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Recent developments in insolvency law

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Introduction

In this paper, I will review several recent developments in insolvency law. I will first address the impact of the Insolvency Law Reform Act 2016 (Cth) on court proceedings and then identify wider issues in insolvency law reform, some of which remain open and some of which are addressed by the proposed safe harbour from liability for insolvent trading to facilitate corporate restructurings. I then consider several recent developments in the case law, including an important appellate decision as to the constitution of classes in creditors' schemes of arrangement, issues arising in the liquidation of trustee companies, liquidators' remuneration and extensions of time to register security interests.

Impacts of the Insolvency Law Reform Act in Court proceedings

The Insolvency Law Reform Act 2016 (Cth) amends both the Bankruptcy Act 1966 (Cth) and the Corporations Act to introduce common rules for the registration, regulation and discipline of corporate and personal insolvency practitioners. The purpose of the proposed amendments includes removing unnecessary costs and increasing efficiency in insolvency administrations; aligning and modernising the registration and disciplinary frameworks that apply to registered liquidators and registered trustees in bankruptcy and rules relating to personal bankruptcies and corporate external administrations; promoting market competition on price and quality; and "improv[ing] overall confidence in the professionalism and competence of insolvency practitioners".[1]

The amendments partly took effect on 1 March 2017. The amendments that then took effect introduced a new registration process for practitioners in corporate insolvency, broadly similar to the registration process for trustees in bankruptcy under the Bankruptcy Act, and conferred the jurisdiction over disciplinary proceedings over liquidators on committees comprising a representative of the Australian corporate regulator, a registered liquidator chosen by issued by the Australian Restructuring Insolvency & Turnaround Association ("ARITA") and a person appointed by the Minister, which can impose a range of sanctions extending to cancellation or suspension of a liquidator's registration.[2] The effect of other amendments was deferred by

[1] Explanatory Memorandum to the Insolvency Law Reform Bill 2015, p 3.
[2] Insolvency Practice Schedule (Corporations) Div 40 Subdiv E, replacing *Corporations Act* s 1292.

regulation to 1 September 2017, and the amendments are also subject to complex transitional provisions.[3]

A number of provisions in the Corporations Act that are commonly relied on in court applications will (with effect from 1 September 2017) be replaced (subject to the transitional provisions) with broadly corresponding powers largely contained in Schedule 2 of the Insolvency Law Reform Act, the Insolvency Practice Schedule (Corporations). The provisions that take effect from 1 September include those dealing with the removal of insolvency practitioners. Section 449B (dealing with the court's power to remove an administrator) and s 503 (dealing with removal of a liquidator) are repealed, operative from 1 September 2017. Creditors will be able to remove an insolvency practitioner under Div 90, Subdiv D of the Insolvency Practice Schedule (Corporations) and the Court's supervisory powers will also be preserved under Div 90 of the Insolvency Practice Schedule (Corporations).

The amendments also affect creditors' and courts' power to give directions. Section 447D of the Corporations Act (dealing with an administrator's ability to obtain directions from the Court), s 479 (dealing with directions to liquidators in a Court ordered winding up) and s 511 (dealing with the Court's determination of questions in a voluntary liquidation) are repealed by the Insolvency Law Reform Act, with effect from 1 September 2017. Creditors will be permitted to give directions to external administrators[4] under Div 85 of the Insolvency Practice Schedule (Corporations). The Court also retains the power to give directions under Div 90 Subdiv B which should at least allow the court to continue to give directions as to the proper course of action for an administrator or liquidator, corresponding to those which could be given under former ss 447D and 473 of the Corporations Act.[5] The Court may well have regard to authorities as to the earlier sections and exercise a similar degree of caution in giving directions as to matters which, for example, involve essentially commercial judgments by insolvency practitioners.

[3] Several cases since 1 March 2017 have dealt with the provisions that are to be amended, although the effect of the Corporations and Other Legislation Amendment (Insolvency Law Reform) Regulation 2016 (Cth) (which defers the operation of the provisions to 1 September 2017) has not always been recognised in those cases: *Campbell-Wilson v Australian Securities and Investments Commission* [2017] FCA 391; *Re Golden Sands Hospitality Pty Ltd (in liq)* [2017] NSWSC 410; *Re Linc Energy Ltd* [2017] QSC 53; *Re Queensland Nickel Pty Ltd (in liq)* [2017] QSC 56; *Re Hayes Steel Framing Systems Pty Ltd (admins apptd)* [2017] NSWSC 385; see J Harris: "ILRA: Is this all just a Bad Dream", Australian Insolvency Law Blog, 20 April 2017, https://AustralianInsolvencyLaw.com/2017/04/20. The operation of these regulations has now been comprehensively summarised in a note by T Gardner, "Insolvency Law Reform Act: Commencement and Transitional Provisions" (2017) BCLB [181]. The complexity of the provisions is indicated by the fact that Mr Gardner's table dealing with these provisions extends over more than 10 pages in small print.

