**Webinar 10 October 2023**

**Insolvency law and commercial law; common mistakes (for legal practitioners)**

**1. Late filing of an application to set aside a Bankruptcy Notice.**

**2. Removal of a Liquidator for making an “unjustified demand for the payment”.**

**3. ASIC “disqualification” of directors**

**4. Director Penalty Notices**

**5. Inspector General (IG) review the trustee's assessments of bankrupt’s income.**

**6. Binding Financial Agreement (“BFA”)**

**7. Small Business Restructuring Process**

**8. ATO credit reporting**

**9. Parliamentary Joint Committee on Corporations and Financial Services Corporate insolvency in Australia, July 2023**

**Please; set your Zoom view to Speaker Mode and mute your sound and turn off your video.**

**Disclaimer; this presentation and these papers are not legal advice!**

**1. Late filing of an application to set aside a Bankruptcy Notice (example A)**

***24 I am satisfied that, on the evidence before me, the Bankruptcy Notice was served on the applicant on 3 April 2023.***

***25 Rule 2.25 of the Rules provides:***

***When is a document filed:***

***(1) A document is filed if:***

***(a) it is lodged with the Court in accordance with rule 2.21(1); and***

***(b) either:***

***(i) for a document in an existing proceeding--it is accepted in the proper Registry by having the seal of the Court affixed to it; or***

***(ii) in any other case--it is accepted in a Registry by having the seal of the Court affixed to it.***

***….***

***(3) If a document is faxed or sent by electronic communication to a Registry, the document is, if accepted by a Registry under subrule (1), taken to have been filed:***

***(a) if the whole document is received by 4.30 pm on a business day for the Registry--on that day; or***

***(b) in any other case--on the next business day for the Registry.***

***27 The applicant electronically lodged the application on 25 April 2023 at 3:33pm. In Australia, 25 April 2023 was a national public holiday.***

***28 On 27 April 2023 at 1:28pm the application was accepted for filing by the Court.***

***29 I am satisfied that the applicant is taken to have filed the application on the next business day for the Registry after 25 April 2023, being Wednesday, 26 April 2023.***

***31 A failure to comply with s 41(7) of the Bankruptcy Act is not a procedural irregularity capable of cure, but rather is fatal to jurisdiction.***

***34 … The day on which the Bankruptcy Notice was served, being 3 April 2023, is excluded from the calculation of the 21 days. Day 1 was 4 April 2023. It follows that any application to extend time for compliance was required to be filed by 11.59pm on 24 April 2023.***

***CONCLUSION***

***35 The application lodged electronically by Peter Van Eps at 3.33pm on 25 April 2023 was not filed before the expiration of the time fixed for compliance with Bankruptcy Notice***

*Van Eps v Child Support Registrar [2023] FCA 1068*

**1. Late filing of an application to set aside a Bankruptcy Notice (example B)**

***3. … at 4:37pm on 15 June 2022, seven minutes after the time for a document to be lodged so that it would be deemed to have been filed on that day as prescribed in r 2.25(3)(a) of the Federal Court Rules 2011, Ms Lamb’s former solicitors lodged electronically with the Court an application that purported to apply to set aside the bankruptcy notice, under s 41(6A) of the Bankruptcy Act 1966 (Cth).***

***21. The note under r 2.01 lists numerous examples of applications under the Bankruptcy Act that must be made by filing a Form B2, but does not include, expressly, an application under s 41(6A) of the Bankruptcy Act. …. Thus, because the Federal Court (Bankruptcy) Rules do not otherwise provide, r 2.01(1)(a) required that Ms Lamb make the application, as she did, in accordance with Form B2.***

***22. Next, the Federal Court Rules in Div 2.3, headed ‘Lodging and filing documents’, contain a detailed scheme for identifying how documents may be lodged with the Court and when they are actually, or are deemed to have been, filed.***

***30. … s 41(6A) can be seen to operate consistently with the scheme of the Bankruptcy Act in providing certainty as to whether a debtor has committed an act of bankruptcy. That is because the section requires that, as a jurisdictional precondition of the Court having power to make any order extending the time for compliance with a bankruptcy notice or setting it aside, the debtor “make” that application to the Court before the expiration of the time for compliance with the bankruptcy notice.***

