) Do you agree with the proposal to clearly stipulate that it is up to the court to determine the powers, duties, remuneration and termination of appointment of provisional liquidators who were appointed by the court before the making of a winding-up order (i.e. section 193 PL)?

Yes, we generally agree with the proposal. However, under special circumstances, the court should take into consideration of the wishes of creditors/shareholders/stakeholders of the company in the drafting of appointment order of provisional liquidator, granting comprehensive yet specific powers and duties to suit the business model and the location and nature of assets etc.

Q14) Do you agree with the proposal of setting out the powers of liquidators now found in section 199(1) and (2) of the CO in a Schedule to improve the clarity of the provisions?

Yes, we agree with the proposal and have no further comments to add.

Q15) Do you agree that the requirement for the liquidator to apply to the court or the COI for exercising the power to appoint a solicitor in a court winding-up should be removed, provided that prior notification is given to the COI or, where there is no COI, the creditors when the liquidator exercises such power?

Yes, we agree that the requirement should be removed to streamline the process.

However, consideration may be given to what a COI can do in case it has a different opinion to the liquidator regarding a proposed appointment of solicitors , such as whether it can apply to court, etc.

Q16) (a) Do you agree that, notwithstanding the release of a liquidator by the court, the liquidator should not be absolved from the provisions of section 276 of CO?

We generally agreed to the proposal as best practice on a global perspective in relation to misfeasance of a liquidator.

However, our local members found that the current proposal the liquidator should not be absolved from the provisions of section 276 of CO after his release by the court too onerous because it raises too many uncertainties and concerns for the insolvency practitioners.

There are practical concerns, such as insurance coverage. There are only a few insurance companies in the market which is willing to offer liquidator's bonds but under very strict terms and conditions, such as full indemnities from the professional firms and of the liquidator personally. Retired liquidators and/or liquidators who changed fields will not be able to get insurance even if he is willing to pay the premium from his own pocket. Not to mention, retired professionals no longer covered by general professional indemnity insurance.

Costs for storage and safe keeping of documents and files are other practical issues. Upon release, all documents and files of companies which had their liquidation completed will be destroyed. It would be most unfair for the released liquidator to defense his case without his working papers or any documentary evidence.

Another situation is the change of liquidators, for instance, the joint and several liquidators may have changed or replaced from one professional firm to another or within the same firm during the course of liquidation administration. One liquidator may have resigned and his place taken up by another. Who would be held responsible for all the decisions made during liquidation? All of them or just the last one?

One last thing that worth mentioning is that majority of the liquidation cases do not have sufficient assets to fully pay liquidator's remuneration and disbursements. Under these circumstances, the Government still expects insolvency practitioners to incur further expenses after their release or retired. Will this work?

It light of the above, it is foreseeable that the Official Receiver would end up taking up most of the liquidation cases and act as their liquidator with tax payers' money.

(b) Do you agree that, where the court has granted a release to a liquidator, the power to make an application under section 276 should only be exercisable with the leave of the court?

Yes, we agree that an application under section 276 should only be exercisable with the leave of the court. However, please note our local members' view in Q16 (a) above.

Q17) Do you agree with the proposed technical amendments relating to the appointment, powers, vacation of office and release of provisional liquidators and liquidators as set out in Annex C?

Yes, we agree with the proposed technical amendments as listed in Annex C (No. 5 – 7) under sub-heading "Appointment, Powers,

Vacation of Office and Release of Provisional Liquidators and Liquidators" and have no further comments to add.

Q18) Do you agree that a maximum and a minimum number of members should be set for the COI appointed in both a court winding-up and a creditors' voluntary winding-up? If so, are the proposed maximum number (seven) and minimum numbers (three) appropriate? Do you agree that the court should have the discretion to vary the maximum and minimum numbers on application by the liquidator?

Yes, we agree with the proposals and that a maximum (seven) and a minimum number (three) of members should be set for the COI appointed in both a court winding-up and a creditors' voluntary winding-up.

Yes, we agree that the court should have the discretion to vary the maximum and minimum numbers on application by the Liquidator.

