**Webinar 26 October 2023**

**Insolvency & Commercial Law,**

**Developments in the Profession**

1. **Funds paid into Court are not security requiring a PPS registration**
2. **Leave under s 459S to argue a debt on a winding up**
3. **Priority for liquidators’ fees over employees**
4. **Approvals for a Liquidator to compromise**
5. **Late filing of an application to set aside a Bankruptcy Notice.**
6. **Removal of a Liquidator for making an “unjustified demand for the payment”.**
7. **Inadequate reporting by Administrators**
8. **ASIC “disqualification” of directors**
9. **Director Penalty Notices**
10. **Inspector General (IG) review the trustee's assessments of bankrupt’s income.**
11. **Review of trustee’s decisions and conduct**
12. **Binding Financial Agreement (“BFA”)**
13. **Small Business Restructuring Process**
14. **ATO credit reporting**
15. **ASIC consultation on Safe Harbour**
16. **Parliamentary Joint Committee on Corporations and Financial Services Corporate insolvency in Australia, July 2023**
17. **Review of PPS law and Whittaker report, Sept 2023**
18. **Economic Climate; asset values (Hymans, Asset Valuers and Auctioneers)**
19. **March 2023 Webinar subjects**
20. **Current Amounts under Bankruptcy**
21. **Presenters background and 2024 training sessions**

**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 (and start 15 years ago at 9 Windeyer Chambers).**
* **As Albert Einstein once said;**

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

**2024 - lunch-time senior staff training for insolvency accountants. I will present 1 session on ethics and 3 sessions on practice and procedure. The proposed dates are on the Tuesdays of 13 February, 30 April, 18 June and 27 August 2024 from 1pm – 2pm. Please place those dates in your diary and email me to be on the invitation list.**

1. **Funds paid into court are not “security” if the payer becomes insolvent**

***2 … The defendant/plaintiff by counterclaim (‘Mitsui’) had become concerned that if it successfully defended the claim brought against it by the plaintiff/first defendant by counterclaim (‘APT’), [2] APT would be unable to pay Mitsui’s costs.***

***4… APT provide security in the amount of $100,000 by payment of funds into Court..***

***7 On 30 November 2022, APT was placed into voluntary administration..***

***8 The Administrator contends that the amount paid into Court pursuant to the Second SFC Orders gave rise to a security interest for the purposes of the Personal Property Securities Act 2009 (Cth) (the ‘PPSA’), which security interest had not been registered by Mitsui and hence, was an unperfected security interest as at the date of the appointment of the Administrator. The Administrator contends that such interest vests in APT immediately before the appointment by reason of s 267 of the PPSA, and accordingly, seeks an order that the funds held in Court pursuant to the Second SFC Orders be paid out to the Administrator.***

***72 Mitsui acquired an interest in the funds paid into Court on 22 April 2022 pursuant to the Second SFC Orders. The interest so acquired was in the nature of an equitable lien or equitable charge, which arose by reason of the general law, and as such falls, within the scope of s 8(1)(c) of the PPSA.***

*In Laurus Group Pty Ltd (admin apptd) v Mitsui & Co. (Australia) Ltd (No 2) [2023] VSC 412*

**2. Leave under s 459S to argue a debt on a winding up**

**A company sought leave under s 459S of the Corporations Act 2001 (Cth) to oppose a winding up application, on grounds which it had already raised in its failed application to set aside the statutory demand.**

**The Court refused to grant leave to rely on the previous arguments and wound up the company. The Court found that there must be a very good reason to allow the company to reargue the previous points and, in this case, there were no such reasons.**

**The Court rejected the submission that the discretion to grant leave under s 459S must be exercised cautiously or sparingly. The discretion should be exercised on a case-by-case basis, without being restricted by the presumption (barrier) that leave should only be granted cautiously or sparingly**

**Garslev Holdings Pty Ltd [2023] NSWSC 609**

**3. Priority for liquidators’ fees over employees**

**The Court considered whether the liquidator’s remuneration and expenses ranked in priority to claims of priority employee creditors under section 556(1)(e),(g) and (h) of the Corporations Act 2001 (Cth) (Act). The Commonwealth, on behalf of the Department, argued that priority creditor (or employee) claims must be paid out first under section 561 of the Act, to the extent of “floating” or circulating security interests.**

