R+I IN BRIEF

2023

CONTENTS

Welcome to the inaugural edition of R+I In Brief, where we explore the past year of developments in the Australian restructuring and insolvency industry and provide our thoughts on the year ahead.

The 2023 edition of R+I In Brief includes a collection of articles and case notes we have prepared as well as some further commentary on issues we consider pertinent to the restructuring and insolvency industry.

It is broken up into three Parts:

1. SETTING THE SCENE
2. INDUSTRY INSIGHTS
3. JUDICIAL HIGHLIGHTS

Each Part of the this publication includes various resources which, we trust, will equip you with valuable insights to prepare you for what 2024 may have in store in the restructuring and insolvency space. For those who favour brevity, we have distilled the key messages at the beginning of each article.

We hope you will find the 2023 edition of R+I In Brief to be an interesting read and a useful resource for FY23/24.

PETER BOWDEN
Head of Restructuring + Insolvency
Gilbert + Tobin

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SETTING THE SCENE

RESTRUCTURING AND INSOLVENCY DEVELOPMENTS IN AUSTRALIA IN FY22/23

Overview

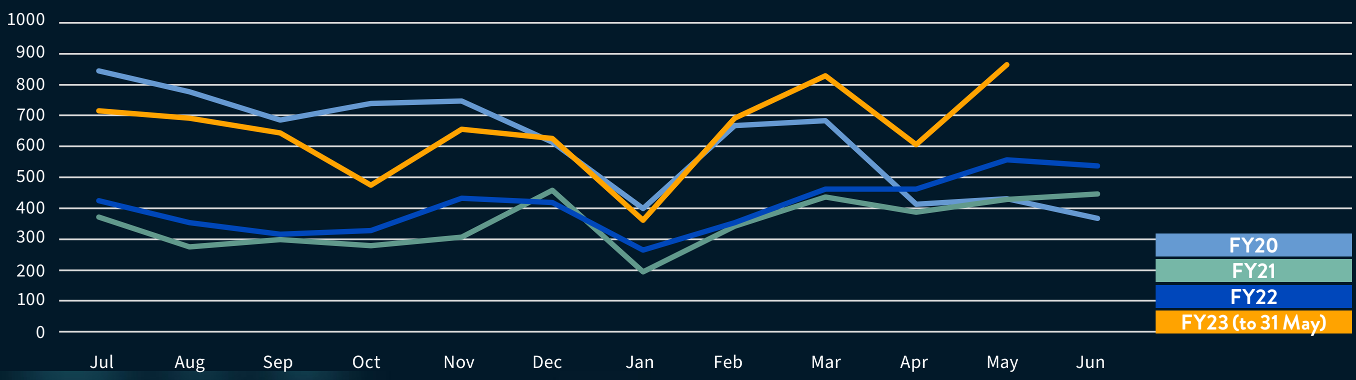
Despite the challenges flowing from increasing global inflation and supply chain disruptions, the Australian economy has to date remained resilient and a technical recession has been avoided in 2023. However, after many years of historically low interest rates, the Reserve Bank of Australia raised interest rates rapidly from April 2022 (12 rate rises and counting) as inflation became uncontrollable.

With consumer spending slowing, there remains a degree of uncertainty for Australia's near-term economic outlook. Notwithstanding this tightening monetary environment, however, capital has remained available for opportunistic buyers looking for investment opportunities or strategic angles to acquire distressed businesses. What we are observing, however, is a less buoyant refinancing market than we have seen in recent times, despite the deep pockets and numerous players that comprise the debt markets. The result of this is that where businesses once had numerous options to roll over or refinance their debt at expiry, borrowers are now having more trouble securing suitable financing leading to protracted negotiations and, in some instances, delicate negotiations. In an environment where equity markets are tight, this has created opportunities for company-side balance sheet restructures.

Insolvency practitioners in Australia are now watching closely whether macroeconomic factors, including inflation (which, while it may have levelled off is still objectively high) will lead to an increase in insolvency appointments and distressed asset sales, especially for struggling businesses that meandered through COVID-19 off the back of the generous relief packages, but have struggled since.

In FY21/22, the Australian Securities and Investments Commission (**ASIC**) recorded a total of 4,912 companies that entered external administration or had a controller appointed for the first time. That number rose significantly in FY22/23, with 7,156 companies entering external administration or having a controller appointed for the first time for the period spanning from 1 July 2022 to 31 May 2023.

External administration appointments by month



(Source: ASIC, Australian insolvency statistics, released 11 July 2023)

We expect voluntary administration followed by deeds of company arrangement (**DOCAs**) will continue to be popular as restructuring tools and, where appropriate, vehicles for effecting debt-for-equity swaps. Drivers for restructurings of this type include:

+ the power given to deed administrators to compulsorily transfer shares with court approval (if the shares have no economic value);
+ the speed with which DOCAs can be initiated from the date the administrator is appointed; and
+ the validation DOCAs obtain by being dependent upon creditor approval.

Inquiry into corporate insolvency in Australia

On 28 September 2022, the Parliamentary Joint Committee on Corporations and Financial Services commenced an inquiry into the effectiveness of Australia's corporate insolvency laws in protecting and maximising value for the benefit of all interested parties and the economy. The inquiry is arguably the broadest review of Australia's insolvency laws since the Harmer Report in 1988. It comes after a decade of industry consultations, legislative amendments to the existing legislative framework, and an increased desire from insolvency practitioners for more fundamental and considered law reform.

On 12 July 2023, the Committee released its Report including 28 recommendations to improve the effectiveness of Australia's insolvency system. As a result of the inquiry, the Committee found that Australia's insolvency laws are "overly complex", might not reflect modern business practices, are not keeping pace with the Australian and global economy and have been subject to piecemeal reforms.

The key recommendation is for an independent and comprehensive review of Australia's corporate and personal insolvency laws (**Comprehensive Review**). Separately, the Committee has identified a number of "Near-Term Actions", which should be progressed independently of the Comprehensive Review, to address clear and broadly recognised failings in the current law.

While the Report and recommendations are welcomed, all eyes will be on the government to see the extent to which it implements these recommendations.

Significant transactions in the Australian restructuring and insolvency market

Basslink

ASX-listed APA Group (**APA**), a leading Australian energy infrastructure business, acquired Basslink Pty Ltd (**Basslink**) for $773 million in September 2022, including 100% of the secured bank debt which had a face value of approximately $526 million in late 2021 and early 2022. It also entered into revised network services and operational arrangements with Hydro Tasmania and the State of Tasmania respectively, to facilitate the operations of the interconnector and also provide APA with a pathway to convert Basslink to a regulated asset.

Basslink owns and operates a 370km high voltage direct current electricity interconnector between Victoria and Tasmania. In November 2021, Basslink's Singaporean owner, Keppel Infrastructure Trust, placed the business into administration and the senior secured lenders at the time appointed receivers and managers to Basslink and its related entities.

APA secured this unique piece of critical infrastructure, initially with APA confirming its interest in acquiring Basslink through its acquisition of the secured debt. This involved APA participating in the receiver-led competitive process for the sale, restructure or recapitalisation of the business, which concluded with APA being selected preferred bidder.

The complex transaction then involved APA entering into binding documentation with the receivers which led to APA acquiring the shares in Basslink from the Cayman Islands-based holding company (to which the receivers were also appointed) and entering into a DOCA. The DOCA provided the platform for Basslink to exit external administration and continue trading, unsecured trade creditors to be paid in full and the ongoing employment of Basslink's staff.

Camp Australia

In one of the largest restructuring debt packages in Australia for 2022, Camp Australia was a pioneering restructuring deal of the post pandemic and changing economic landscape and involved several innovative and ground-breaking features. This successful restructuring enabled Camp Australia, Australia's largest out of school hours services provider, to deleverage and reposition its debt profile, providing certainty to its 3,700 employees and hundreds of thousands of customers reliant on it for child-care services after a challenging period coming out of the pandemic.

As certain lenders bought into the first lien debt from the second tier, this reinforced the highly complex nature of the restructuring and its one-of-a-kind nature. The deal also involved the negotiation of an amended debt facility and a new shareholders agreement between the lenders/shareholders of the target.

Gilbert + Tobin advised APA and the second lien lenders to Camp Australia in relation to the above transactions.

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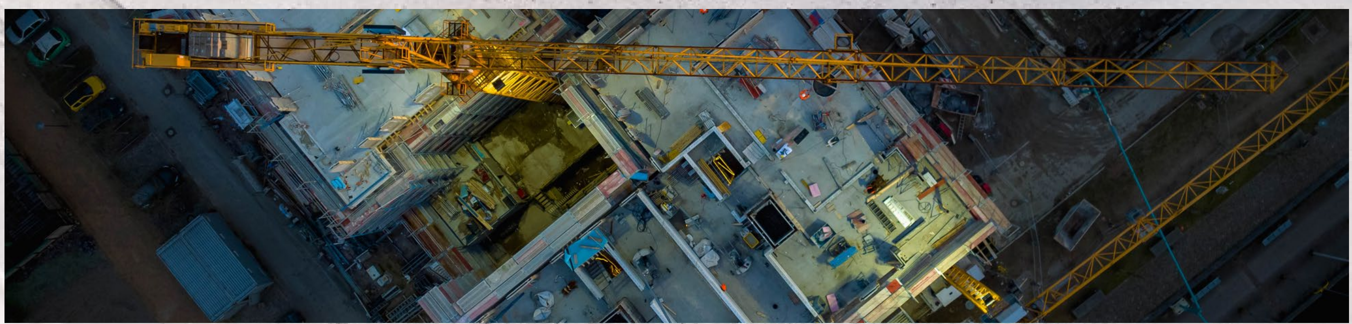
INDUSTRY INSIGHTS

This Part of the 2023 edition of R+I In Brief provides key industry and sector insights relating to the restructuring space over the past year. These hot topics include:

+ challenges gripping the Australian construction industry in an era of pre-COVID fixed-term contracts and soaring construction and funding costs;
+ the latest movements of Australia's largest creditor, the Australian Taxation Office;
+ the prevalence of 'whitelists' in debt documentation and the need to rethink their use; and
+ the emergence of cryptocurrency in the insolvency arena.



BUILDING ON SHAKY GROUND: SOLVENCY CHALLENGES IN THE AUSTRALIAN CONSTRUCTION INDUSTRY

What you need to know:

+ Recent corporate insolvencies in the Australian construction industry have highlighted the challenges faced by the sector.
+ The collapse of residential builder Porter Davis Homes received widespread media attention, with thousands of aspiring homeowners left in a state of uncertainty.
+ Legal frameworks, including the ipso facto regime and Australian personal property security framework set out in the *Personal Property Securities Act 2009* (Cth) play a crucial role in responding to insolvencies in the construction industry.

Recent corporate insolvencies in the Australian construction industry have generated widespread media coverage and public interest. Events including the collapse of residential builder Porter Davis, have brought to light the significant challenges confronting the industry. Unstable and unpredictable economic conditions, cost overruns fuelled by inflation and high interest rates have presented real challenges for many construction businesses that threaten their ongoing viability. These factors have caused strain on financial stability across the industry and in some cases resulted in insolvencies, leaving many construction projects incomplete and in a state of uncertainty.

In this industry spotlight, we explore recent developments and shed light on the issues affecting the Australian construction industry, with a particular focus on the residential sector and what legal frameworks and governments are doing to respond to these challenges.