***35. Here, because Ms Lamb lodged her application at 4:37pm on 15 June 2022, by force of r 2.25(3)(b) it was deemed to have been filed on the next business day, being 16 June 2022, when, in fact, the Registry accepted it for filing at 2:44pm on 16 June 2022 and inserted, as its first page, the notice of filing and a hearing date.***

***39. The effect of r 2.25 is to put a person who lodges a document electronically in the same position as one who does so physically…. However, if the person arrives after the Registry has closed for business, the person must either apply to reopen it or must apply to a person, such as a registrar or a judge, with the authority to waive compliance with the Rules for lodging or filing documents,***

***41. Thus, a person must do something more to make sure, if a lodgment occurs after hours (that is, after 4:30pm under r 2.25(3)), that this act will be effective to invoke the Court’s jurisdiction on the day of lodgment by taking steps to have a judge or registrar open the Court to enable the document to be filed out of hours on the same day.***

***55. Of course, it is always possible, because this Court is a superior court of record, for a person to make an oral application for relief to a judge, including under s 41(6A), in cases where there is urgency and the judge is satisfied that it is appropriate and there is a sufficient basis to accept such an application.***

***58. The imposition of strict time limitations in cases such as this is consistent with the approach the High Court has taken in other similar areas, such as its decision in David Grant & Co Pty Ltd v Westpac Banking Corporation .. identified that the provisions of the then s 459G of the then Corporations Law (Vic), required an application to set aside a statutory demand to be made strictly in accordance with the conditions set out in the statute. (consider Guillotine Order).***

***Lamb v Sherman* [2023] FCAFC 85**

# FEDERAL COURT OF AUSTRALIA

## **New South Wales Registry**

### Level 17, Law Courts Building 184 Phillip Street Queens Square SYDNEY, 2000

### 10 October 2023

URGENT MATTERS - GENERAL DUTY JUDGE: Justice Perram

From 8:30am Monday the 9th of October through to 8:30am Monday the 16th of October.

Practitioners - contact Associate on (02) 8099 8315 or (02) 8099 8312

Self-represented parties - for assistance contact the Registry on 1300 720 980

URGENT MATTERS - COMMERCIAL & CORPORATIONS DUTY JUDGE: Justice Shariff

From 8:30am Monday the 9th of October through to 8:30am Monday the 16th of October.

Practitioners - contact Associate on (02) 8099 8578

Self-represented parties - for assistance contact the Registry on 1300 720 980

LISTING & GENERAL ENQUIRIES:

Contact the Registry on 1300 720 980

Use Federal Law Search on the Commonwealth Courts Portal at www.comcourts.gov.au/public/esearch

Visit www.fedcourt.gov.au

AFTER HOURS:

For urgent after hours applications call: 1300 352 000

**2. Removal of a Liquidator for making an “unjustified demand for the payment”**

***130. In this case, it seems to me a clear abuse of process to make what was, on any view, an unjustified demand for the payment of $69m, in circumstances where the liquidators insist, even now, that “it would have been quite obvious to [the plaintiffs] that the claim would be limited to the quantum of proven debts at the time of the transfer of the Billi Business” (which they said was $497,723.20). Quite how it is said that a formal demand for $69m, with an accompanying threat of legal proceedings and a reporting of the alleged contraventions to ASIC if the amount was not promptly paid, was supposed to be read as being a demand for $497,723 was not adequately explained.***

***133. Those answers, and the submission advanced on behalf of the liquidators in closing submissions, suggest that the liquidators believed and still believe that it is appropriate to issue letters of demand by way of ambit claims. That is assuredly not so.***