### CORPORATIONS ACT 2001 - SECT 561

**Priority of employees' claims over circulating security interests**

                   So far as the [property](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s1233.html#property) of a company available for payment of creditors other than [secured creditors](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s51e.html#secured_creditor) is insufficient to meet payment of:

                     (a)  any debt referred to in [paragraph](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s561.html#paragraph) 556(1)(e), (g) or (h); and

                     (b)  any [amount](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s9.html#amount) that pursuant to [subsection](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s562.html#subsection) 558(3) or (4) is a cost of the winding up, being an [amount](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s9.html#amount) that, if it had been payable on or before the [relevant date](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s9.html#relevant_date), would have been a debt referred to in [paragraph](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s561.html#paragraph) 556(1)(e), (g) or (h); and

                     (c)  any [amount](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s9.html#amount) in respect of which a [right](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s1371.html#right) of priority is given by [section 560](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s560.html);

payment of that debt or [amount](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s9.html#amount) must be [made](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s1371.html#made) in priority over the claims of a [secured party](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s51b.html#secured_party) in relation to a [circulating security interest](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s51c.html#circulating_security_interest) created by the company and may be [made](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s1371.html#made) accordingly out of any [property](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s1233.html#property) comprised in or subject to the [circulating security interest](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s51c.html#circulating_security_interest).

### CORPORATIONS ACT 2001 - SECT 556

**Priority payments**

             (1)  Subject to [this Division](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s1674a.html#this_division), in the winding up of a [company](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s556.html#company) the following debts and claims must be paid in priority to all other [unsecured](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s9.html#unsecured) debts and claims:

…

                   (dd)  next, any other expenses (except [deferred expenses](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s556.html#deferred_expenses)) properly incurred by a [relevant](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s556.html#relevant_authority) [authority](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s556.html#relevant_authority);

                   (de)  next, the [deferred expenses](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s556.html#deferred_expenses);

…

                     (e)  subject to [subsection](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s558.html#subsection) (1A)--next:

                              (i)  [wages](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s9.html#wages), [superannuation](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s556.html#superannuation_contribution) [contributions](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s556.html#superannuation_contribution) and [superannuation guarantee charge](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s9.html#superannuation_guarantee_charge) payable by the [company](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s556.html#company) in respect of services rendered to the [company](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s556.html#company) by [employees](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s556.html#employee) before the [relevant date](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s9.html#relevant_date); or

                             (ii)  liabilities to pay the [amounts](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s9.html#amount) of estimates under Division 268 in Schedule 1 to the [*Taxation Administration Act 1953*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/taa1953269/)of [superannuation guarantee charge](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s9.html#superannuation_guarantee_charge) mentioned in subparagraph (i);

                      (f)  next, [amounts](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s9.html#amount) due in respect of injury compensation, being compensation the [liability](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s1371.html#liability) for which arose before the [relevant date](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s9.html#relevant_date);

                     (g)  subject to [subsection](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s558.html#subsection) (1B)--next, all [amounts](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s9.html#amount) due:

                              (i)  on or before the [relevant](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s9.html#relevant_date) [date](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s9.html#relevant_date); and

                             (ii)  because of an industrial [instrument](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s1371.html#instrument); and

                            (iii)  to, or in respect of, [employees](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s556.html#employee) of the [company](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s556.html#company); and

                            (iv)  in respect of leave of absence;

                     (h)  subject to [subsection](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s558.html#subsection) (1C)--next, [retrenchment payments](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s556.html#retrenchment_payment) payable to [employees](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s556.html#employee) of the [company](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s556.html#company).

***"deferred expenses"***, in relation to a [company](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s556.html#company), means expenses properly incurred by a [relevant authority](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s556.html#relevant_authority), in so far as they consist of:

                     (a)  [remuneration](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s9.html#remuneration), or [fees](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s601raa.html#fees) for services, payable to the [relevant authority](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s556.html#relevant_authority)

**The Court held, inter alia, that:**

1. **the liquidator is not a “creditor” of the Company, because a liquidator is not entitled to prove in the winding up (see section 553 of the Act) and therefore the liquidator’s remuneration and expenses must be deducted from the amount of “available property of the Company” in determining the property of the Company available for payment of creditors.**
2. **The reference in section 561 of the Act to property being “available” for payment to creditors, other than secured creditors, distinguishes between property which is available for general creditors and assets which are subject to a security interest.**
3. **Upon the secured creditor being paid out, as was the case, from the Company’s (fixed) non-circulating assets, section 561 had no work to do. The issue of priority was governed by section 556(1) of the Act and was clear; remuneration before employees.**