The industry

The Australian construction industry is a vital sector that plays a significant role in the country's economy and is a significant contributor to Gross Domestic Product and employment. The industry encompasses residential, commercial, and infrastructure construction businesses, each presently facing unique challenges as set out below:

Economic conditions

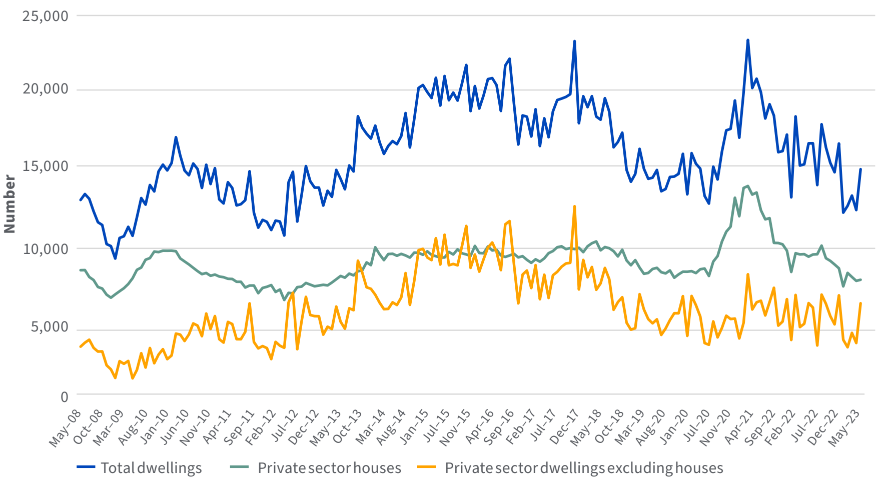
Challenging economic conditions, including rising interest rates, higher cost of living and earlier declines in household wealth (Reserve Bank of Australia, Statement on Monetary Policy – May 2023), have significantly impacted the industry, leading to reduced demand in some sectors. According to statistics released by the Australian Bureau of Statistics earlier in 2023, the total number of dwellings approved (by local government authorities and other principal certifying authorities) in April 2023 was at the lowest level in over a decade, since 2012. The decline was principally driven by a fall in approvals for private sector dwellings excluding houses. While the month of May was more positive, with the total number of building permits issued in Australia surging 20.6% from the prior month, approvals were still down 9.8% year on year.

Cost overruns

Cost overruns caused by various factors including inflation and labour shortages have also put significant financial strain on many construction businesses (especially those locked into fixed price contracts). While supply chain issues have eased since the height of the pandemic, material costs are continuing to challenge project profitability. CoreLogic's Cordell Construction Cost Index reached its highest point ever, with a remarkable 11.9% surge in costs recorded during the 2022 calendar year.

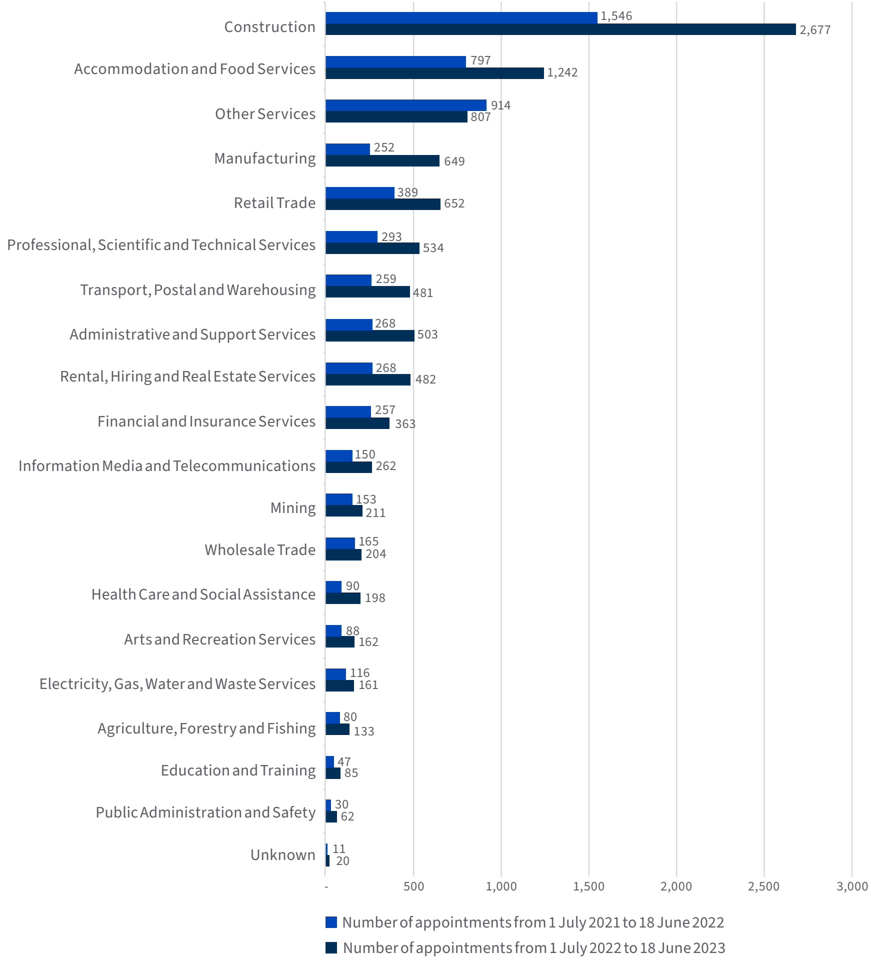
In statistics published by ASIC, external administrator appointments of companies operating in the construction industry significantly out number insolvencies in other industries. As illustrated in the graph below, the construction industry saw 2,677 external administration appointments from 1 July 2022 to 18 June 2023, representing an increase of 73.16% from the prior corresponding period.

Dwelling units approved, by building type, seasonally adjusted



(Source: Australian Bureau of Statistics, Building Approvals, Australia, released 3 July 2023)

External administration appointments by industry (1 July 2021 – 18 June 2023)



(Source: ASIC, Australian insolvency statistics, released 4 July 2023)

The big collapse: Porter Davis

In a recent surge of residential builder collapses, the Porter Davis Homes liquidation was of particular notoriety. On 31 March 2023, liquidators were appointed over 14 companies in the Porter Davis Homes group. The liquidation left thousands of aspiring homeowners in a state of uncertainty and at the time of the liquidation, the group was the 12th biggest home builder in Australia. Of significant concern in the collapse was that, for many customers, it was discovered that Porter Davis had not lodged insurance policies as required under relevant building contracts to protect monies paid as deposits for home builds.

Government intervention

In response to the collapse, the Victorian Government pledged to reimburse customers who paid deposits but were not provided with insurance as promised, with the establishment of the Porter Davis customer support paymentscheme. The scheme has provided refunds of deposits of up to 5% of contract value to customers at an estimated total cost to the State of around $15 million. Despite the implementation of a scheme in this instance, it remains to be seen how State and Commonwealth governments will respond in similar future collapses.

In the aftermath of the collapse, the Victorian government also announced plans to enhance enforcement of the State's building insurance scheme, including by reforming the *Domestic Building Contracts Act 1995* (Vic) and strengthening residential building insurance requirements.

Other outcomes of liquidation

The liquidators of Porter Davis were also successful in selling Porter Davis' intellectual property to two buyers and the company's multiple-dwelling business, enabling some positive outcomes for projects.

Legal considerations

Looking back: government enquiries and reviews

A number of the issues currently impacting the construction industry in Australia have been longstanding. Both Commonwealth and state governments have previously undertaken to deal with challenges facing the industry, as exhibited by the following notable reviews and inquiries:

+ The *Inquiry into Construction Industry Insolvency in NSW* was established over a decade ago, on 9 August 2012, by the Government of New South Wales following a string of collapses of well-established construction companies.
+ The Commonwealth Senate Economics References Committee published the report *Insolvency in the Australian construction industry* in 2015, after conducting an inquiry into insolvencies in the industry. The report made 44 recommendations to deal with what the Committee identified as a "completely unacceptable culture of non-payment of subcontractors for work completed on construction projects". The report highlighted, amongst other issues, significant concerns with illegal 'phoenix' activity and other misconduct in the industry.
+ The *Review of Security of Payment Laws* led by John Murray AM was commissioned by the Commonwealth government in 2017 with the aim to pinpoint optimal approaches within the construction industry, with a particular emphasis on addressing payment concerns and enhancing safeguards for subcontractors. Comprising 86 recommendations, the report aimed to establish uniform security of payment laws across Australia. The objective was to guarantee payment for subcontractors' services in situations involving insolvency, irrespective of the specific state or territory where operations are conducted.

Legal frameworks designed to respond to insolvencies in the construction industry

Despite the efforts made by both Commonwealth and state governments to reform the law, previous reform attempts have been limited, with high rates of insolvency continue to be evident in the construction industry. Nonetheless, various legal frameworks are of heightened importance to insolvencies in the construction industry, including:

Ipso facto regime

An ipso facto clause creates a contractual right for a party to terminate or modify the operation of a contract upon another party commencing a specified insolvency or restructuring process, even if the other party has complied with its obligations under the contract.

A prohibition on reliance on ipso facto clauses came into effect on 1 July 2018 through the *Treasury Laws Amendment (2017 Enterprise Incentives No 2) Act 2017* (Cth). The ipso facto regime introduced a general prohibition on the application of ipso facto clauses, subject to various exceptions. The primary purpose of the regime is to enable companies that have entered into a restructuring process to continue to trade.

In the context of the construction industry, the ipso facto regime has significant implications. The regime seeks to provide relief to contractors facing liquidity issues and attempting to facilitate project completion. By preventing the termination of construction contracts solely based on insolvency events, the regime aims to minimise disruption within the industry. For principals and owners, while the ipso facto regime restricts their ability to terminate contracts solely based on a contractor's insolvency, it does not prevent termination for other reasons, such as non-performance.

Notably, several exceptions to the ipso facto regime under section 5.3A.50 of the *Corporations Regulations 2001* (Cth) are specifically relevant to the construction industry. Contracts entered into after 1 July 2018, but before 1 July 2023, for the provision of building works of at least $1 billion are excluded from the regime. Additionally, the regime does not apply to contracts that were executed prior to 1 July 2018, which may be relevant in the context of construction projects of a complex nature that span multiple years.

PPSA

The *Personal Property Securities Act 2009* (Cth) (**PPSA**) is of considerable importance to insolvencies in the construction industry as it governs the creation, registration, and enforcement of security interests in personal property, including construction equipment, machinery and building materials.

By registering security interests in accordance with the PPSA, contractors, suppliers, and others can protect their rights in the event of insolvency or default by a counterparty. The PPSA also provides a framework for determining priority between competing security interests. In the construction industry, this is particularly important in circumstances where multiple parties have security interests over the same assets.

The PPSA is also of particular importance in the context of equipment leasing, including in relation to security interests in leased or financed assets which are commonplace in the industry.

Director disqualification

Finally, the director disqualification framework contained within the *Corporations Act 2001* (Cth) (**Corporations Act**) is also relevant in light of the prevalence of liquidations, illegal 'phoenix' activity and other misconduct which has been identified in the construction industry.

ASIC has the power to disqualify a director for up to 5 years if the person is a director (or a director within the last 12 months) of 2 or more companies that have been placed into liquidation in the previous 7 years pursuant to section 206F of the Corporations Act.

Additionally, the court may make orders disqualifying persons from managing corporations including in circumstances where the court has previously made a declaration that the person has contravened a civil penalty provision of the Corporations Act. A director may also be automatically disqualified in some circumstances (see for example section 206B of the Corporations Act).

Looking forward

The outlook for the rest of 2023 in the construction industry appears conservative, with a projected decrease in both residential and non-residential construction activity. This poses a harsh reality for construction businesses that have already endured the challenges of the pandemic and economic conditions at present. However, the legal framework outlined above and the various external administration and other formal/informal restructuring options serve to help businesses in the industry to weather these uncertain times.