Q19) Do you agree to allow the COI not to fill a vacancy if the liquidator and a majority of the remaining members of the COI so agree, provided that the total number of members does not fall below the proposed minimum number?

We do not agree with the proposal to allow the COI not to fill a vacancy if the liquidator and a majority of the remaining members of the COI so agreed, provided that the total number of COI members does not fall below the proposed minimum number.

We suggest that the liquidator should notify the creditors and contributories of the proposed changes with sufficient notice period, say 14 days. This would allow other creditors and contributories which did not have a chance to join the COI previously (perhaps due to the maximum number of COI members constraint) now have a chance to participate.

Q20) Do you agree to the proposals as set out in paragraphs 4.12and 4.13 for streamlining and rationalizing the proceedings of the COI?

Yes, we agree on the proposals set out in paragraphs 4.12 and 4.13 and do not have further comments to add.

Q21) Do you support the proposal to enable the COI to function through written resolutions sent by post or using other electronic means (such as using emails or through websites)?

Yes, we support the proposal and do not have further comments to add.

Q22) (a) Do you agree with allowing the costs and charges of the agents employed by the liquidators to be determined by agreement between the liquidator and the COI?

We agree that **only** for costs and charges of agents employed by the liquidators at a **fixed costs or percentage or success fees basis** be determined by agreement between the liquidator and the COI.

For all other agents who charged on **hourly basis** should go through the normal taxation process as most COI members may not have the experience and knowledge to assess whether a professional's (such as counsels and solicitors) time costs is reasonable.

(b) Do you agree that if such agreement cannot be reached, the costs and charges of the agents shall be delivered up for taxation by the court?

Yes, we agree that if in any event such agreement cannot be reached, the costs and charges of the agents shall be delivered up for taxation by the Court.

Q23) Do you support the proposal to allow liquidators and provisional liquidators to communicate with creditors, contributories or other parties by electronic means, subject to the conditions as set out in paragraph 4.21?

Yes, we support the proposal and do not have further comments to add.

Q24) Do you agree with the proposed technical amendments relating to the conduct of winding-up as set out in Annex C?

Yes, we agree with the proposed technical amendments as listed in Annexure C (No. 8 – 13) under sub-heading “Conduct of Winding-up” and have no further comments to add.

Q25) (a) Do you agree that new provisions should be introduced to empower the court to make orders for restoring the position of a company to what it would have been if the company has not entered into a transaction at an under value?

Yes, we agree to introduce the new provisions on “transactions at an undervalue”.

(b) Do you agree to the proposal regarding “relevant time” as proposed in paragraph 5.10?

Yes, we agree to the proposal and have no further comments to add.

(c) Do you agree that transactions at an undervalue entered into by the company with a person who is connected with the company should be subject to a more stringent control as proposed in paragraph 5.11?

Yes, we agree with the presumption of insolvency of the company as proposed in paragraph 5.11.

(d) Do you agree that statutory protection should be provided for the party seeking to resist an application made by the liquidator of a company in respect of the undervalue transaction? If so, do you agree with the statutory protection as proposed in paragraph 5.12?

Yes, we agree with the proposed statutory protection and have no further comments to add.

Q26) (a) Do you agree that the current provisions in the CO incorporating

the provisions in the BO on unfair preference should be replaced by new standalone provisions which apply to winding-up cases as proposed in paragraph 5.17 to rectify the existing anomalies which limit the application and effectiveness of such provisions?

Yes, we agree and welcome the introduction of new standalone provisions.

(b) Do you agree with the definitions of "person who is connected with a company" and "associate" as proposed in paragraphs 5.19 and 5.20?

Yes, we agree with the definitions and have no further comments to add.

(c) Do you agree that the existing protection for persons who have received benefits or acquired or derived interest in property in good faith and for value from unfair preference should be maintained, and that the same protection should also be applicable to the proposed new provisions on transactions at an undervalue?

Yes, we agree that the existing protection should be maintained and the same protection should also be applicable to the proposed new provisions on transactions at an undervalue.

Q27) Do you agree to the proposed special provisions in relation to floating charges created by a company in favour of a person who is connected with the company as detailed in paragraph 5.26?

Yes, we agree to the proposed special provisions as detailed in paragraph 5.26 and have no further comments to add.