[4] Div 5, cl 5-20 of the Insolvency Practice Schedule (Corporations) provides that an external administrator is an administrator of a company, the administrator of a deed of company arrangement in respect of the company or the liquidator or provisional liquidator of the company.

[5] The case law as to the giving of such directions is voluminous, but important cases include at least *Re GB Nathan & Co Pty Ltd (in liq)* (1991) 24 NSWLR 674; 5 ACSR 673; *Re Ansett Australia Ltd* (2001) 39 ACSR 355; [2001] FCA 1439; *Re Pasminco Ltd (No 2)* (2004) 49 ACSR 470; [2004] FCA 656; *Re Ansett Australia Ltd and Korda* (2002) 115 FCR 409; 40 ACSR 433; [2002] FCA 90.

The amendments also affect the courts' supervisory jurisdiction. Section 447E (dealing with supervision of the administrator of a company or deed of company administration) and s 536 (supervision of liquidators) are repealed by the Insolvency Law Reform Act, with effect from 1 September 2017. The Court's powers in relation to insolvency practitioners are now generally found, first, in Division 45 of the Insolvency Practice Schedule (Corporations). Section 45-1 allows the Court to make such orders as it thinks fit in relation to a registered liquidator[6], on its own initiative, on an application by the registered liquidator or the Australian Securities and Investments Commission. Section 45-1(4) lists factors that the Court may take into account in making such orders, which are broadly concerned with the liquidator's professional conduct and its effect on interested parties. Division 70 Subdiv G also allows the Court (and also ASIC) a new power to direct an insolvency practitioner to provide information, including information requested by creditors.

Division 90 allows inquiries by the Court which may be initiated at the Court's own initiative or on the application of creditors and others. Section 90-15 allows the Court to make such orders as it thinks fit in relation to an external administration.[7] The Court can exercise that power on its own initiative, during proceedings before the Court or on application by specified persons under s 90-20. Section 90-15(2) gives examples of such orders.[8] Section 90-15(4) specifies matters which the Court may take into account when making orders, namely whether the liquidator has faithfully performed, or is faithfully performing, the liquidator's duties; whether an action or failure to act by the liquidator is in compliance with the Insolvency Law Reform Act and the Insolvency Practice Rules; whether an action or failure to act by the liquidator is in compliance with an order of the Court; whether the company or any other person has suffered, or is likely to suffer, loss or damage because of an action or failure to act by the liquidator; and the seriousness of the consequences of any action or failure to act by the liquidator, including the effect of that action or failure to act on public confidence in registered liquidators as a group. The Court may well also have regard to the principles which applied to supervision of administrators and liquidators in exercising its continuing supervisory jurisdiction under Div 90 of the Insolvency Practice Schedule (Corporations),

[6] A "registered liquidator" is a person registered under Division 20 as a liquidator, who may act as a liquidator, provisional liquidator, voluntary administrator, deed administrator, scheme administrator or receiver or receiver and manager.

[7] "External administration" is defined in s 5-15 of the Insolvency Practice Schedule (Corporations) to include a liquidation, voluntary administration or deed administration, but not a scheme of arrangement or receivership

[8] These include an order determining any question arising in the external administration of the company; an order that a person cease to be the external administrator of the company; an order that another registered liquidator be appointed as the external administrator of the company; an order in relation to the costs of an action (including court action) taken by the external administrator of the company or another person in relation to the external administration of the company; an order in relation to any loss that the company has sustained because of a breach of duty by the external administrator; and an order in relation to remuneration, including an order requiring a person to repay to a company, or the creditors of a company, remuneration paid to the person as external administrator of the company.

although the new provisions are wider than the earlier sections in some respects.[9]

The amendments also affect the assignment of causes of action by external administrators. Division 100, s 100-5 will allow an external administrator to assign any "right to sue" conferred on him or her by the Corporations Act, but court approval for that assignment is required after the action has begun. This section will apply, for example, to the power to bring proceedings in respect of voidable transactions under Part 5.7B, but does not seem to extend, for example, to permit assignment of a company's (as distinct from an external administrator's) cause of action for breach of directors' duties arising under the Corporations Act or a right to sue for misleading and deceptive conduct arising under the Australian Consumer Law (since that is not a right conferred under the Corporations Act).[10]

Wider issues in insolvency law reform

The Insolvency Law Reform Act primarily focusses on regulation of insolvency practitioners and does not seek to address several wider issues in insolvency law reform, although several have previously been recognised in Australia. I do not say this by way of criticism, and rather simply to identify that those issues remain open.

The Insolvency Law Reform Act does not address the debate as to whether Australia should introduce a "debtor in possession" concept, allowing a debtor company's management to remain in control of the company's business during a restructuring, analogous to Chapter 11 of the US Bankruptcy Code.[11] A report of a Senate Committee dealing with the performance of Australia's corporate regulator, the Australian Securities and Investments Commission ("ASIC") (June 2014) recommended (recommendation 61) that:

> "[T]he Government commission a review of Australia's corporate insolvency laws to consider amendments intended to encourage and facilitate corporate turnarounds. The review should consider features of the chapter 11 regime in place in the United States of America that could be adopted in Australia."