THE ATO: KEEPING TABS ON AUSTRALIA'S LARGEST CREDITOR

What you need to know:

- The Australian Taxation Office (**ATO**) is a major player in the restructuring and turnaround space, being the largest creditor in Australia and responsible for numerous corporate winding up applications.
- The ATO's policies and strategies have a substantial influence on external administrations and turnarounds, making its movements important to track when forecasting insolvency activity.
- The impact of the ATO's new digital strategy on corporate insolvency and turnaround remains to be seen but is expected to be significant and far-reaching.

It appears that the tsunami of insolvencies that corporate Australia has been bracing for is upon us, with external administrations up 65% on the previous year (for the period July 2022 – May 2023). As Australia's largest creditor and, according to creditor reporting bureau CreditorWatch, responsible for the greatest number of company windups prior to the pandemic in 2019, the ATO can fairly be described as an influential, if not dominant, player in the restructuring and turnaround space and in corporate Australia more broadly.

The ATO's influence on the insolvency landscape

The ATO's response to the COVID-19 pandemic demonstrates the influence of Australia's tax office in shaping the country's corporate landscape.

- As part of the Federal Government's plan to assist companies during the pandemic, the ATO largely deferred debt collection for two years, and initiated only three corporate windups between 1 July 2020 and 31 March 2021. This resulted in its collectable debt rising to $38.5 billion for the FY20/21.
- The ATO also managed a range of support and stimulus measures, including the critical "JobKeeper" program. The outcome, which is primarily attributable to the ATO's actions, was a nearly 50% reduction in insolvency appointments compared to pre-pandemic levels. In simple terms, approximately half of the companies that would have likely faced collapse without the ATO's intervention and initiatives during the pandemic were arguably able to stay afloat.

In May 2022, the ATO confirmed the revival of its debt recovery activities and the adoption of a more assertive approach, including garnishees, recovery of director penalties, disclosure of business tax debts, and legal actions including summons, creditors petition, wind-up and insolvency action. It should come as no surprise that the resumption of the ATO's debt recovery efforts this year has coincided with a surge in external administrations. CreditorWatch has reported a rebound in debt collections to levels seen before the pandemic, with external administrations rising by 46% in FY 21/22.

As at August 2022, the ATO reported issuing 120 Director Penalty Notices (**DPN**) per day, with that number expected to increase. A DPN allows the ATO to pursue directors personally for a penalty equal to the value of a company's outstanding superannuation, PAYG withholding and GST obligations, which effectively pierces the corporate veil that protects directors from personal liability. Anecdotally, the receipt of a DPN will compel a board of directors to take proactive action to avoid personal liability, including seeking legal advice to assess the risk of insolvent trading, devising contingency plans and exploring the protective measures provided by the safe harbour provisions.

The ATO itself has acknowledged its influence on Australia's insolvency landscape. At The Tax Institute Tax Summit on 20 October 2022, Second Commissioner Jeremy Hirschhorn said that:

> *"Many stakeholders have also made clear to us [the ATO] the system-wide role that the ATO has in helping struggling businesses understand that they should move to finalisation of the business rather than struggle on as 'zombie businesses'".*

Looking to the future: ATO's new digital strategy

With its recently announced plan to create "a future where tax just happens", the ATO may transcend its role as an influencer and become a true agent of change, altering the corporate landscape in Australia as we know it.

While the full details of the plan have not yet been disclosed, ATO Commissioner Chris Jordan revealed that the ATO's executive group had "endorsed a new digital strategy" coined "Tax 3.0", which would see the ATO become a "fully digitalised tax office by 2030". Described as the ATO's "North Star", the digitalisation strategy aims to automate reporting, payment and real-time compliance checks which are to coincide with the taxable event. Commissioner Jordan foreshadowed the possibility of a "BAS-free future"!

The implications of a fully digitalised tax office for the corporate insolvency space might include the following.

Loss of #1 creditor ranking

If payments to the ATO happen automatically, the ATO may lose its position as Australia's largest creditor. While this is an unenviable title, holding the prime position comes with power. For example, during a voluntary administration, the fate of a company is decided by a majority of creditors voting in both value and number. If the ATO is the largest creditor by value, it is essential that the ATO supports any restructure (including by way of DOCA) proposal to sell or recapitalise a company) in order for it to be successful. While the Commissioner has confirmed that the ATO will generally endorse DOCA proposals which have no adverse features and would result in a greater and more timely recovery than would be achieved in a liquidation, it is also less likely to support certain DOCA terms, including non-cash items (eg shares or other property) being offered to creditors and in some cases, the use of a creditors' trust.

Only time will tell whether the ATO's proposed digitalisation strategy will lead to a decrease in its influence on DOCA terms and on voluntary administrations more generally, creating an opportunity for new influential creditors to emerge.

Fostering early action

Many distressed businesses delay or fail to pay tax to continue trading and stay afloat. The automation of payments to the ATO will make it more challenging for struggling businesses to maintain the cashflow necessary to continue trading.

One of the biggest challenges to business recovery and turnaround is a crippling leverage ratio which cannot be tackled through a restructure. If companies are prevented from accruing significant amounts of debt (at least to the ATO), and if directors are prompted to address cashflow issues in their company at an earlier stage, the outcomes may be more positive.

Alternatively, the forced cash payment of tax debts to the ATO may push distressed businesses into external administration rather than continuing to trade and survive by accruing tax debts (and thereby incurring more debts in the process).

Reduction in director liability

Automation of tax payments may also reduce the number of DPNs issued by the ATO. If tax is automatically remitted to the ATO, there will be no outstanding debt for which directors can be held personally liable under the DPN regime providing of course that a company has sufficient funds to make the automatic payments.

Unfair preference claims: "The computer did it"

Unfair preference claims allow liquidators to claw back certain transactions which have resulted in an unsecured creditor receiving a greater amount from an insolvent company than it would if that company was wound up.

The ATO is the most common defendant to statutory "unfair preference" claims brought by company liquidators. In part, this is because the ATO is an attractive counterparty to litigation: it is solvent and has model litigant obligations.

The most common defence to an unfair preference claim is the "good faith" defence. Under this defence, a creditor argues that:

+ they were party to the transaction in good faith;
+ at the time of the transaction:
  - they did not have reasonable grounds for suspecting the company was insolvent or would become insolvent; and
  - a reasonable person in the creditor's circumstances would also have had no such grounds for suspecting the company's insolvency.

It is conceivable that the ATO's digitalisation strategy may bolster the ATO's use of the "good faith" defence to an unfair preference claim. for instance, the ATO may seek to deny having the requisite knowledge of a company's insolvency, having outsourced its debt collection to digitisation. To do so, the ATO would need to argue that a "reasonable person" in the ATO's circumstances is one with fully digitalised systems.

The Federal Court of Australia has previously considered the impact of ATO automation in the case of *Pintarich v DCT* (2018) 262 FCR 41, where it found that a taxpayer remained liable for interest charges on a tax liability despite receiving a computer-generated letter from the Deputy Commissioner of Taxation purportedly waiving the general interest charges (**GIC**). The Court held that the ATO did not make a decision to remit the GIC because a decision required a mental process to reach a conclusion. Perhaps when faced with an unfair preference claim, the ATO will seek to argue that knowledge, like a decision, also requires a mental process which is not present in computer generation.

Key takeaways

It is unclear how the ATO's digitalisation strategy will fit with broader reforms the industry may undergo, particularly with respect to the preference regime which may result from the recent inquiry by the Federal Government's Parliamentary Joint Committee on Corporations and Financial Services into corporate insolvency in Australia.

We are certain, however, that the ATO will continue to have a sizeable and far reaching impact on insolvencies and restructurings in Australia, and that its policy and strategy will continue to influence decision makers in the insolvency space and determine the outcomes of external administrations and turnarounds.

TAKE CARE: THE STYMYING EFFECT OF WHITELISTS IN AN ERA OF HIGHER RESTRUCTURING ACTIVITY

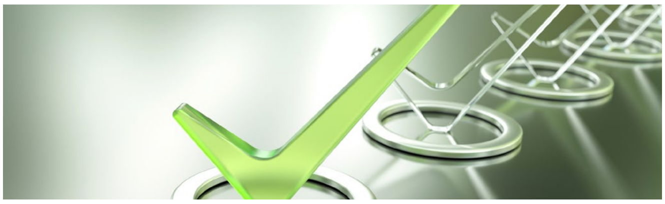
What you need to know:

- Loan documentation imposing significant restrictions on lenders' ability to transfer or exit loans, including through the use of whitelists, can hinder effective restructuring efforts as credit conditions worsen and more loans become distressed.
- As tight credit conditions endure, lenders should consider renegotiating transferability restrictions (including whitelists) to allow for more flexibility in restructuring efforts and mitigate risks.
- The GenesisCare case serves as a reminder of the restructuring challenges that can be associated with whitelists in debt documentation.

Restrictive whitelists in debt documentation, a post-2008 trend, may be hampering restructuring efforts when they are needed most. Has the time come to rethink how they are used?

The rise of whitelists

Benign market conditions post-GFC and pre-COVID saw significant growth in restrictions in loan documentation, including whitelists, on lenders' ability to transfer or exit out of loans held by them. As credit conditions have worsened and are forecast to continue doing so, whitelists may be hampering effective restructuring efforts when deeper restructuring may be needed most.



Whitelists: what and why

Whitelists in debt documentation are lists of preapproved lenders or classes of lenders with whom existing lenders must trade their debt to exit a loan, unless the lender has obtained prior borrower consent. Generally, the permitted transferees are par lenders who, in the event of a debt restructuring, are perceived as friendly and unlikely to take control of the borrower. Additional language in whitelists may bar lenders from transferring their debt to 'loan-to-own' funds. Their United States equivalent, 'blacklists', prohibit transfers to certain lenders or classes of lenders, generally distressed investors and funds.

Whitelists will often be accompanied by enhanced borrower consent rights, whereby prior borrower consent to a transfer will only fall away when there has been a payment default or insolvency event. Transfer restrictions may also extend to include sub-participations, so that lenders cannot exit and reduce their exposure even if they remain lender of record.

The design of restrictions like whitelists is to focus par lenders on short-term 'amend and extend' and other light-touch solutions when loans become impaired. They also work to prevent distressed funds from buying up debt at deeply discounted prices and seizing control of a distressed company in the event of a restructuring.

Whitelists and other transfer restrictions featuring in loans have grown exponentially since 2008. They have also become more and more restrictive. According to Reorg Debt, 66% of loans sold in 2019 in the European leveraged finance market featured restrictions on sales to distressed funds, compared to 29% in 2017 and fewer than 10% in 2015. While we were unable to obtain current statistics for the APAC region, we assume a similar trend may be occurring.

When these loans become distressed, lenders will generally have two exits available:

- wait for a material default, in which case a whitelist will cease to apply (although, by this time, the expected recovery by the exiting lender will have dropped dramatically); or
- wait for a financial covenant breach.

Yet financial covenants – and the early warning system they give lenders of potential borrower liquidity issues – have also been gradually eroded in a simultaneous post-2008 trend towards 'cov-lite' debt documentation. In their 2022 European Leveraged Loans Market Wrap, Reorg noted the big question going forward is whether investors will start to undo innovations like whitelists and blacklists:

> *"The big question in this area is whether investors will seek to roll back innovations that have become more commonplace. The absolute prohibition on transfers to distressed investors, for instance, which are commonly prohibited unless a material (i.e. non-payment or insolvency) event of default is continuing, could be rolled back by easing of the fallaway to any event of default (rather than a material event of default) or by the removal of this absolute prohibition entirely."*

Whitelists, designed to preserve control of a distressed borrower by keeping distressed debt funds away, may be creating distortions in an era of prolonged tight credit when more than short-term, 'amend and extend' solutions are needed. By restricting potential distressed debt buyers, whitelists are making debt trading harder, leaving lenders unable to exit deteriorating instruments and inhibiting deeper, longer-term restructuring.