**Re BCA National Training Group Pty Limited (in liq) [2023] NSWSC 366**

**(subject to an Appeal?)**

**4. Approvals for a Liquidator to compromise**

# Michell (Liquidator) v Fowler, in the matter of WITS Holdings Pty Ltd (In Liquidation) [2023] FCA 1231 (16 October 2023)

**THE COURT DECLARES THAT:**

1. **Pursuant to**[**s 1322(4)(a)**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s1322.html)**of the**[***Corporations Act 2001***](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/)**(Cth) (Act), the deed of settlement being Annexure “B” to the affidavit of Mr Stephen Michell sworn on 7 September 2023 (Deed of Settlement), is not invalid by reason of it having been entered into without the Court’s prior approval.**

**THE COURT ORDERS THAT:**

1. **Pursuant to [s 90](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s90.html)-**[**15**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s15.html)**of the *Insolvency Practice Schedule (Corporations)* being Sch 2 of the Act, the first plaintiff was justified in entering and causing the second plaintiff to enter into, and is justified in giving effect to, the Deed of Settlement.**
2. **Pursuant to**[**s 477(2A)**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s477.html)**of the Act, the first plaintiff be authorised *nunc pro tunc* to enter and to cause the second plaintiff to enter into the Deed of Settlement.**

**Reasons**

1. **The Court may give directions under**[**s 90**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s90.html)**-**[**15**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s15.html)**of the IPS in respect of settlement of litigation if (a) there is an element of potential controversy in respect of the compromise, (b) a settlement has a substantial element of compromise about it, or (c) it involves not only the exercise of a commercial judgment by the liquidator, but also the exercise of a legal judgment involving the assessment of merits of the settlement against the prospects of success in the proceeding: *In the matter of A.C.N. 004 410 833 Limited (formerly Arrium Limited) (In Liquidation)***[**[2021] NSWSC 799**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2021/799.html)**at**[**[14]**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2021/799.html#para14)**(Black J).**
2. **Section 477(2A) applies to debts in the strict sense and there is a question as to whether a claim for compensation for insolvent trading under s 588M of the Act constitutes a “debt” within the meaning of the provision:*Arrium*at [7] (Black J). In*Mustang Marine Australia Services Pty Ltd (in liquidation)***[**[2015] NSWSC 2152**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2015/2152.html)**, Brereton J found at [5] that:**

**There is a question as to whether a claim of this kind is in respect of a debt, such as to fall within s 477(2A). Observations made by Foster J in *Engineered Thermal Systems Pty Ltd***[**[2012] FCA 1159**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2012/1159.html)**(at [31]-[32]) provide some reason for thinking that there may be a debt involved. In any event, as Barrett J (as his Honour then was) has said in cases such as *Re HIH Insurance Limited***[**[2004] NSWSC 5**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2004/5.html)**(at [12]) and *QBE Workers Compensation (NSW) Limited v G J Formwork Pty Ltd***[**[2006] NSWSC 98**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2006/98.html)**;**[**(2006) 56 ACSR 687**](http://www.austlii.edu.au/cgi-bin/LawCite?cit=%282006%29%2056%20ACSR%20687)**; [2006] NSWNSC 98 (at [4]-[5]), where there is room for argument about whether a claim involves a debt within s 477(2A), the Court should err on the side of treating the claim as a debt rather than declining to grant approval on the ground of lack of jurisdiction. As Lindgren J suggested in *Elderslie Finance Corporation Limited v Newpage Pty Ltd (No 6)***[**[2007] FCA 1030**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2007/1030.html)**;**[**(2007) 160 FCR 423**](http://www.austlii.edu.au/cgi-bin/LawCite?cit=%282007%29%20160%20FCR%20423)**(at [27], [34]), the advice can be qualified in terms “to the extent that approval may be required”.**