Q28) Do you support the expansion of the scope of the exemption of a floating charge from invalidation catered for genuine credit transactions to cover "property and services supplied to the company" and "money paid at the direction of the company" as detailed in paragraph 5.28?

Yes, we support the expansion of scope of the exemption of a floating charge and have no further comments to add.

Q29) (a) Do you agree to expressly set out in the legislation the common law position that a person summoned for either a private or a public examination cannot invoke the privilege against self-incrimination during the examination?

Yes, we agree to expressly set out in the legislation the common law position in relation to self-incrimination, so that the person summoned must answer all questions that may be put to him.

(b) If so, do you agree that we should introduce provisions to prohibit the subsequent use of answers given and statements made during the examination in subsequent criminal proceedings if certain conditions are satisfied, subject to certain exceptions such as offences relating to perjury and provision of false statement and offences under the future Companies (Winding Up and Miscellaneous Provisions) Ordinance?

Yes, we agree to strike a balance by introducing provisions to prohibit the subsequent use of materials from examinations in criminal proceedings subject to certain conditions and exemptions as stated in paragraph 6.11.

Q30) (a) Do you agree to the removal of the requirement that the OR or the liquidator must have alleged in his “further report” that fraud has been committed for initiating the public examination procedure, and to provide that a public examination may be ordered by the court upon the application by either the liquidator or the OR?

Yes, we agree to remove the requirement that fraud has been committed so that it is easier for the public examination procedure to be triggered.

(b) Do you agree with the proposed new categories of person that may be examined under the public examination procedure, namely (i) any person who has acted as liquidator of the company or receiver or receiver and manager of the property of the company; and (ii) any

person who is or has been concerned, or has taken part, in the management of the company?

Yes, we agree with the proposed new categories and have no further comments to add.

Q31) (a) Do you agree that if a company is wound up insolvent within one year of its shares being redeemed or bought back by payment out of capital, certain categories of persons should be required to contribute to the assets of the company for an amount not exceeding the payment made by the company in respect of the shares redeemed or bought back by the company so as to meet the deficiency in the company's assets?

Yes, we agree to set the relevant period at one year from the date of the company's shares being redeemed is reasonable. We also agree that the amount to contribute to the assets of the company be set at an amount not exceeding the payment made by the company in respect of the shares redeemed is reasonable.

(b) If so, should the members from whom the shares were redeemed or bought back and the directors who made the solvency statement which supported the redemption or buy-back without having reasonable grounds for the opinion expressed in the statement be jointly and severally liable to contribute to such assets?

Yes, we agree that the members/recipients of the payment and the directors who made the solvency statement (without reasonable grounds) should be jointly and severally liable to contribute to the assets of the company. We suggest the definition of "members", "recipient" and "directors" should cover corporate shareholders and corporate directors (incorporated in Hong Kong or overseas) all the way to the ultimate natural persons who own and control these legal entities.

(c) Should such persons be allowed to apply for winding-up of the company under the specific grounds as set out in paragraph 6.22?

Yes. Given the above persons could have personal liability, they should be allowed to petition for winding up the company under the specific grounds set out in paragraph 6.22.

Q32) Do you agree with the proposed technical amendments relating to the investigation during winding-up, offences antecedent to or in the course of winding-up and powers of the court as set out in Annex C?

Yes, we agree with the proposed technical amendments as listed in Annexure C (No. 14– 27) under sub-heading “Investigation during Winding-up, Offences Antecedent to or in the course of Winding-up and Powers of the Court” and have no further comments to add.

–END–

Annexure 1

Form 509H

(paragraph 459E (2) (e)) *Corporations Act 2001*

CREDITOR'S STATUTORY DEMAND FOR PAYMENT OF DEBT

To (*name and A.C.N. or A.R.B.N. of debtor company)* of *(address of the company's registered office)*

1. The company owes (*name)* of (*address) (* "the creditor")

*the amount of $(*insert amount),* being the amount of the debt described in the Schedule.

*the amount of $(*insert total amount),* being the total of the amounts of the debts described in the Schedule.

*2. The amount is due and payable by the company.