GenesisCare

On 1 June 2023, GenesisCare, an Australian-based privately held cancer care provider, entered Chapter 11 bankruptcy in the US as part of a broader restructure of its business and operations. This followed an aggressive debt-laden expansion plan in the US, including the acquisition of 21st Century Oncology in late 2019, and subsequent earnings slump in 2022.

In a statement on 1 June, GenesisCare said it had secured commitments from some existing lenders for US$200 million in restructuring funding via a super-priority, debtor-in-possession term loan facility. The facility would fund GenesisCare's bankruptcy and its plan to split off its US operations from its rest-of-world operations, including in Australia.

GenesisCare is a cautionary tale of the distortions that restrictive whitelists can create in the pricing and restructuring of loans. They make the trading of these loans more difficult, locking out potential investors at a time of distress and inhibiting turnaround opportunities. By April and May this year, GenesisCare's loans were trading between 15 cents and 30 cents in the dollar. At least one of those loans – a EUR 500 million loan – contained a restrictive whitelist that excluded early interest from potential investors, including distressed debt funds. The judge overseeing the bankruptcy has since described the debtor-in-possession facility, made available to GenesisCare following the Chapter 11 filing, as "incredibly expensive money", before approving it on 13 June 2023.

It leads to the question: If restrictions like whitelists had not been in play, could GenesisCare's lenders have exited earlier and traded their debt to investors better positioned to implement a less formal and less expensive turnaround than Chapter 11 bankruptcy?

What should happen next?

The example of GenesisCare is a timely reminder for lenders to consider potential restructuring options when negotiating new or existing loan facilities. Tight credit conditions have been prolonged and are forecast to remain for some time yet. On the one hand, this means a greater proportion of loans might start to enter distressed territory, if they have not already. On the other hand, it is an opportunity for lenders to begin thinking about renegotiating common restrictions on transferability in existing debt instruments, before the merry-go-round of 'amend and extend' discussions with borrowers comes around again. In this respect, consideration should be given to loosening transfer restrictions like whitelists so they do not pose risks to syndicate financiers in the future who, in times of distress, must turn to restructuring.

CRYPTOCURRENCY EXCHANGES: HOW COLLAPSES POSE NOVEL CHALLENGES

What you need to know:

+ Cryptocurrencies have experienced explosive growth and are now traded on centralised cryptocurrency exchanges, increasing market centralisation.
+ The centralisation of cryptocurrency exchanges introduces greater risk, as these exchanges can become distressed and fail.
+ Lenders and financiers of cryptocurrency investors may mitigate risk by securing crypto assets held by borrowers, and investors may improve their returns by carefully selecting exchanges with favourable terms.
+ The cryptocurrency landscape is still largely unexplored, and participants should proceed cautiously.

The past year has seen numerous high-profile collapses in the cryptocurrency trading universe: an exchange (FTX), a hedge fund (Three Arrows Capital), lenders (BlockFi and Celsius) and a broker (Voyager). Rapid growth, high asset volatility and limited regulatory constraint each contributed to a frenzy of crypto-related insolvency activity.

At the same time, an estimated 99% of cryptocurrency trading occurs on centralised exchanges (like FTX) where investors exchange real currency for cryptocurrencies. In a volatile environment, investors, their lenders, insolvency practitioners and other crypto stakeholders should be aware of the unique challenges that come with cryptocurrency exchange collapses. In this article, we discuss some of those challenges.

What are cryptocurrencies?

Cryptocurrencies are digital assets which can be transferred and used without an intermediary and whose issuance is not under the control of any central administrating authority. While a cryptocurrency has an equivalent notional value in real currencies, such as the Australian dollar, and can be exchanged back-and-forth on cryptocurrency exchanges for real currency, it has no central monitoring or oversight. Cryptocurrencies are stored in digital wallets that involve the generation of a public key (which serves to encrypt the cryptocurrency) and a private key (which allows the holder of the digital wallet to decrypt the cryptocurrency).

In practice, most investors participate in the cryptocurrency universe by way of cryptocurrency exchanges like CoinSpot, Swyftx, Coinbase and eToro. A standard cryptocurrency exchange is a centralised platform on which users can trade cryptocurrencies based on spot prices. Like the ASX, an exchange acts as an intermediary between buyer and seller, and generally charges fees for trades. Testimony in a 2018 US Senate hearing estimated 99% of all cryptocurrency trades occur on cryptocurrency exchanges.

The vast majority of investors using cryptocurrency exchanges choose (or are required by the exchange) to keep their cryptocurrencies in accounts with exchanges which retain control of the private keys required to transfer investors' crypto assets. Exchanges may describe this arrangement as the provision of 'wallet services' to their users. For example, Swyftx's Terms of Use state:

> *"While your Crypto Assets remain on Swyftx's Platform, Swyftx has control of those Crypto Assets. To hold the private keys of your Crypto Assets, you have the option of withdrawing those Crypto Assets to your own wallet."*

In this way, users only 'hold' cryptocurrencies in the sense that their holdings are recorded by the exchange operator. But they do not 'possess' the cryptocurrencies in the ordinary sense, as a shareholder would possess shares on the ASX.

Implications of using cryptocurrency exchanges

How cryptocurrency exchanges hold cryptocurrencies on behalf of their users becomes significant when considering:

+ whether security can be taken over cryptocurrencies purchased by investors; and
+ how cryptocurrencies are to be treated when an exchange becomes insolvent.

We discuss these issues further below.

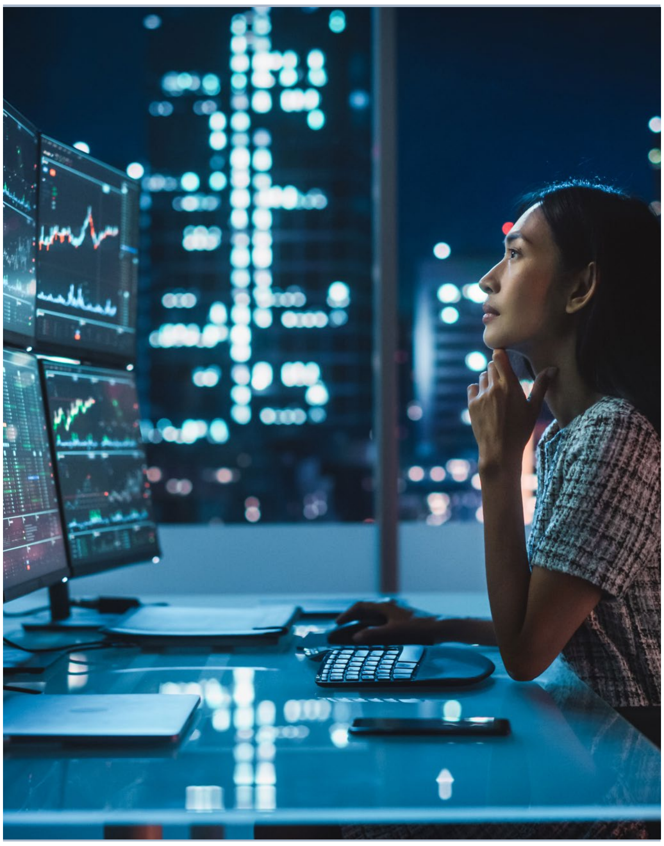
Taking security over cryptocurrencies in Australia

The relevant law governing security interests in property other than land – ie 'personal property' – is the PPSA. In addition to creating a framework that regulates the validity and priority of security interests in personal property, the PPSA also establishes the Personal Property Securities Register (PPSR) as a public register of those interests.

Under the PPSA, a security interest in personal property will only be effective (by being 'perfected') if the party that is taking the security (**secured party**) has possession or control of the personal property, or has registered its interest in the property on the PPSR. In the context of crypto assets, a secured party may be a lender, in circumstances where a borrower has used borrowings to acquire cryptocurrency on an exchange. Given the typical exchange 'holds' crypto assets for users by providing a platform for trading, but in reality, possesses the crypto assets itself in its own wallet(s), a secured party will in almost all cases never have possession or control of the cryptocurrency, at least in the sense required by the PPSA. Registration of the interest in the cryptocurrency held by the secured party on the PPSR is therefore necessary.

In registering an interest, definitional issues also arise when it comes to figuring out what 'collateral class' cryptocurrency falls within. It may be 'financial property', in the sense it is 'currency' or an 'investment instrument', although we have already discussed how cryptocurrencies differ from fiat or real currencies. Otherwise, it may simply be 'intangible property', although this class expressly excludes 'financial property', so misclassification as intangible property could render the registration ineffective. The best option for a secured party may be to register their interest in 'all present and after-acquired property' of the cryptocurrency investor, a catch-all classification, with exceptions covering the classes of personal property not intended to be covered by the registration.

The laboriousness apparent in the above analysis and registration process reflects the theoretical challenges that crypto assets pose to established legal frameworks, like the PPSR, and the principles underpinning them. Judicial guidance in Australia is also lacking: only the question of whether 'cryptocurrency mining equipment' could be the subject of a PPSR-registrable bailment has reached the bench of an Australian superior court (which declined to consider it; see *Yimiao Australia Pty Ltd v Cyber Intelligence Tech Pty Ltd* [2023] VSCA 21). We await further developments in this space.



Issues relating to cryptocurrency exchanges in insolvency

Given the majority of everyday interactions with crypto assets occurs through crypto exchanges, how crypto assets would be treated if an exchange were to become insolvent also raises novel questions.

The terms and conditions of the cryptocurrency exchange are paramount

The answers to those questions depend heavily on the terms and conditions of the particular exchange, usually found in its user agreement or terms of use. Where the exchange terms indicate the exchange holds the crypto assets on trust for a user, for example, it is more likely that the user could be said to have proprietary rights in the assets. There may be provisions expressly stating that the assets are held on trust on behalf of users, or provisions indicating a custodial arrangement between exchange and user with the user ultimately having ownership.

Alternatively, the terms and conditions may indicate the exchange is holding the crypto assets itself – for example, by offering its own wallets to users in respect of which only the exchange has the private keys – and is offering exchanges between users who all use the same 'wallet services'. In this case, the user will likely only have contractual rights against the exchange in relation to the crypto assets.

The distinction is significant. If the user has proprietary rights in the crypto assets, in the event of insolvency of the exchange, the user will have priority in relation to those assets over the general body of unsecured creditors. If the user only has contractual rights, they will be treated as an unsecured creditor of the exchange without priority in relation to the crypto assets.

The case of Cryptopia Limited

In *Ruscoe v Cryptopia Ltd (in liq)* [2020] NZHC 728 (***Cryptopia***), for example, Cryptopia Limited was an exchange that enabled customers to trade cryptocurrencies among themselves, but which exclusively held the private keys to the wallets containing those crypto assets. Cryptopia had entered into liquidation.

The New Zealand High Court was asked to consider the identity and proprietary character of cryptocurrencies. Finding cryptocurrencies were a form of 'property', the Court then considered whether the crypto assets were held on trust by the exchange on behalf of its investors, where the investors could be said to have a proprietary interest in the cryptocurrencies.

Although the Court found that Cryptopia exercised effective control over the coins in users' wallets and had commingled those coins with its own assets, it also found that the terms and conditions of the exchange gave rise to an express trust. The language throughout the terms and conditions was consistent with the users being beneficial owners of the coins. As a result, the Court held that the users were entitled to the return of their coins rather than a distribution along with the other unsecured creditors of the exchange.