***140. Whether liquidators carry the obligations of a model litigant is not clear.***

* 1. ***Because liquidators are officers of the court it is axiomatic that they should not make demands for the payment of large sums of monies, founded on asserted causes of action for which there is no proper basis. The litany of matters sought to be invoked now to justify the $69m demand listed at paragraph [***[***101***](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2023/647.html#_Ref137540326)***] above only make matters worse, because they do not, individually or collectively, form a proper or sufficient basis for the making of the demands in the 30 August 2022 letter. The obligation to identify “possible recovery actions” required by the IPSC does not, as the liquidators submissions seem to suggest, mean that they can make serious but purely speculative allegations (here, against directors under multiple provisions of the***[***Corporations Act***](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/)***) in the hope that they may bear fruit or drive the directors to the bargaining table.***
1. ***The liquidators conceded in counsel’s written closing submissions that “they accept that an alternative approach they could fairly have taken would be to cite the interim value of the potential claim as the total of known unrelated creditors to date, with the caveat that that amount could increase if and when more unpaid creditors came to light”. But that is not, with great respect, “an alternative approach”. If by “potential claim” the liquidators meant a claim which could reasonably and properly be made consistently with a liquidator’s duty as an officer of the court, then that is not an “alternative approach” to take. It is the only approach, for reasons which I trust I have adequately explained.***
2. ***The next question is whether the conduct by the liquidators identified above warrants their removal.***
3. ***In my view, it does.***

# Gadsden v MacKinnon (Liquidator), in the matter of Allibi Pty Ltd (in liq) [2023] FCA 647 (15 June 2023)

**3. ASIC “disqualification” of directors.**

**CORPORATIONS ACT 2001 - SECT 206F**

**ASIC's power of disqualification**

**Power to disqualify**

**(1) ASIC may disqualify a person from managing corporations for up to 5 years if:**

**(a) within 7 years immediately before ASIC gives a notice under paragraph (b)(i):**

**(i) the person has been an officer of 2 or more corporations; and**

**(ii) while the person was an officer, or within 12 months after the person ceased to be an officer of those corporations, each of the corporations was wound up and a liquidator lodged a report under subsection 533(1) … about the corporation's inability to pay its debts; and (note; simplified liquidation)**

**(b) ASIC has given the person:**

**(i) a notice in the prescribed form requiring them to demonstrate why they should not be disqualified; and**

**(ii) an opportunity to be heard on the question; and**

**(c) ASIC is satisfied that the disqualification is justified.**

**(2) In determining whether disqualification is justified, ASIC:**

**(a) must have regard to whether any of the corporations mentioned in subsection (1) were related to one another; and**

**(b) may have regard to:**

**(i) the person's conduct in relation to the management, business or property of any corporation; and**

**(ii) whether the disqualification would be in the public interest; and**

**(iii) any other matters that ASIC considers appropriate.**

…

**(4) The disqualification takes effect from the time when a notice referred to in subsection (3) is served on the person.**

[**23-259MR ASIC disqualifies Philip Whiteman from managing corporations for maximum five years after engaging in illegal phoenix activity | ASIC**](https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-259mr-asic-disqualifies-philip-whiteman-from-managing-corporations-for-maximum-five-years-after-engaging-in-illegal-phoenix-activity/)

**ASIC has disqualified Philip Whiteman of Mount Dandenong, Victoria, from managing corporations for the maximum period of five years due to his involvement in the failure of five companies.**

**Between November 2010 and June 2017, it was determined that Mr Whiteman acted as a 'shadow director’ by controlling companies and acting in the position of a director, despite not being a registered director.**

**At the time of ASIC’s decision, the companies owed a combined total of $17 million, including approximately $15.2 million owed to the ATO.**

**Mr Whiteman is currently an undischarged bankrupt and was previously a bankrupt from January 2010 to March 2014.**

**ASIC’s investigation was assisted by the receipt of a supplementary report lodged by Andrew Yeo of Pitcher Partners (Victoria), the liquidator of A&S, B&S, DNV and Armstrong. Mr Yeo was assisted by grant funding from the**[**Assetless Administration Fund**](https://asic.gov.au/for-finance-professionals/registered-liquidators/your-ongoing-obligations-as-a-registered-liquidator/assetless-administration-fund/)**, which is administered by ASIC, enabling the liquidator to investigate and report their findings.**