**24. It is well established that the Court does not concern itself with the commercial desirability of the transaction in an application for approval pursuant to s 477(2A) and s 477(2B) of the Act: *Vardy*at [15]; *Tracy*at [18]; *In the matter of Rubix Investments Group Pty Ltd (in liq)***[**[2018] NSWSC 1184**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2018/1184.html)**at**[**[27]**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2018/1184.html#para27)**(Gleeson JA). As Giles J stated in the oft-cited passage in *Re Spedley Securities Ltd (in liq)***[**(1992) 9 ASCR 83**](http://www.austlii.edu.au/cgi-bin/LawCite?cit=%281992%29%209%20ASCR%2083)**;**[**10 ACLC 1742**](http://www.austlii.edu.au/cgi-bin/LawCite?cit=10%20ACLC%201742)**at 85-86:**

**... the court pays regard to the commercial judgment of the liquidator (*ReChase Corporation (Australia) Equities Ltd***[**(1990) 8 ACLC 1118).**](http://www.austlii.edu.au/cgi-bin/LawCite?cit=%281990%29%208%20ACLC%201118)**That is not to say that it rubber stamps whatever is put forward by the liquidator but, as is made clear in *Re Minerals Securities Australia Ltd***[**[1973] 2 NSWLR 207**](http://www.austlii.edu.au/cgi-bin/LawCite?cit=%5b1973%5d%202%20NSWLR%20207)**at 231-2, the court is necessarily confined in attempting to second guess the liquidator in the exercise of his powers, and generally will not interfere unless there can be seen to be some lack of good faith, some error in law or principle, or real and substantial grounds for doubting the prudence of the liquidator’s conduct.**

**27. Although the court does not exhaustively or closely consider the commercial merits or otherwise of the proposal, which is largely entrusted by the Court to the liquidator, some examination of the merits of the proposal cannot be avoided: *One.Tel Limited*at [29]. However, if the liquidator expresses the opinion that it is an appropriate commercial compromise, and there does not appear to be any such lack of good faith, error in law or principle, or real or substantial ground for doubting the reasonableness of the liquidator’s view, the Court will generally give its approval: *In the matter of Adscaff Pty Limited***[**[2013] NSWSC 1081**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2013/1081.html)**at**[**[5]**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2013/1081.html#para5)**(Brereton J).**

**5A. 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*

**5B. 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

### 25 October 2023

URGENT MATTERS - GENERAL DUTY JUDGE: Justice Abraham

From 8:30am Monday the 23rd of October through to 8:30am Monday the 30th of October.

Practitioners - contact Associate on (02) 8099 8389 or (02) 8099 8367

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

URGENT MATTERS - COMMERCIAL & CORPORATIONS DUTY JUDGE: Justice Halley

From 8:30am Monday the 23rd of October through to 8:30am Friday the 27th of October.

Practitioners - contact Associate on (02) 8099 8535 or (02) 8099 8519

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

URGENT MATTERS - COMMERCIAL & CORPORATIONS DUTY JUDGE: Justice Goodman

From 8:30am Friday the 27th of October through to 8:30am Monday the 30th of October.

Practitioners - contact Associate on (02) 8099 8487

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

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For urgent after hours applications call: 1300 352 000

USE OF RECORDING DEVICES PROHIBITED.

The use of recording and transmission devices on Court premises or in Court hearings, irrespective of whether that hearing is heard in person, using remote access technology or a combination of both is strictly prohibited, without express approval of the Court. Failure to comply may constitute an offence.

**6. 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)

[Hall Chadwick partner cleared of dishonesty after 17 years (insolvencynewsonline.com.au)](https://insolvencynewsonline.com.au/old-hall-chadwickin-off-the-hook-after-17-years/)

**7. Inadequate Report by Administrator**

***Sino Group International Ltd v Toddler Kindy Gymbaroo Pty Ltd* [2023] FCAFC 110.**

**The creditors and company had been in dispute before the administration. The dispute continued about the amount the creditors could vote for in the administration.**

**The administrators were appointed after related creditors had called on their debts to be paid. Those creditors proposed a DOCA in which they would be deferred, but their claims were not released and, subject to subordination deeds.**

**The Full Court set aside the DOCA.**

* **Creditor reports need to have clear, up to date, and fairly presented information as to the choices available to creditors.**
* **Information that *could* affect how creditors vote is sufficient for the court to exercise its discretion in terminating a DOCA.**
* **Administrators are appropriate contradictors, but they must conduct a defence fairly and ensure relevant information within their knowledge is brought to the attention of the court. (per ARITA)**