In Australia, the Federal Treasury, in its consultation paper on crypto exchanges, has proposed the application of mandatory obligations on crypto exchanges that maintain custody of crypto assets on behalf of users, including obligations to hold assets on trust for users and appropriately segregating users' assets. At time of writing, however, the questions raised in *Cryptopia* have not been judicially tested in Australia and are yet to be resolved, even preliminarily.

Key takeaways

While cryptocurrencies in their true form offer anonymity and decentralisation, their explosive growth as a new class of investment traded on cryptocurrency exchanges has created a market that is in fact highly centralised. With greater centralisation comes greater risk in the event cryptocurrency exchanges become distressed and ultimately fail.

Lenders and financiers of cryptocurrency investors may seek to limit risk by taking security over crypto assets acquired by their borrowers. Returns to investors in the event of an exchange insolvency may also be improved where investors take the time to choose the exchange with the most favourable terms and conditions governing how they hold crypto assets. But much of the cryptocurrency territory remains uncharted and participants exploring it do so at their peril.

3

JUDICIAL INSIGHTS

In this Part of the 2023 edition of R+I In Brief, we delve into significant judicial developments relating to insolvency law, including:

- how the Court can cure defects in the appointment of an administrator, if there are governance concerns including that a board is inquorate;
- the powers and duties of the last director left standing, in circumstances where all the other directors have resigned due to the company's financial distress;
- how the Court can validate an administrator's appointment, importantly securing their remuneration and disbursements;
- whether creditors are entitled to a right of set off against a liquidator's claim to recover an unfair preference, and whether liquidators can apply the 'peak indebtedness rule' when assessing unfair preference claims;
- the Court's attitude to late applications made by insolvency practitioners for routine matters; and
- a recent decision of the UK Supreme Court establishing the 'creditors' interest duty' (or the *West Mercia rule*), which is likely to influence Australian courts going forward.

IN CASE OF EMERGENCY: USING EMERGENCY POWER PROVISIONS TO APPOINT AN ADMINISTRATOR

What you need to know:

- Financially distressed companies often face challenges associated with corporate governance, including director resignations, which can hinder directors' ability to take swift actions in appointing an administrator.
- In an 'emergency', constitutions may include provisions that alter the process and composition of the board of directors required for certain limited purposes.
- Where the company constitution does not contain emergency power provisions, the Court may make orders to cure defects in the appointment of an administrator.

When a company becomes financially distressed, directors are often required to act quickly and decisively. However, directors may at the same time find themselves held back by the requirements of the Corporations Act or their company constitution.

While it is not unusual for financially distressed companies to grapple with matters of corporate governance, issues arise where these matters affect the ability of directors to appoint an administrator or call into question the validity of that appointment. Critically, directors of financially distressed companies may be unable to assemble the necessary quorum to pass a resolution to appoint an administrator. The risk of a board becoming inquorate is especially real for directors of distressed companies in Australia, given the tendency of directors to resign when a company becomes financially stressed.

How can emergency powers assist?

Emergency powers in a company's constitution can assist directors to respond in situations of financial distress by temporarily relaxing the procedural and compositional requirements so that, for example, a board resolution will not be invalid because the usual quorum cannot be assembled.

As the long-forecasted economic downturn in Australia begins to materialise, boards should consider whether their constitution contains emergency power provisions or whether any amendments are required to allow for greater flexibility in responding to distress.

How does a company ordinarily appoint an administrator?

Section 436A of the Corporations Act provides that a company may appoint an administrator if the board has resolved that:

+ 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
+ an administrator of the company should be appointed.

For the appointment to be valid and effective, the resolution under section 436A will need to satisfy the requirements of:

+ the company's constitution; or
+ in the absence of a constitution, the Corporations Act.

A company's constitution will usually set the "quorum" for a meeting of directors, being the minimum number of directors that must be present for a board meeting to take place (and for a resolution to be effective). Where a company has not adopted a constitution, or its constitution does not address a particular aspect of its governance, it will be governed by the 'replaceable rules' set out in the Corporations Act. The replaceable rules provide that, unless the directors determine otherwise, the quorum for a meeting of directors is two.

A company's constitution will also usually fix the minimum number of directors the company must maintain. The Corporations Act requires that:

+ a proprietary company must have at least one director who is an Australian resident; and
+ a public company must have at least three directors (excluding alternate directors), of whom two must be Australian residents.

What's the risk of insufficient directors?

A company may be unable to appoint an administrator under section 436A of the Corporations Act (or their appointment may be vulnerable to challenge) if, due to the resignation or flight of a director:

+ a quorum cannot be gathered;
+ a quorum can be formed, but only one (or in the case of a private company, none) of the directors are Australian residents; or
+ in the case of a public company, the number of directors falls below three.

What is an emergency power provision?

Some company constitutions include provisions that alter the composition of the board of directors and its processes in certain limited circumstances. The purposes for which these provisions are enlivened often includes responding to a situation of "emergency".

Examples include:

+ a provision that allows a single director to act on behalf of the company; and
+ a provision that allows the remaining directors to act even if the number of directors (or Australian resident directors) falls below the minimum number fixed in the constitution.

An important advantage of emergency power provisions is that the appointment of an administrator may still be valid if it meets the requirements of the company's constitution, despite the number of directors of the company falling below the minimum number of directors (or Australian resident directors) required by the Corporations Act.

What constitutes an emergency?

It is well established that it is an "emergency" for the purposes of an emergency power provision in a company's constitution if the level of financial distress of the company is expected to result in insolvency. In *Re HPI Australia Pty Ltd* [2008] NSWSC 1106, Barrett J held:

> *"I am satisfied that a company faced with a need to take action to appoint administrators because of insolvency or expected insolvency should be regarded as facing a situation of "emergency". Such a situation is one calling for immediate and decisive action in the interests of creditors in order that exposure to danger may be addressed. It is within the ordinarily accepted concept of "emergency"."*

What if a company constitution does not contain emergency power provisions?

If the company's constitution does not contain emergency power provisions, administrators or hamstrung directors may need to seek an order from the Court under sections 447A or 1322(4) of the Corporations Act which cures the defects in the appointment of an administrator:

+ Section 447A of the Corporations Act empowers the Court to make such orders as it thinks appropriate about the operation of Part 5.3A of the Corporations Act in relation to a particular company.
+ Section 1322(4) of the Corporations Act provides that the Court may order that any act purporting to have been taken under the Corporations Act is not invalid by reason of a contravention of the Corporations Act or a provision of the company's constitution.

The Courts have tended to prefer section 447A as the source of power for these orders, due to the wide discretion it confers. In *Hayes v Doran (No 2)* [2012] WASC 486, Martin J summarised the relevant factors to be considered in relation to the exercise of the power conferred by section 447A, including:

+ whether the purposes of Part 5.3A would be best served by the making of an order;
+ whether substantial injustice would be caused by effectively validating an otherwise invalid appointment; and
+ the position of the company at the time the order is made and what is best for the company in the future.

The utility of this provision was recently demonstrated in *Hutton, in the matter of Big Village Australia Pty Ltd (Administrators Appointed)* [2023] FCA 48. In that case, the administrators sought orders under section 447A to dispel any uncertainty about the validity of their appointment given all but one of the company's directors had resigned prior to their appointment. This case is further discussed in the next article.

Gilbert + Tobin acted for the administrators of Big Village Australia Pty Ltd in Hutton, in the Matter of Big Village Australia Pty Ltd (Administrators Appointed) [2023] FCA 48.

THE "LAST DIRECTOR RULE": CONSIDERED BY THE COURT FOR THE FIRST TIME

What you need to know:

- The legislative provision preventing a company from being abandoned by its directors without leaving at least one director in place has received substantial judicial consideration.
- The Federal Court of Australia has ruled that a director's resignation would be ineffective if it left the company without a director, regardless of any provisions in the company's constitution.
- Directors affected must continue to fulfill their duties and exercise their powers, including passing resolutions in accordance with the company's constitution, despite attempting to resign.

Along with other reforms designed to prevent illegal phoenixing activity, the Federal Government passed the *Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020* (Cth) in 2020. The amendment came into effect on 18 February 2021 and inserted section 203AB into the Corporations Act. Section 203AB prevents a company from being abandoned by its directors and left without a board by providing that the resignation does not take effect if, at the end of the day on which the resignation takes effect, the company does not have at least one director (unless the resignation is to take effect after the winding up of the company has begun).

Section 203AB had not been the subject of substantial judicial consideration until the February 2023 decision in *Hutton, in the matter of Big Village Australia Pty Ltd (Administrators Appointed)* [2023] FCA 48 (***Big Village Australia***).

The *Big Village Australia* decision

In *Big Village Australia*, the administrators sought orders under section 447A of the Corporations Act to dispel any uncertainty about the validity of their appointment as joint and several voluntary administrators of the company. In the months prior to their appointment, all but one of the company's directors had resigned and the administrators were appointed by resolution of the last remaining director. The uncertainty regarding the validity of their appointment arose from two issues:

- the last remaining director was a resident of New York, leaving the company in breach of section 201A of the Corporations Act, which requires a proprietary company to have at least one director that ordinarily resides in Australia; and
- prior to passing the resolution to appoint the administrators, the last remaining director resigned in accordance with the company's constitution, leaving the position of director vacant. However, the director later satisfied herself that her resignation was ineffective under section 203AB of the Corporations Act. The director proceeded to pass the necessary resolutions to affect the appointment of the administrators.

Anderson J of the Federal Court applied section 203AB in a clear and common sense fashion. He gave orders that Part 5.3A of the Corporations Act must operate as though the administrators were validly appointed as joint and several administrators of the company. Relevantly, his Honour held:

> *"Section 203AB [...] does not appear to have been the subject of judicial consideration. However, its terms are clear. It prevents a resignation taking effect if that resignation would leave the company without a director. In the present case, it operated to prevent Ms Kracht's resignation taking effect on 13 January 2023. That meant that, notwithstanding cl 11.5(c) of the Company's constitution, which provides that "the office of a Director becomes vacant if the Director ... resigns as Director by giving written notice of resignation to the Company ...", she remained the director at the time she passed the Resolutions. Ms Kracht relied on the assumption that the legislation had that effect at the time she passed the Resolutions."*

Key takeaways for directors

The Court imparted some important lessons for directors, especially sole directors, of companies facing distress, including:

- section 203AB of the Corporations Act will apply notwithstanding any inconsistent provision in a company's constitution;
- a director who has attempted to resign, but whose resignation has been rendered ineffective by section 203AB, can continue to exercise the powers of a director, including the power to pass resolutions in accordance with the company's constitution; and
- having been prevented from resigning, the director will remain subject to the full suite of directors' duties, including the duty to act in the best interests of the company.

Gilbert + Tobin acted for the administrators in Hutton, in the matter of Big Village Australia Pty Ltd (Administrators Appointed) [2023] FCA 48.

NAVIGATING COMPLEX VOLUNTARY ADMINISTRATION APPOINTMENTS: THE POWER OF THE COURT

What you need to know:

+ Courts have the power to cure defects in the appointment of an administrator, enabling appointments to be validated in circumstances of inquorate board meetings and failures to meet notice requirements.
+ Administrators have a strong incentive to seek validation orders to protect their right to recoup remuneration and expenses and maintain their indemnity and lien rights.
+ Failure to obtain validation orders can jeopardise these rights and call into question the binding nature of administrators' actions on behalf of the company.