Published 25 September 2023

**4. Director Penalty Notices**

**The Australian Taxation Office (ATO) is reportedly issuing director penalty notices (DPN) at an average rate of 60/day, according to an ATO spokesperson.**

**A director penalty notice (DPN) doesn’t make the director liable for outstanding company debt, as directors are already liable by operation of law. The director penalty notice is formal notice which entitles the ATO to commence recovery proceedings, should the ATO wish to do so.**

**A lockdown DPN, applies when:**

* **a company failed to lodge its business activity statements (BAS) and instalment activity statements (IAS) within three months of the due lodgment.**
* **superannuation guarantee charge (SGC) statements within one month and 28 days after the end of the quarter that the superannuation charge contribution relates to.**

**In such cases, the director’s exposure to the penalty is automatic and permanent.**

**The existence of a DPN is recorded on the person’s MyGov account.**

**“As a new director you can avoid becoming liable for director penalties that were due before your appointment, if within 30 days of your appointment, you ensure the company does one of the following:**

* **pays their debts in full for PAYGW, net GST from 1 April 2020 (including luxury car tax (LCT) and wine equalisation tax (WET) amounts) and SGC from 1 April 2012**
* **appoints an administrator under section 436A, 436B or 436C of the Corporations Act 2001**
* **appoints a small business restructuring practitioner under section 453B of that Act.**
* **begins to be wound up (within the meaning of the Corporations Act 2001).”**

**Even if you resign as a company director within the 30-day period, you will still be liable for the company's unpaid PAYG withholding, net GST or SGC liabilities that were due before your appointment.**

**CORPORATIONS ACT 2001 - SECT 453B**

**Appointing a restructuring practitioner**

**(1) A company may, by writing, appoint a small business restructuring practitioner for the company if:**

**(a) the eligibility criteria for restructuring are met in relation to the company on the day the appointment is made; and**

**(b) the board has resolved to the effect that:**

**(i) in the opinion of the directors voting for the resolution, the company is insolvent, or is likely to become insolvent at some future time; and**

**(ii) a restructuring practitioner for the company should be appointed.**

**In the matter of Concreting and Formwork Personnel Pty Ltd ACN 627 355 480 (In Liquidation) [2023] NSWSC 512 (16 May 2023)**

***22. It is well established that, where a person has not consented to their appointment as director or secretary of a company, either by written consent or by consent in fact, then their appointment will be invalid.***

***26. I am also satisfied that it is appropriate to make the declarations sought by Ms Dib to that effect. Those declarations will resolve a legal controversy between Ms Dib and the Deputy Commissioner. It is plain from the position taken by the Deputy Commissioner in these proceedings that, unless and until the Court makes the declarations sought by Ms Dib, the Deputy Commissioner intends to rely on the ASIC register to establish Ms Dib’s directorship for the purpose of future recovery action against Ms Dib in relation to the Penalty Notice.***

**ORDERS**

**(2) A declaration that Jennifer Dib did not consent to act as, and was not appointed as, director of Concreting and Formwork Personnel Pty Ltd ACN 627 355 480 on 6 July 2018.**

**(5) A declaration that the purported appointment of Jennifer Dib on 6 July 2018 as director and secretary of Concreting and Formwork Personnel Pty Ltd ACN 627 355 480 on 6 July 2018 is void and of no effect.**

**PADDINGTON GOLD PTY LTD -v- WAVE PTY LTD (SUBJECT TO A DEED OF COMPANY ARRANGEMENT) [2023] WASC 263 (17 July 2023)**

***58. In relation to the insolvency of Wave, the administrators expressed the view that it was not insolvent, having regard to a payment arrangement being made by it with the Commissioner of Taxation.***

***59. Paddington points out though that such an arrangement does not alter the date on which the debts fell due (see Clifton (Liquidator) v Kerry J Investment Pty Ltd t/as Clenergy [2020] FCAFC 5). Paddington also points out that the need for Wave to enter into such an arrangement itself demonstrates it was unable to pay its debts as and when they fell due.***

**5. Inspector General (IG) review the trustee's assessments of bankrupt’s income**

### Inspector-General in Bankruptcy v Rutherfurd (Bankrupt) [2023] FCAFC 99

In this matter, the trustee in bankruptcy had issued income assessment notices, requiring the bankrupt to pay income contributions for the first four years of his bankruptcy, in 2020. Shortly thereafter, the bankrupt requested that the Inspector General (IG) review the trustee's assessments. The IG decided not to review the bankruptcy trustee's assessments and the bankrupt then applied to the Administrative Appeals Tribunal (AAT) seeking to have the IG's decision set aside and an amended income contribution assessment made. The AAT determined that it did not have the power to review the IG's decision.