*2. Attached is the affidavit of (*insert name of deponent of the affidavit)* , dated (*insert date of affidavit),* verifying that the amount is due and payable by the company

3. The creditor requires the company, within 21 days after service on the company of this demand:

(a) to pay to the creditor the *amount of the debt/*total of the amounts of the debts; or

(b) to secure or compound for the *amount of the debt/*total of the amounts of the debts, to the creditor's reasonable satisfaction.

4. The creditor may rely on a failure to comply with this demand within the period for compliance set out in subsection 459F (2) as grounds for an application to a court having jurisdiction under the *Corporations Act 2001* for the winding up of the company.

5. Section 459G of the *Corporations Act 2001* provides that a company served with a demand may apply to a court having jurisdiction under the *Corporations Act 2001* for an order setting the demand aside. An application must be made within 21 days after the demand is served and, within the same period:

(a) an affidavit supporting the application must be filed with the court; and

(b) a copy of the application and a copy of the affidavit must be served on the person who served the demand.

A failure to respond to a statutory demand can have very serious consequences for a company. In particular, it may result in the company being placed in liquidation and control of the company passing to the liquidator of the company.

6. The address of the creditor for service of copies of any application and affidavit is (insert the address for service of the documents in the State or Territory in which the demand is served on the company, being, if solicitors are acting for the creditor, the address of the solicitors).

SCHEDULE

Description of the debt	Amount of the debt
(indicate if it is a judgment debt, giving the name of the court	

and the date of the order)

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*Total Amount

Dated:

signed:

Print name: capacity:

Corporation or partnership name (if applicable):

NOTES:

1. The form must be signed by the creditor or the creditor's solicitor. It may be signed on behalf of a partnership by a partner, and on behalf of a corporation by a director or by the secretary or an executive officer of the corporation.

2. The amount of the debt or, if there is more than one debt, the total of the amounts of the debts, must exceed the statutory minimum of $2,000.

3. Unless the debt, or each of the debts, is a judgment debt, the demand must be accompanied by an affidavit that:

(a) verifies that the debt, or the total of the amounts of the debts, is due and payable by the company; and

(b) complies with the rules.

4. A person may make a demand relating to a debt that is owed to the person as assignee.

5. This form was amended in 2006 as part of amendments of the *Corporations Regulations 2001* . For the period of 12 months after the commencement of those amendments a person may comply with paragraph 459E (2) (e) of the *Corporations Act 2001* in relation to a statutory demand for payment of debt by using:

(a) the version of this form that was in force immediately before the commencement of the amendments; or

(b) this version of the form.

*Omit if inapplicable

Form 7 - Affidavit accompanying statutory demand

(rule 5.2)

[Name of creditor(s)]
Creditor(s)

[Name of debtor company]
Debtor company

I, [name] of [address and occupation], *say on oath/*affirm:

1 I am [state deponent's relationship to the creditor(s), eg, 'the creditor', '(name), one of the creditors', 'a director of the creditor', 'a director of (name), one of the creditors'] in respect of *a debt of $ [amount]/*debts totalling $ [amount] owed by [name of debtor company] to *me/*us/*it/*them relating to [state nature of debt or debts, ensuring that what is stated corresponds with the description of the debt or debts, to be given in the proposed statutory demand, with which this affidavit is to be served on the debtor company].

2 [If the deponent is not the creditor, state the facts entitling the deponent to make the affidavit, eg 'I am authorised by the creditor(s) to make this affidavit on its/their behalf].

3 [State the source of the deponent's knowledge of the matters stated in the affidavit in relation to the debt or each of the debts, eg 'I am the person who, on behalf of the creditor(s), had the dealings with the debtor company that gave rise to the debt', 'I have inspected the business records of the creditor in relation to the debtor company's account with the creditor'].

4 *The debt/*The total of the amounts of the debts mentioned in paragraph 1 of this affidavit is due and payable by the debtor company.

5 I believe that there is no genuine dispute about the existence or amount of the *debt/*any of the debts.

*Sworn/*affirmed at: [place of swearing or affirmation] on [date]

Signature of deponent

Before me:

Signature and designation of
person before whom deponent
swears or affirms affidavit

* Omit if not applicable