As discussed throughout this Part, there is ample precedent where courts have made orders under sections 447A or 1322(4) of the Corporations Act to cure defects in an appointment of an administrator. Circumstances warranting the exercise of this power include where:

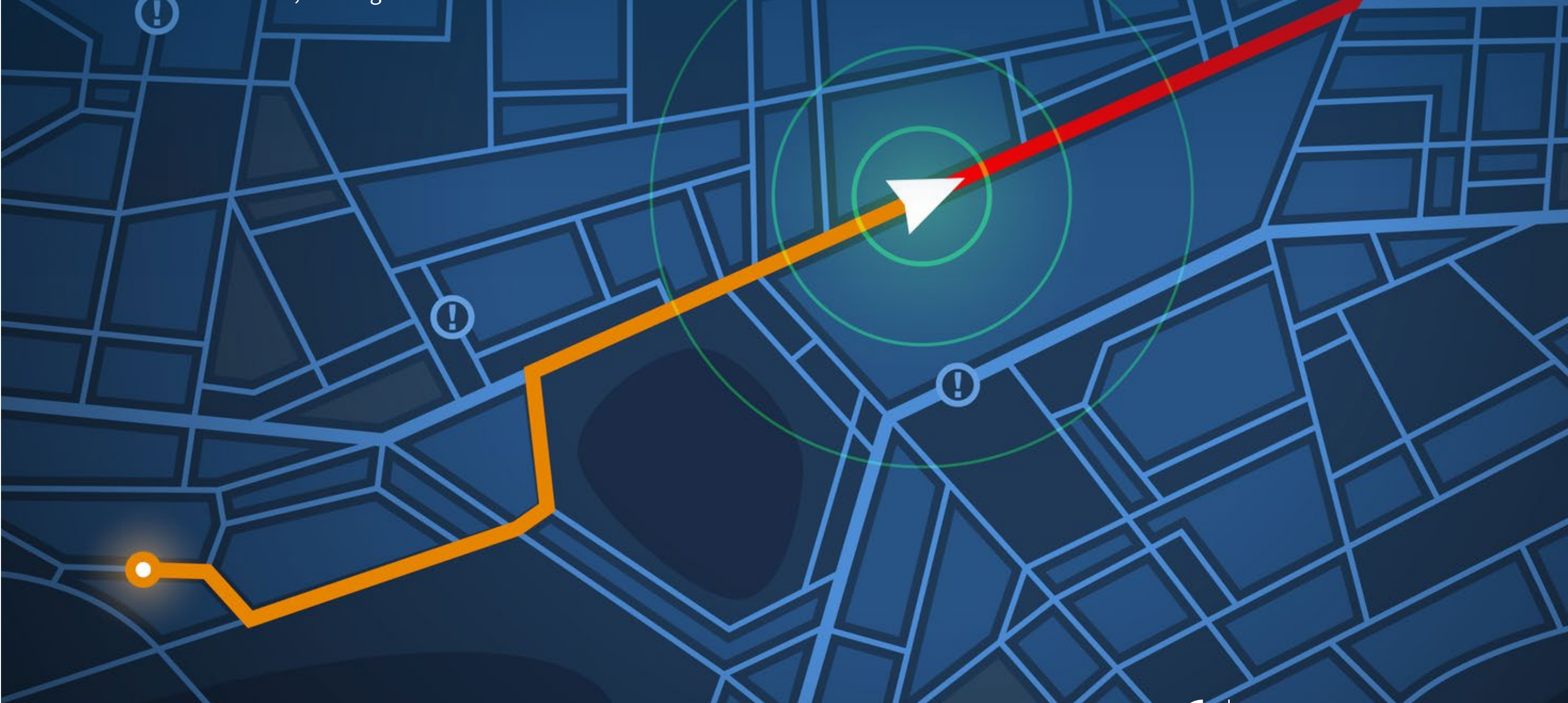
+ the resolution to appoint administrators was passed at an inquorate board meeting (*Re Australian Art Investment Pty Ltd* [2012] VSC 18);
+ notice requirements for the board meeting convened to appoint administrators were not met (*Re Foodora Australia Pty Ltd* [2018] NSWSC 1426); and
+ the last director of a company purported to resign prior to appointing administrators (*Hutton, in the matter of Big Village Australia Pty Ltd (Administrators Appointed)* [2023] FCA 48).

The incentive for an administrator to seek validation orders is obvious. Aside from being dutybound to take reasonable steps to satisfy themselves of the validity of their appointment on the face of the appointment documents, the doubt cast over their right to recoup their remuneration and expenses, should their appointment be deemed invalid, is enough to send most administrators to court.

Specifically, an invalid appointment puts at risk an administrator's right of indemnity under section 443D of the Corporations Act for remuneration and debts incurred, as well as the corresponding lien provided by section 443F of the Corporations Act over the assets of the company to secure that right of indemnity.

Given the potential exposure to administrators, the validity of an administrator's appointment is an issue which is usually promptly resolved by the Court on application by an administrator.

However, what happens if the Court is unwilling or unable to grant validity orders when sought by an administrator? Aside from potentially jeopardising the administrator's right to payment of their remuneration and expenses from the assets of the company, a subsequent finding of invalidity may also have wider-reaching effects, including calling into question the binding nature of steps taken by the administrator on behalf of the company during the appointment (including in respect of any transaction to which an administrator has sought to bind the company).



The administration of the Adaman Group

While the above circumstance may be rare, this was the situation the administrators of gold miner Adaman Resources and six of its subsidiaries (**Adaman Group** or the **Group**) found themselves in and which precipitated eight successive applications to the Federal Court of Australia.

Shortly after the appointment of administrators to the Adaman Group, questions were raised regarding the validity of their appointment, which stemmed from:

- the directors relying on an emergency power in the holding company's constitution to affect the appointment of the administrators; and
- a consent requirement contained in a shareholders' deed.

Banks-Smith J made orders validating the administrators' appointment over five of the Adaman Group entities less than two weeks after the administrators were appointed. However, her Honour declined to validate the administrators' appointment to the two remaining Group entities at that time. Her Honour's reasoning was that a separate oppression proceeding had been commenced by an aggrieved shareholder in respect of these two companies which raised, amongst other things, the bona fides of the appointment of the administrators to those entities.

The unresolved question of validity created uncertainties for the administrators in continuing with the appointment over the two remaining Group entities, including whether:

- actions taken by them in the administration on behalf of the two remaining Group entities, including the entry into a DOCA, would be valid and binding on those companies; and
- the fees and disbursements incurred by the administrators would be recoverable, in circumstances where they would be relying on the right of indemnity and lien over the two remaining Group entities' assets under sections 443D and 443F of the Corporations Act, respectively.

Court assistance

In light of the ongoing validity concerns, the administrators sought orders from the Court throughout the administration process to minimise their exposure and liability in continuing with the appointment over the two remaining Group entities.

Entry into the DOCA

The administrators applied for and received orders that they were justified and would be acting reasonably and properly by entering into and giving effect to the proposed DOCA. The administrators also received orders under section 447A of the Corporations Act that:

- Part 5.3A of the Corporations Act was to operate in relation to the two remaining Group entities as if the administrators did have the power to enter into the DOCA under sections 437A(1) and 442A(c); and
- entry into the DOCA would not be void for lack of authority.

Remuneration and disbursements

Prior to the Adaman Group administration, there was precedent for invalidly appointed administrators and liquidators receiving orders entitling them to their remuneration and expenses already incurred in an appointment after having their appointment deemed invalid by the Court (see for example *Re Warwick Keneally as administrator of Australian Blue Mountain International Cultural & Tourist Group Pty Ltd (administrator appointed) [2025] NSWSC 2037*; *Re Polat Enterprises Pty Ltd (in liq)* [2020] VSC 485). As recognised by Banks-Smith J, the foundational basis of this relief is restitution on a quantum meruit basis or that the work was of incontrovertible benefit.

However, the Adaman Group administration was the first time that a court granted prospective relief. In particular, the court , ordered that the administrators were entitled to their reasonable costs and remuneration, and a lien to secure the same, irrespective of and before any determination as to the validity of their appointment. This form of order provided the requisite comfort needed for the administrators to continue with the appointments.

As part of the application, the administrators proposed a regime that in effect applied Division 60 of Schedule 2 to the Corporations Act (being the Insolvency Practice Schedule (Corporations) (**IPS**)), requiring creditor or court approval for payment of their remuneration, and (departing from the usual course) also provided for the same approval process for costs and expenses.

Setting precedent, the Court granted orders giving *prospective* relief, citing the following factors in favour of the administrators:

+ the administrators continued to carry out all relevant tasks relating to the administration of the Adaman Group and had reported to the Court on a number of occasions as to the work that was being undertaken;

+ the Adaman Group continued to trade through the administrators' efforts. That work was being undertaken to maximise the possibility of a sale or restructure of the Group and the value of the assets for the benefit of creditors and to preserve employment prospects, in furtherance of the objects of Part 5.3A;

+ it was appropriate that there be a measure of certainty in respect of the administrator's personal exposure in undertaking that work; and

+ the orders proposed by the administrators advanced the objects of Part 5.3A by giving the administrators a reasonable degree of certainty in the continued performance of their functions and duties, while leaving open the ability of interested parties to review their costs, expenses and remuneration in due course.

Voluntary administration – an out of court process?

Although the voluntary administration process is traditionally considered to primarily be an out of court process, with the Court taking a supervisory role, the broad powers conferred on the Court are a powerful tool which can be utilised by administrators to assist them in the performance of their duties, especially when undertaking higher-risk and more complex appointments.

While Banks-Smith J ultimately made orders validating the administrators' appointment over the two remaining Group entities, those orders were only made some five months after the administrators' initial appointment and only once the administration had effectively run its course, with the Adaman Group undergoing a restructure and recapitalisation through a DOCA. In the face of significant personal exposure, it was the ability to run the Adaman Group administration effectively under court supervision (consisting of eight successive court applications), which enabled the administrators to continue with and finalise the appointment.

The prospective relief received for the administrators' remuneration and disbursements is just one example of the reach of section 447A of the Corporations Act and section 90-15 of the IPS. We will be keenly monitoring the development of case law in this area, as insolvency practitioners continue to turn to the Court for assistance, and the boundaries of the facilitative provisions in the Corporations Act are tested.

Gilbert + Tobin acted for the administrators of the Adaman Group. See Nipps (Administrator) v Remagen Lend ADA Pty Ltd, in the matter of Adaman Resources Pty Ltd (Administrators Appointed) [2021] FCA 520 and the subsequent 7 decisions.

LANDMARK INSOLVENCY CASES: RULINGS OF THE HIGH COURT

What you need to know:

+ The High Court of Australia has recently clarified two key issues for insolvency practitioners: set off rights for creditors and the 'peak indebtedness rule' for unfair preference claims.
+ The Court ruled that the liabilities arising from unfair preference claims cannot be considered as mutual dealings for the purpose of set-off, as they do not involve the same persons and lack mutuality of interest.
+ The Court also ruled that incorporating the 'peak indebtedness rule' in assessing unfair preference claims is not possible because it would allow a liquidator to select a start date outside the prescribed period or prior to the insolvency date.

The High Court of Australia began its judicial calendar in February 2023 with a "bang" for insolvency practitioners, handing down two landmark decisions that put to rest two long-held questions:

+ whether creditors are entitled to a right of set off against a liquidator's claim to recover an unfair preference; and
+ whether liquidators are entitled to apply the 'peak indebtedness rule' when assessing unfair preference claims.

Statutory set-off

For some time, it has been unclear as to whether a defendant, faced with a liquidator's claim to recover unfair preferences, is entitled to invoke a right to set-off under section 553C of the Corporations Act.

Pursuant to section 553C, a company's creditors are entitled to a right of set-off where there have been mutual credits, debts or other dealings between an insolvent company that is being wound up and a creditor seeking to have a debt or claim admitted against that company.