**8. 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

**9. 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 debts.**

**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.***

**10. 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.

**11. Review of Trustee’s Decision**

***29. On 6 October 2022, (the trustee’s office) replied, stating that the Trustee considered there were currently no grounds to remove the objection as the information provided to date had not been satisfactory and Mr Duckworth had 'continued to make threats which is inappropriate'. The trustee’s staff indicated that the Trustee did not intend to remove the objection at that time.***

***31. I note that AFSA's reference to the inability to take into account conduct that subsequently remedies an objection notice is presumably a reference to***[***s 149N(1B)***](https://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s149n.html)***of the***[***Bankruptcy Act***](https://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/)***, a provision which does not apply in the case of an application to Court: Nguyen v Pattison***[***[2005] FCA 650***](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2005/650.html)***at***[***[85]***](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2005/650.html#para85)***(Weinberg J).***

***45. It follows, and I infer, that Mr Duckworth's real complaint is that the trustee has more recently refused to withdraw the objection. Whilst one could consider the refusal to withdraw the objection to be a continuing act over a period of time, I proceed on the basis that the decision reflected in the email to Mr Duckworth of 6 October 2022 is the relevant action of the Trustee for the purpose of this application. The Court considered such an application in Frost v Sheahan***[***[2005] FCA 1014***](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2005/1014.html)***(affirmed on appeal - Frost v Sheahan (Trustee)***[***[2009] FCAFC 20***](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2009/20.html)***(Frost FCAFC)). It was accepted that the trustee's refusal to withdraw the notices in that case constituted an act, omission or decision of the trustee within the meaning of (then) s 178, such that it could be reviewed having regard to the supervisory jurisdiction over the conduct of a trustee contemplated by that provision.***

***55. Mr Duckworth submitted that there is no purpose in his continued bankruptcy; that the Trustee's actions are punitive, having regard to his age and health; and that there is no evidence that there is any utility in continuing the administration of the estate. He asserts that any grounds relied upon by the Trustee are vindictive and trivial.***

***59. Even if there has not been complete compliance with the matters raised by the notice of objection, I am persuaded on balance by the evidence placed before me by Mr Duckworth that there has been substantial compliance with the matters it raised. To the extent there remain other (unparticularised) deficiencies in the information provided by Mr Duckworth to the Trustee, I am not satisfied that such deficiencies justify denying relief.***

[Duckworth v Field [2023] FCA 801 (14 July 2023) (austlii.edu.au)](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2023/801.html)

**12. 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.)**

**149D 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)**; …**

**13. 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.**

**Re Dessco Pty Ltd [2021] VSC 94 (26 February 2021)**

***21 Regulation 5.3B.03 provides that for the purposes of paragraph 453C(1)(a) of the Act, the test for eligibility is that the total liabilities of the company on the day the restructuring begins must not exceed $1million. Relevantly, this regulation also defines liability to mean any liability to pay an admissible debt or claim.***

***22 Admissible debt or claim is defined in Reg 5.3B.01 to mean:***

***... a debt or claim that would be admissible to proof against the company under s 553(1) of the Act if:***

***(a) the company were wound up; and***

***(b) the relevant date were:***

***(i) if the company is under restructuring—the beginning of the restructuring...***

***23 Section 553(1) of the Act provides that:***

***Subject to this Division and Division 8, in every winding up, all debts payable by, and all claims against, the company (present, future, certain or contingent, ascertained or sounding only in damages), being debts or claims the circumstances giving rise to which occurred before the relevant date, are admissible to proof against the company.***

***CORPORATIONS ACT 2001 SECT 554E***

***Proof of debt by secured creditor***

***(1) In the winding up of an insolvent company, a secured creditor is not entitled to prove the whole or a part of the secured debt otherwise than in accordance with this section and with any other provisions of this Act or the regulations that are applicable to proving the debt.***

***(5) If the creditor has not realised or surrendered the security interest, the creditor may:***

***(a) estimate its value; and***

***(b) prove for the balance due after deducting the value so estimated.***

**14. 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.”**

**15. Insolvent trading safe harbour provisions**

**Published 14 September 2023**

**ASIC has released**[**Consultation Paper 372**](https://asic.gov.au/regulatory-resources/find-a-document/consultation-papers/cp-372-guidance-on-insolvent-trading-safe-harbour-provisions-update-to-rg-217/)**Guidance on insolvent trading safe harbour provisions: Update to RG 217 seeking feedback on our proposed updates to**[**Regulatory Guide 217**](https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-217-duty-to-prevent-insolvent-trading-guide-for-directors/)**Duty to prevent insolvent trading: Guide for directors (RG 217).**