The bankrupt appealed the AAT's decision to the Federal Court where, in the first instance, the Judge set aside the AAT's decision and sent the matter back to the AAT to determine the bankrupt's application. The IG then appealed the matter to the full Federal Court that held the primary judge’s decision should be set aside and affirmed the AAT's original decision.

This confirms the principle that, while the AAT can review an income assessment made by the IG, the AAT is unable to review a decision by the IG to not undertake a review and make an assessment.

**6. Binding Financial Agreement**

# As you probably know, a Binding Financial Agreement (“BFA”) is a legally binding document that sets out the way some or all of the assets of a relationship are to be divided in the event the relationship breaks down. Part VIIIA of the Family Law Act 1975 (“the FLA”) makes provision for financial agreements between married couples whereas Part VIIIAB of the FLA makes provision for financial agreements between couples in a de facto relationship (including same sex relationships).

# It is a common misconception that individuals in financial difficulty can protect their assets and defeat legitimate creditor claims by entering into a BFA. In fact, the legislation specifically prevents its use for such purposes. A further complication arises from the interaction between the FLA and the Bankruptcy Act 1966 (“the BA”).

# <https://obp.com.au/2023/09/16/hope-springs-eternal-for-debtors/>

**Bankruptcy Act, 1966 (Cth.)**

**122 Grounds of objection**

**(1)  The grounds of objection that may be set out in a notice of objection are as follows:**

**(aa)  any transfer is void against**[**the trustee**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s5.html#the_trustee)**in the**[**bankruptcy**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s5.html#bankruptcy)**because of**[**section 120**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s120.html)**or**[**122**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s122.html)**;**

**(ab)  any transfer is void against**[**the trustee**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s5.html#the_trustee)**in the**[**bankruptcy**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s5.html#bankruptcy)**because of**[**section 121**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s121.html)**; …**

**7. Small Business Restructuring Process**

**Eligibility;**

1. **Ensure all taxation returns are up to date and lodged;**
2. **All employee entitlements paid up to date;**
3. **Creditors need to be under $1,000,000; and**
4. **The company must not have been subject to a SBR or a simplified liquidation in the last seven (7) years.**

**Benefits include the director remaining in control of the business during the restructure, lower fees due to a more streamlined appointment and less reporting requirements of the practitioner.**

**Further:**

**1. The**[**ATO**](https://www.ato.gov.au/) **engages with the restructuring practitioner early in the process. A practitioner could provide a draft plan to the ATO for discussion.**

**2. The** [**Queensland Building and Construction Commission**](https://www.qbcc.qld.gov.au/)**(QBCC), is not treating the appointment of an SBRP as triggering an automatic exclusion of a company holding a building license (i.e. causing the suspension and then termination of the license).**

**3. There has been an excellent approval rate for plans proposed by companies**

**4. There has been a willingness by major stakeholders such as the ATO (who were a major creditor in 70% of the SBRPs undertaken in the first 18 months of its existence) to embrace this.**

**8. ATO credit reporting**

**The Australian Newspaper: 9 October 2023**

**“ATO ramps up business disclosure credit reporting”**

**Subsection 355-72(2)(a) of Schedule 1 of the *Taxation Administration Act 1953* (Cth) (“Act”) provides that “*The Commissioner must notify a primary entity if information that relates to the primary entity is to be disclosed to a credit reporting bureau under this section.***