The purpose of section 553C is to ascertain what funds are available for distribution to each of the company's creditors. Where a right of set-off is applicable, only the balance of the account is admissible to proof against the company. Section 553C prevents a creditor of an insolvent company who is also a debtor of that company being required to pay the full amount of the debt owed to the company while being entitled to receive only a portion of the credit owed by the company.

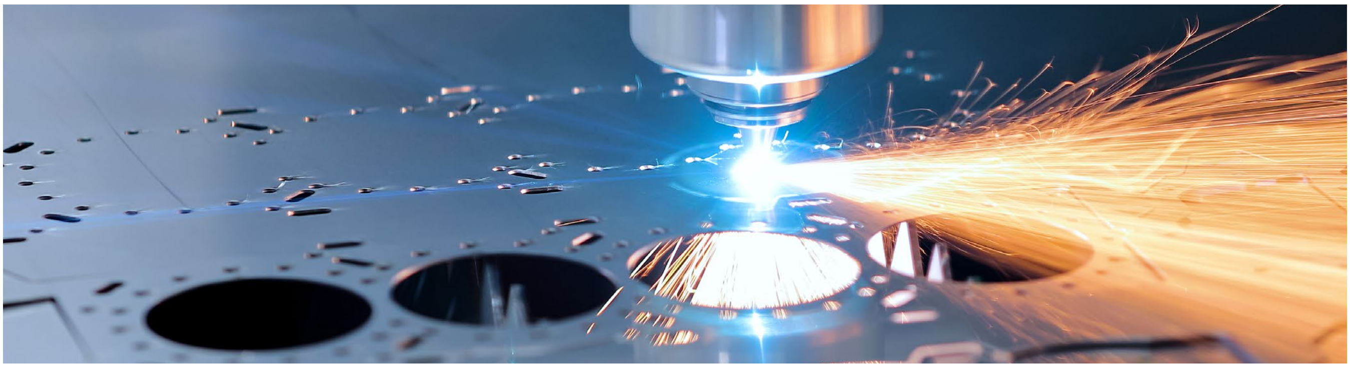
The Courts have held that the following claims are capable of being set-off:

+ liquidated damages;
+ unliquidated damages;
+ secured debts;
+ contingent debts; and
+ future debts

Section 553 creates a cut-off date for the determination of the debts and claims that can be proved in the winding up. In order for debts to be admissible to proof against the company, the rights of both the company and the creditor must arise out of circumstances that occurred before the "relevant date", which is defined in section 9 of the Corporations Act as the day on which the winding up is taken to have commenced.

In order for the right of set-off to be available, the requisite mutuality must be established. In *Gye v McIntyre [1991]* HCA 60, the High Court identified three key aspects of mutuality, being:

+ the credits, debts or claims arising from other dealings must be between the same parties;
+ the benefit or burden of the credits, debts or claims must lie in the same interests – this means that each party must hold the credit, debt or claim in the same capacity as that party is liable under the other claim; and
+ the credits, debts or claims arising from other dealings must be commensurable for the purposes of set-off – that is, they must sound in money. However, they may also be contingent.



The *Morton* decision

In *Metal Manufactures Pty Limited v Morton* [2023] HCA 1, the High Court has determined that a liquidator's claim to recover an unfair preference is not subject to a right of set-off under section 553C of the Corporations Act.

Metal Manufactures Pty Ltd was paid $50,000 and $140,000 by MJ Woodman Electrical Contractors Pty Ltd (**MJ Woodman**), which was subsequently placed into liquidation. The payments were both made by MJ Woodman within the six-month, relation-back period prior to its winding up. MJ Woodman's liquidator sought to recover both payments from Metal Manufactures pursuant to section 588FF(1)(a) of the Corporations Act on the basis that each was an unfair preference under section 588FA. However, Metal Manufactures contended that it had a right to set off its potential liability to repay the alleged unfair preferences against a separate debt owed to it pursuant to section 553C.

The issue was referred by the primary judge to the Full Federal Court. The Full Court unanimously held that set off under section 553C was not available to the appellant because mutuality was not met. In particular, the creditor's debt arose from 'historical events in the ordinary course of business' while the creditor's obligation to pay the unfair preference payments arose from a court order obtained by the liquidator in the exercise of their statutory duties after the 'relevant date'.

Metal Manufactures appealed the decision to the High Court by special leave, which unanimously held that any liability arising from the Court making an order under section 588FF(1)(a) in relation to voidable transactions was not eligible to be set off against the debt owed to Metal Manufactures. The Court held that section 553C(1) requires that the 'mutual credits, mutual debts or other mutual dealings" be credits, debts or dealings arising from circumstances that subsisted in some way or form before the commencement of the winding up'.

Immediately before the commencement of the winding up, there was nothing that could be set off as between the appellant and MJ Woodman. There was no mutuality of interest as required by section 553C(1). This was because the company owed money to the appellant, but the appellant owed nothing to the company immediately before the winding up commenced.

The Court relevantly held:

> *[47] It follows that the appellant could not identify a relevant mutual dealing. Contrary to its contentions, neither the trade transactions which were undischarged by MJ Woodman during the relation-back period nor, for the reasons already expressed, the discharged trade transactions (giving rise to the liabilities of $50,000 and $140,000), together with the liability which may arise under s 588FF(1)(a), were mutual dealings. Section 553C(1), correctly construed, does not address dealings which straddle the period before and after the commencement of the winding up.*
>
> *[50] ... under the statutory scheme of liquidation, any liability arising from the making of an order by a court under s 588FF(1)(a) cannot form part of the process for the identification of provable debts and claims for the purposes of s 553, and thus cannot be the subject of a valid set-off against pre-existing amounts owed by the company to the preferred creditor for the purposes of s 553C.*

The Court concluded that there had been no dealing between the same persons because, while the liability created under section 588FF(1)(a) was owed to the company, it only arose on the application of the liquidator and not MJ Woodman itself. Further, there was no mutuality of interest because the amount the liquidator would recover from the unfair preference claim could not be seen as being for the benefit of the liquidator. Rather, it was to be made available, amongst other things, for the making of priority payments and for distribution to the company's creditors in accordance with the *pari passu* principle.

What is the 'peak indebtedness rule'?

Australian insolvency practitioners have previously applied the 'peak indebtedness rule' to calculate the value of unfair preference claims pursuant to section 588FA(3) of the Corporations Act. Liquidators, by applying the peak indebtedness rule, were able to maximise their assessment of the amount capable of recovery from a creditor by subtracting the debt owed to the creditor from the highest point of the indebtedness during the relevant period.

The peak indebtedness rule is based on the "running account" principle, being that the payments made from a company to a creditor are part of a "continuing business relationship" where the level of the company's indebtedness to that creditor increases and decreases from time to time as a result of the existence of that relationship.

The *Badenoch* decision

In *Bryan v Badenoch Integrated Logging Pty Ltd* [2023] HCA 2, the High Court unanimously settled the question of when the 'peak indebtedness rule' may be used. Previously, the Full Federal Court had held liquidators could not use the rule in assessing unfair preference claims. It found the peak indebtedness rule was not a rule that applied under the Corporations Act and that creditors ought to be provided with the benefit of earlier dealings within a continuing business relationship when considering whether creditors have received an unfair preference.

The High Court affirmed the view of the Full Federal Court. A key focus of the Court's reasoning was the statutory context surrounding section 588FA(3). In short, the 'peak indebtedness rule' cannot be applied given its inconsistency with the broader clawback regime for insolvent companies contained in Part 5.7B of the Corporations Act, including:

+ section 588FE(2) to (6B), which identify the circumstances when a transaction is voidable. Relevantly, the transaction must have been entered into during the time prescribed by the relevant subsection of the Corporations Act. That is, the transaction must have been entered into during the 6 months (or, if the transaction involves a related entity, the 4 years) ending on the "relation-back day" (the date the liquidation begins or is deemed to have begun) or after the relation-back day but before the day when the winding up actually began (section 588FE); and
+ section 588FC, which provides that an insolvent transaction is only an unfair preference if, and only if, the transaction was entered into when the company was insolvent, or the transaction had the effect of causing the company to become insolvent.

The effect of the application of the 'peak indebtedness rule' would allow a liquidator to select a starting date for the "continuing business relationship" that was outside of the period prescribed by section 588FE(2) to (6B) or a start date that was prior to the insolvency date. It follows, the High Court found, that incorporating the 'peak indebtedness rule' is not possible.

While the High Court accepted that limiting the relevant period in this way might be arbitrary, the effect of which might prevent the liquidator from maximising the potential claw-back from creditors, it reflects a policy choice made by Parliament as to the operation of section 588FA(3) of the Corporations Act.

INSOLVENCY PRACTITIONERS BEWARE: COURT DENIES APPLICATION TO EXTEND CONVENING PERIOD

What you need to know:

+ Routine applications by insolvency practitioners are not automatically approved and practitioners should be mindful to have their "ducks in a row", by developing a reasoned application before approaching the Court.
+ In applications to extend the period for convening the second meeting of creditors of a company in voluntary administration, the onus is on the administrators to clearly demonstrate why an extension is sought and substantiate the duration of the extension sought.
+ Practitioners should be aware of risks associated with bringing late applications including providing insufficient notice to creditors and the importance of procedural fairness.

Australian insolvency practitioners have long considered that the Court will take a liberal approach to granting an extension to the period in which the second meeting of creditors must be convened under section 439A(6) of the Corporations Act. Indeed, there is ample case law where courts have granted extensions to the convening period, with some extensions even being granted "on the papers". Out of the 30 judgments published since the beginning of 2022 in respect of applications made to the Federal Court under section 439A(6), only one application has resulted in the Court declining to extend the convening period.

The decision in *Frisken, in the matter of Xpress Transport Solutions Pty Ltd (Receivers and Managers Appointed) (Administrator Appointed)* [2023] FCA 448 (***Frisken***) provides insolvency practitioners with a timely reminder that the Court will not just "rubber stamp" an application to extend the convening period in all circumstances and will not exercise its powers under section 439A(6) lightly.

Extensions to convening period

The Courts have jurisdiction to make orders providing for an extension to the convening period under sections 439A(6) and 447A of the Corporations Act. When considering an extension application, the Courts have recognised the need to balance competing considerations that arise from:

+ the expectation that an administration will be conducted in a relatively "speedy and summary" manner, typically between 25 and 30 business days (see for example *Re Virgin Australia Holdings Ltd (Admins Apptd) (No 2)* [2020] FCA 717);
+ fulfilling the overall object of Part 5.3A of the Corporations Act, as described in section 435A, to maximise the chances of the company, or as much as possible of its business, continuing in existence or achieving a better result for creditors and shareholders than in an immediate winding up.

Factors relevant to granting an extension

In *Re Riviera Group Pty Ltd (admin apptd) (recs and mgrs apptd) [2009] NSWSC 585*, Austin J summarised the factors the Court will take into account when deciding an application to extend the convening period. These include:

+ the size and scope of the business;
+ whether there are substantial offshore activities;
+ the complexity of the corporate group structure and intercompany loans;
+ the time needed to execute an orderly process for disposal of assets;
+ the time needed for thorough assessment of a proposal for a deed of company arrangement;
+ whether the extension will allow the sale of the business as a going concern; and
+ more generally, whether additional time is likely to enhance the return for unsecured creditors.

Section 439A(8) of the Corporations Act provides that, if the application for an extension is made after the convening period begins, the Court may only grant an extension if it is satisfied doing so would be in the best interests of the creditors.