**CP 372 is seeking feedback on ASIC’s proposed approach to:**

* **updating existing guidance to include information about when a holding company may be liable for debts incurred by a subsidiary when the subsidiary has continued to trade while insolvent,**
* **providing information and general guidance about the operation of the safe harbour provisions and the factors ASIC will consider when assessing whether safe harbour protection is available to a director, and**
* **providing guidance for directors about the key principles they should consider in carrying out their duty to prevent insolvent trading.**

**ASIC encourages comments from industry and other interested stakeholders on its proposed approach to Regulatory Guide 217 Duty to prevent insolvent trading: Guide for directors. Comments should be sent by 5:00pm AEST on Wednesday, 26 October 2023.**

**16. 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.

17 Public Consultation on the Government's response to the statutory review of the Personal Property Securities Act 2009

On 22 September 2023 the Attorney-General announced the Australian Government’s response to the Final Report of the 2015 statutory review of the Personal Property Securities Act 2009 (the Whittaker Review). The Whittaker Review made 394 recommendations with the overarching objective of simplifying the personal property securities (PPS) framework. The government has developed a comprehensive reform package in response to these recommendations, which includes amendments to the Personal Property Securities Act 2009 (PPS Act) and new PPS Regulations. These reforms will achieve a clearer, more consistent, and more accessible PPS framework.

This index includes the Government’s response to all 394 recommendations made by the Whittaker Review. The index is broken down by the chapters of the Whittaker Review. The Government has accepted 345 recommendations, including recommendations that have been partially accepted. The Government has rejected 29 recommendations and rejected but clarified nine recommendations …

[Index of recommendations made by the Whittaker Review and the Government’s response (ag.gov.au)](https://consultations.ag.gov.au/legal-system/government-response-to-pps-review/user_uploads/recommendations-index-pps-framework-reforms.pdf)

18. Economic Climate; asset values

Since the start of this year, older asset prices have been in gentle decline with this continuing until the end of the 2023 financial year. These price declines have become significant since early July with many categories of older assets suffering declines in sale prices in excess of 20% since the beginning of the new financial year which is only 4 months ago.

There are several reasons for this depending on industry category, some obvious, some not so obvious.

* The Instant Asset Write Off was wound back to $20,000 per asset effective 1st July 2023. We saw a flurry of activity in June and a reduction in new transactions from several financiers after 1st July.
* Supply chains continue to improve across all industry sectors and there is substantially more new stock around. Some discounting has returned to the market particularly in the motor vehicle sector. This has led to an increase in trade-ins and softening prices for used assets particularly those that are over 7 years old and of lesser known or less respected brands. This has continued in the past 6 months. This is very consistent with falls in the market when the GFC hit in 2008 after very strong asset prices due to supply chain issues from 2005 to 2007 and a global mining boom. Based on the GFC there are likely to be further price reductions over the next 6 months -12 months.
* Credit has tightened considerably, and many funders are now limiting the types of used assets that they will lend on as well as requiring substantial deposits, shorter terms and low or nil residuals.
* The market continues to soften due to the significant number of building and construction related businesses entering insolvency arrangements leading to greater supply since the start of 2023. We are now starting to see transport operators in distress as well. We expect this to continue for at least another 12 months and possibly for up to 2 years.
* Interest rates have risen significantly during the year leading to cost pressures whilst building activity and economic growth has been stagnant.
* Many of our clients lend on an OLV basis but sell on an FLV basis. We would expect a 20% -30% variation for generic assets between FLV and OLV. We would expect a 30% -50% variation between OLV and FLV for specialised assets. In these cases, the asset(s) may take 6 months to sell at OLV. This is accentuated further when the comparison is made between Market Value and Forced Liquidation Value.

We are very negative about a number of construction related assets as well as some transport assets. There are other asset classes such as complex manufacturing, food manufacturing, mineral processing, packaging, leisure sector, gymnasiums etc. where prices have softened due to high installation costs and very narrow resale markets.

**(Ian Hyman, valuer and auctioneer)**

**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/)***)***