**Engaging with the ATO to manage your debts**

**“If you are effectively engaging with us to manage your debt, we will not report it, even if it is $100,000 or more.**

**Effectively engaging with us means that you have:**

**• a payment plan and you are complying with the terms of the arrangement**

**• applied for release from the tax debt**

**• an active objection against a taxation decision to which the tax debt relates**

**• an active review with the Administrative Appeals Tribunal (AAT) or an active appeal to the Court**

**• an active review with the AAT of a reviewable decision which may affect the amount of a non-complying superannuation fund's tax debt with the relevant regulator**

**• an active complaint with the IGTO in relation to the tax debt.”**

**9. Parliamentary Joint Committee on Corporations and Financial Services Corporate insolvency in Australia, July 2023**

# List of recommendations

[**Recommendation 1**](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/CorporateInsolvency/Report/List_of_recommendations#RecommendationHeading0)

3.104The committee recommends that as soon as practicable the government commission a comprehensive and independent review of Australia’s insolvency law, encompassing both corporate and personal insolvency. The committee is also recommending that the government progress several other near-term actions as identified in the executive summary.

[**Recommendation 2**](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/CorporateInsolvency/Report/List_of_recommendations#RecommendationHeading2)

4.61The committee recommends that the comprehensive review, as part of its early work, consider and report on the appropriate principles and objectives of insolvency law. The committee further recommends that the government respond quickly to this first report of the comprehensive review to allow the comprehensive review to continue with further stages of work in a timely way.

[**Recommendation 3**](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/CorporateInsolvency/Report/List_of_recommendations#RecommendationHeading4)

5.77The committee recommends that the comprehensive review consider and make recommendations on options to enhance public interest objectives and the effectiveness of, and interaction between, the personal and corporate insolvency systems.

[**Recommendation 4**](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/CorporateInsolvency/Report/List_of_recommendations#RecommendationHeading6)

6.75The committee recommends that the Australian Securities and Investments Commission collect high quality, granular data in relation to insolvency and provide this data in a timely way to relevant government agencies and regulators.

[**Recommendation 5**](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/CorporateInsolvency/Report/List_of_recommendations#RecommendationHeading8)

6.76The committee recommends that the proposed comprehensive review of insolvency consult data holders, researchers, industry participants, and public sector organisations to progress the access to and analysis of insolvency data.

[**Recommendation 6**](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/CorporateInsolvency/Report/List_of_recommendations#RecommendationHeading10)

7.98The committee recommends that the proposed comprehensive review consider and report on the current system of corporate insolvency pathways from a holistic systems analysis perspective.

[**Recommendation 7**](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/CorporateInsolvency/Report/List_of_recommendations#RecommendationHeading12)

7.101The committee recommends that the government implement recommendations from the SafeHarbour Review, independent and likely in advance of the further review, and consider referring the remainder of safe harbour reform issues identified in this report to a comprehensive review.

[**Recommendation 8**](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/CorporateInsolvency/Report/List_of_recommendations#RecommendationHeading14)

7.107The committee recommends that as soon as practicable the government consider and consult on potential reforms to the:

small business restructuring pathway; and

simplified liquidation pathway.

[**Recommendation 9**](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/CorporateInsolvency/Report/List_of_recommendations#RecommendationHeading18)

7.108The committee recommends that the comprehensive review consider the:

voluntary administration pathway; and

members voluntary liquidation pathway.

[**Recommendation 10**](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/CorporateInsolvency/Report/List_of_recommendations#RecommendationHeading22)

7.110The committee recommends that the Australian Securities and Investments Commission collect and analyse data from an appropriately sized sample of voluntary and compulsory deregistrations, to provide greater visibility of the solvency status of deregistered companies.

[**Recommendation 11**](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/CorporateInsolvency/Report/List_of_recommendations#RecommendationHeading24)

8.25The committee recommends that the comprehensive review consider the requirements for the registration of small business restructuring practitioners to understand the reasons for the limited number of registrations to date.

[**Recommendation 12**](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/CorporateInsolvency/Report/List_of_recommendations#RecommendationHeading26)

8.30The committee recommends that the government reform the experience eligibility requirements for registered liquidators, to address the inequity of the requirements and the gender imbalance in the population of registered liquidators. Reforms could potentially include:

increasing the period over which experience is demonstrated, or

replacing part of the required hours with a competency-based exam.