The *Frisken* decision

Background

In *Frisken*, an application was brought by the administrator of six related companies for a section 439A(6) order to extend the convening period for the second creditors' meeting by around six months. Prior to the administrator's appointment on 4 April 2023, receivers and managers had been appointed by the companies' secured creditor. The administrator did not, however, apply to the Court for an extension until 9 May 2023. Without the extension, the time to convene the meeting would have expired on 11 May 2023.

Administrator's application to extend convening period

Broadly, the administrator viewed that the extension was required and would be in the interests of the companies' creditors where it would:

+ allow for the administration to be conducted in a thorough and orderly fashion;
+ permit the receivership to continue, with a clearer position likely to emerge as to the approach to be taken by the receivers;
+ allow sufficient time for a DOCA to be proposed by the companies' director or a third party; and
+ allow for further investigations which were said to be required in order properly to provide a complete report to creditors on the future of the companies.

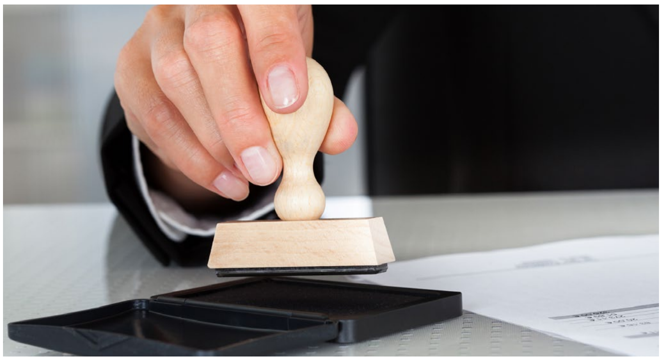
No extension granted

The Federal Court dismissed the application, citing the following:

+ the director's DOCA proposal was highly generalised and unsupported by documentary evidence;
+ a six-month extension was a significant extension;
+ while not opposed to the application, the receivers viewed that it was unclear whether the extension would benefit creditors in circumstances where the businesses conducted by the companies had been wound down and the DOCA proposal was highly speculative.

The Court was also critical of how the application had been brought, stating:

> *"To bring the application so late and on such short notice unnecessarily and unfairly undermines the opportunity afforded to stakeholders to seek to oppose the application when they choose to do so. It deprives the Court of the benefit of a properly prepared and instructed contradictor when approaching the balancing task it is required to undertake on an application such as this."*



Key takeaways

Frisken is a timely reminder that routine applications by administrators are not simply 'rubber-stamped' by courts. The onus is on administrators to demonstrate an extension of time to the convening period is necessary in the circumstances and will not prejudice creditors.

The Court was particularly critical of the lateness of the application and the short notice given to creditors – two days before the convening period was set to expire. While extension applications are often lodged on an urgent basis, courts are not willing to forgo procedural fairness including adequate notice of the application to creditors. Practically speaking, administrators should leave some time between a court hearing an extension application and the end of the convening period so that, if the application is unsuccessful, there is time to write and finalise their report to creditors.

DISSECTING "CREDITORS' INTEREST DUTY": LESSONS FROM THE UK SUPREME COURT

What you need to know:

- The UK Supreme Court has established the 'creditors' interest duty', or the *West Mercia rule* for directors in the context of insolvency. This requires directors to consider the interests of the company's creditors where a company is insolvent or is nearing insolvency.
- Without officially recognising this duty, the Australian courts have accepted the underlying principles and commonly consider company decisions by superior UK courts as persuasive in their decision-making process.

In *BTI 2014 LLC v Sequana SA* [2022] UKSC 25 (***Sequana***), the UK Supreme Court held that, in the context of insolvency, directors owe an obligation to consider the interests of the creditors of a company. This is known as the 'creditors' interest duty', or the *West Mercia rule*.

Many of the underlying principles in *Sequana* have been accepted in Australian courts (and were, in fact, derived from those courts' decisions), but no authority has recognised the duty in Australia. However, Australian courts generally regard company law decisions by superior UK courts as persuasive. The decision is therefore likely to influence future consideration of the existence and content of a 'creditors' interest duty' affecting directors of Australian companies when the issue does come before an Australian court.

Summary of *Sequana* decision

The Court made several observations about the nature and content of the creditors' interest duty:

- the duty is enlivened when a company is insolvent or nearing insolvency, or an insolvent liquidation or administration is probable; and
- the weight to be given to creditors' interests is determined by reference to the extent of the company's financial difficulties; and
- when the directors' duty to act in good faith includes acting in the interests of creditors, shareholders are no longer able to authorise or ratify conduct which is in breach of that duty.

Background to *Sequana* decision

Facts

Sequana concerned a company called AWA. In May 2009, AWA's directors caused AWA to distribute a lawful dividend to its only shareholder, Sequana SA. AWA was solvent at the time, both on a balance sheet and a cash flow basis. However, it had long-term pollution-related contingent liabilities of an uncertain amount which, together with uncertainty as to the value of its insurance portfolio, gave rise to a real risk (but not the probability) of AWA becoming insolvent at an uncertain but not imminent future date.

In October 2018, BTI 2014 LLC (**BTI**), who was assigned claims of AWA, sought to recover from AWA's directors an amount equal to the dividend paid almost 10 years prior to Sequana SA. This was on the basis that the decision to make the distribution was in breach of the directors' duty to AWA's creditors. AWA's largest creditor also applied to have the dividend set aside for being a transaction at an undervalue intended to prejudice creditors.

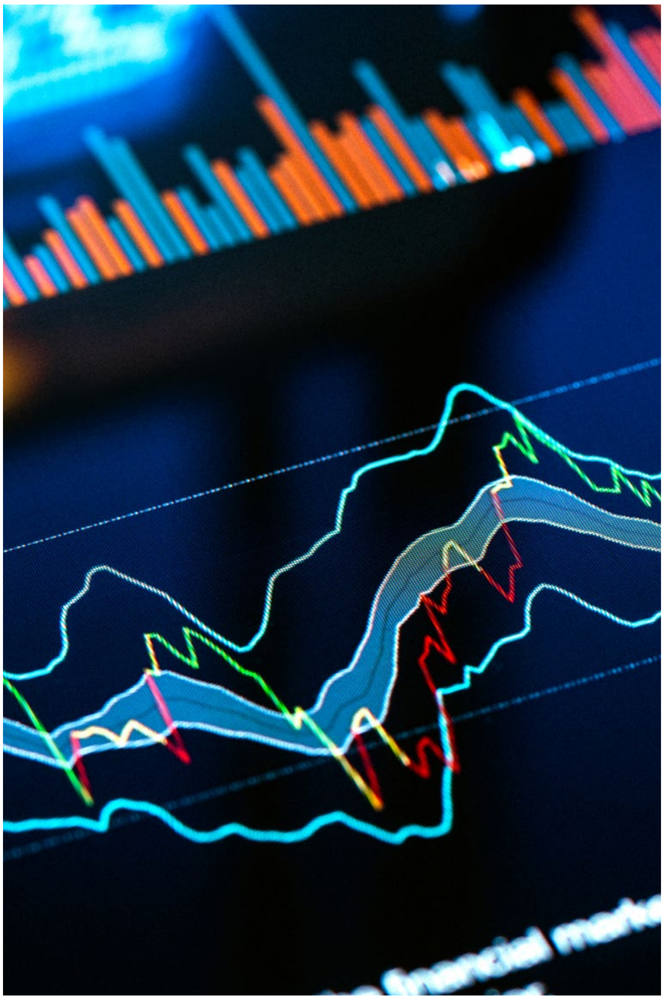
Proceedings

Both claims were heard together by the UK Supreme Court, which decided that:

+ the dividend was a transaction at an undervalue intended to prejudice creditors; and
+ the directors' duty to creditors had not been enlivened at the time because AWA had not then been insolvent, nor was future insolvency imminent or probably (although there was a real risk of insolvency).

BTI appealed the second issue. It sought to establish that the common law imposes a duty on directors to considers creditors' interests prior to insolvency, consistent with section 172(3) of the *Companies Act 2006* (UK), which provides that a director's duty to act in good faith to promote the success of the company is "*subject to any enactment or rule of law, in certain circumstances, to consider or act in the interests of the creditors of the company*". BTI argued this duty arises in circumstances where the company is solvent and there is a real but not remote risk of it becoming insolvent at some future time.

The Supreme Court unanimously dismissed the appeal. It held the creditors' interest duty is not enlivened prior to insolvency. Separate reasons were given by most of the judges from which the below principles may be gleaned.



Creditors' interest duty: key principles

When is the duty enlivened?

Ordinarily, in considering the duty of a director to act in good faith in the interests of the company, the interests of the company are taken to be the interests of its members as a whole. Where a company is insolvent or nearing insolvency, the interests of the company are modified to include the interests of creditors as a whole. This is known as the *West Mercia rule*.

For the *West Mercia rule* to arise:

+ It must no longer be appropriate to treat the interests of the company as being equivalent only to the interests of the company's members, when considering economic interests and the distribution of risk.
+ There must be some sense of imminence. This will be present where the company is insolvent or nearing insolvency, or if insolvent liquidation or administration is probable. It will not be present if there is only a real but not remote risk of insolvency, or if the company is likely to become insolvent at an undefined point in the future.

Once the duty is enlivened, shareholders no longer have the power to authorise or ratify conduct by the directors in breach of the duty.

Scope and content of the duty

The Supreme Court emphasised that the director's fiduciary duty to the company is merely modified in an insolvency context where the directors are required to act with regard to the interests of the company's creditors. It does not interfere with any statutory protections of creditors' interests.

+ The extent to which creditors' interests are to be considered is based on the seriousness of the company's financial problems. Initially, creditors' interests should be considered alongside members' interests but the weight given to creditors' interests will increase as the company's financial problems worsen. Where insolvent liquidation or administration is inevitable, the interests of members cease to bear any weight, and the company's interests are to be treated as equivalent to the interests of its creditors as a whole.
+ Creditors' interests are to be considered as a whole class, not as a fixed group of individuals.
+ Creditors' interests should be understood by having regard to their prospective interests in the company's assets and liabilities where a company is insolvent or nearing insolvency. Directors should take these prospective interests of the company, as well as those of its shareholders, into account and seek to prevent them.

Prior to liquidation becoming inevitable, the duty involves the consideration of creditors' interests, giving them appropriate weight, and balancing them against shareholders' interests where they may conflict. Determination of that balancing exercise is informed by '*who risks the greatest damage if the proposed course of action does not succeed*'.

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ABOUT GILBERT + TOBIN'S RESTRUCTURING + INSOLVENCY TEAM

This past year has been an exciting year for the Gilbert + Tobin Restructuring + Insolvency team as we have "gone out on our own" and formed a separate dedicated sub-group as part of Gilbert + Tobin's broader and market leading Banking + Projects group.

We have also made some strategic hires to bolster our talented team of lawyers for an anticipated increase in restructuring and insolvency work in this next phase of the economic cycle.

The team is dynamic and valued for its pragmatic, commercial and partner-led service. We are a tight and coordinated team across the country and remain ready and committed to solving complex restructuring and insolvency challenges faced by our clients.

We advise banks, creditors, borrowers, investors and directors, as well as many leading insolvency practitioners in relation to all types of formal and informal insolvency administrations, restructurings, workouts and near insolvency situations.

We regularly advise and act for creditors, directors, lenders and investors facing issues and looking for opportunities arising from corporate insolvency on both contentious and non-contentious matters. In addition to our experience in transactional restructuring and turnarounds, we have extensive experience advising and acting in relation to disputes and applications arising in restructures, voluntary administrations, liquidations and receiverships, including insolvent trading claims and actions in relation to insolvent transactions.

We have acted on the winning Restructuring + Insolvency deal almost every year for the past 12 years at the Australasian Law Awards, as well as a number of finalist deals.

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