[**Recommendation 13**](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/CorporateInsolvency/Report/List_of_recommendations#RecommendationHeading30)

8.67The committee recommends that the comprehensive review include consideration of the remuneration of insolvency practitioners, including:

the extent to which public interest work carried out by liquidators for no or limited pay is sustainable; and

the impact of this on all stakeholders in external administrations.

[**Recommendation 14**](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/CorporateInsolvency/Report/List_of_recommendations#RecommendationHeading34)

8.87The committee recommends that the comprehensive review include consideration of the operation, efficacy, and efficiency of the current independence requirements for insolvency practitioners, including:

whether the current requirements are achieving the policy settings that inform them and whether these policy settings are optimal; and

the advantages and disadvantages of formally separating the roles of advice and restructuring from formal appointments to liquidations and administrations.

[**Recommendation 15**](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/CorporateInsolvency/Report/List_of_recommendations#RecommendationHeading38)

8.108The committee recommends that the comprehensive review include consideration of the nature and extent of the harm posed by ‘untrustworthy pre-insolvency advisors’, and whether further regulation or enforcement measures are needed to address this issue. The committee further recommends that in the interim, the government take prompt action to improve the regulation and active enforcement of pre-insolvency advisers.

[**Recommendation 16**](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/CorporateInsolvency/Report/List_of_recommendations#RecommendationHeading40)

9.46The committee recommends that the government consider changes to the Assetless Administration Fund to ensure that it is achieving its intended policy objectives.

[**Recommendation 17**](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/CorporateInsolvency/Report/List_of_recommendations#RecommendationHeading42)

9.51The committee recommends that the Department of the Treasury consider assessing the potential benefit of the Public Interest Administration Fund proposed by the Productivity Commission in 2015, including the impacts of the required increase on the annual review fee for company renewals; and either consider implementing the proposal, or provide that analysis to a comprehensive review.

[**Recommendation 18**](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/CorporateInsolvency/Report/List_of_recommendations#RecommendationHeading44)

9.73The committee recommends that the comprehensive review consider and make recommendations on options for funding the administrations of assetless companies, including reforms to the Assetless Administration Fund (noting the committee’s recommendation 16) and the merits of creating a public liquidator for corporate insolvency.

[**Recommendation 19**](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/CorporateInsolvency/Report/List_of_recommendations#RecommendationHeading46)

10.35The committee recommends that the comprehensive review consider whether the current statutory reporting obligations for insolvency practitioners are best serving the integrity, efficiency, and efficacy of the Australian corporate insolvency framework, including (but not limited to):

the ability of the Australian Securities and Investments Commission (ASIC) to appropriately process, utilise and respond to initial statutory reports on current resources; and

the appropriateness of existing reporting thresholds, having regard to their regulatory value as well as the burden imposed on insolvency practitioners.

The committee further recommends that in the interim, the government and ASIC consider whether any timely changes can be made to the regulations on reporting thresholds, and ASIC’s response to insolvency practitioner reports.

[**Recommendation 20**](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/CorporateInsolvency/Report/List_of_recommendations#RecommendationHeading51)

10.54The committee recommends that the comprehensive review examine the operation of the insolvent trading regime and its impact on the broader corporate insolvency framework.

[**Recommendation 21**](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/CorporateInsolvency/Report/List_of_recommendations#RecommendationHeading53)

10.105The committee recommends that the comprehensive review analyse and make recommendations on the overall economic and social benefits and costs of Australian Taxation Office relief to potentially insolvent companies in hard economic times, in the context of the impacts on the purposes of the insolvency system.

[**Recommendation 22**](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/CorporateInsolvency/Report/List_of_recommendations#RecommendationHeading55)

10.106The committee recommends that the Australian Taxation Office consult, act on and publish model creditor guidelines, consistent with its model litigant obligations.

[**Recommendation 23**](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/CorporateInsolvency/Report/List_of_recommendations#RecommendationHeading57)

11.37The committee recommends that the comprehensive review consider the relative priority of employees, liquidators, and secured creditors, including the priority over circulating assets under section 561 of the Corporations Act 2001. The committee further recommends that this be a high priority topic for the comprehensive review.

[**Recommendation 24**](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/CorporateInsolvency/Report/List_of_recommendations#RecommendationHeading59)

11.79The committee recommends that the government develop reforms to improve the framework designed to ensure the policy objective of access to the Fair Entitlements Guarantee as a scheme of last resort, both to prevent misuse by novel schemes of arrangement, phoenixing, and other practices and to ensure capture of all individuals with valid entitlements.

[**Recommendation 25**](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/CorporateInsolvency/Report/List_of_recommendations#RecommendationHeading61)

11.87The committee recommends that the comprehensive review consider and report on franchising insolvency issues.

[**Recommendation 26**](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/CorporateInsolvency/Report/List_of_recommendations#RecommendationHeading63)

12.65The committee recommends that the government provide a formal response to the Whittaker Review which was completed in 2015.

[**Recommendation 27**](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/CorporateInsolvency/Report/List_of_recommendations#RecommendationHeading65)

13.61The committee recommends that the comprehensive review consider unfair preferences and voidable transactions as a core aspect of potential insolvency reform.

[**Recommendation 28**](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/CorporateInsolvency/Report/List_of_recommendations#RecommendationHeading67)

14.55The committee recommends that the government amends the Corporations Act 2001 to expressly clarify the treatment of trusts with corporate trustees during insolvency.

**Insolvency Law and Practice**

**Webinars from March 2023, 4.00pm – 5.00pm**

**1. High Court decisions, including:**

1. Preferential Payments; Bryant -v- Badenoch Integrated Logging P/L (2023) HCA 2
2. Preferential Payments; Metal Manufactures -v- Morton (2023) HCA 1
3. Resulting trust; how safe is the family home; Bosanac -v- Commissioner of Tax (2022) HCA 34

**2. Insolvency principles that were tested during 2022**

1. Creditor defeating transactions (Re Intellicomms Pty Ltd (in liq) [2022] VSC 228 (11 May 2022))
2. Accountant unsuccessfully applied to discharge a summons for public examination that required production of their professional indemnity insurance policy (Pearce, in the matter of Bandiera Holdings Pty Ltd (Receiver Appointed) (in liquidation) v Bandiera Holdings Pty Ltd [2022] FCA 876)
3. A solvent company can pursue unreasonable director-related transaction claims (Aviation 3030 Pty Ltd (in liq) v Lao, in the matter of Aviation 3030 Pty Ltd (in liq) [2022] FCA 458)
4. A transfer of the matrimonial home, from a husband and wife to the wife solely, some 16 years before the husband's bankruptcy, did not have the 'main purpose' of preventing the house from becoming divisible among the husband's creditors (McMillan v Warner (Trustee) [2022] FCAFC 20).

**Presenter**

***Geoffrey McDonald***

***Barrister at Law,***

***9 Windeyer Chambers***

***(***[***http://www.9windeyer.com.au/barristers/geoffrey-mcdonald/***](http://www.9windeyer.com.au/barristers/geoffrey-mcdonald/)***)***

**Please; set your Zoom view to Speaker Mode and mute your sound and turn off your video.**

**Disclaimer; this presentation and these papers are not legal advice!**

**The Presenter’s background;**

**Geoffrey McDonald**

**Insolvency Accountant, then Barrister**

* **1987 became a partner, the youngest ever of an accounting firm, aged 23.**
* **1988 became a registered liquidator, then also registered as an auditor, tax agent and then Trustee in bankruptcy.**
* **I went to the Bar in the late 1990s.**
* **I was told that I was the first person to be granted a Practicing certificate as a barrister whilst also practicing as an accountant.**
* **I soon became National Chairman of Hall Chadwick.**
* **I left Accounting to practise as a Barrister in 2008.**
* **As Albert Einstein once said;**

**“The fate of the old one, recognises the culture of the young”.**