On the other hand, the Interim Report of the Financial System Inquiry (July 2014) (which related to a wider review of Australia's financial system) noted that the introduction of Chapter 11 would be costly and "could leave control in the hands of those who are often the cause of a company's financial distress" and that "[a]dopting such a regime would also create more uncertainty for creditors by limiting their rights". The Final Report of the Financial System

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[9] For example, former s 447E of the Corporations Act applied only where an act or omission or proposed act or omission by an administrator of a company under administration or of a deed of company arrangement is, or would be, prejudicial to the interests of some or all of the companies, creditors or members.

[10] See R. Harper, "An Asset Shared can be a Problem Doubled: Assignment of Causes of Action by a Liquidator", (2017) *Australian Law Journal,* forthcoming.

[11] Earlier inquiries into these issues included reports of the Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Insolvency Laws: A Stocktake* (June 2004) and of the Corporations and Markets Advisory Committee, *Rehabilitating Large and Complex Enterprises in Financial Difficulties* (October 2004).

Inquiry (November 2014) expressed the view that there was little evidence that the Australian regime caused otherwise viable businesses to fail, although elements of the Chapter 11 regime merited consideration, and recommended (recommendation 36) that the Government consult as to amendments to the external administration regime to provide additional flexibility to businesses in financial difficulty. None of these inquiries have supported a full implementation of a Chapter 11 regime in Australia.[12]

The Insolvency Law Reform Act also does not address the issues considered in ARITA's 2014 discussion paper, *A Platform for Recovery 2014: Dealing with corporate financial distress in Australia* (October 2014), as to whether it would be desirable to introduce a separate restructuring regime for "micro companies", which ARITA defined as companies with liabilities of less than $250,000. ARITA noted that 43% of Australian insolvencies have liabilities less than that threshold, and 40% of insolvencies are assetless at the time of insolvency, so that a liquidator will generally only be funded for investigations if ASIC provides funding from the Assetless Administration Fund. ARITA proposed that smaller companies could be permitted to enter a binding agreement with creditors, analogous to agreements available to individual debtors under s 185C of the Bankruptcy Act, and that a streamlined liquidation regime also apply to such companies. The Australian Government has not adopted those proposals.

It is perhaps interesting to contrast the scope of the issues addressed by the Insolvency Law Reform Act with the position in Singapore, where recent legislative amendments by the Companies Amendment Bill 13/2017 make much more fundamental changes to the insolvency regime. Those changes include extending the scope of Singapore's scheme of arrangement provisions to allow them wider international operation; providing a mechanism for debtor in possession funding, analogous to that which is available under Chapter 11 of the US Bankruptcy Code; and providing a mechanism to "cram down" dissenting classes of creditors in a scheme of arrangement which would provide a better result to that class of creditors than if the scheme was not passed. Singapore has also now adopted the UNCITRAL Model Law on Cross-Border Insolvency, and the Singapore judiciary was involved in developing the Judicial Insolvency Network "Guidelines for communications and co-operations between Courts in cross-border insolvency matters". The Supreme Court of New South Wales and the Federal Court of Australia were also involved in that initiative and steps toward adoption of those guidelines are under way in Australia.

Safe harbour from insolvent trading

Australia presently has an onerous insolvent trading regime, by international standards, which, broadly, imposes liability on a director in respect of debts incurred by a company that is insolvent (in the sense of being unable to pay

[12] For comment, see L Griggs, "Voluntary administration and Chapter 11 of the Bankruptcy Code (US)" (1994) 2 *Insolv LJ* 93; J Harris, "Restructuring Nirvana? Chapter 11 Bankruptcy and Australian Insolvency Reform" (2015) 16 *Insolvency Law Bulletin* 42; A Terzic, "Turning to Chapter 11 to foster corporate rescue in Australia" (2016) 24 *Insolv LJ* 5.

its debts as and when they fell due) if there were (objectively) reasonable grounds for suspecting the company's insolvency, and subject to several defences.

A Treasury Discussion Paper issued in 2010 had raised the possibility of a "safe harbour" from insolvent trading liability and that proposal had then been supported by both the Law Council of Australia and the Insolvency Practitioners Association. In its Proposals Paper, *Improving Bankruptcy and Insolvency Laws* (April 2016), the Commonwealth Government raised the possibility of introducing two forms of safe harbor to limit the risk of personal liability for directors for insolvent trading, where a director is involved in restructuring efforts.[13] The Proposals Paper identified the rationale for the reform as that it would strengthen Australia's "start-up culture" by moving from a regime that penalised directors and stigmatised failure, so as to encourage entrepreneurship and assist start-ups in attracting experienced and talented board members. The proposed reforms would impact on a larger number of cases dealt with by insolvency practitioners and courts which do not fall within their stated rationale referable to start-up companies.

The Treasury Laws Amendment (2017 Enterprise Incentives No 2) Bill 2017, introduced into Federal Parliament on 1 June 2017, would implement a "safe harbour" for insolvent trading for directors, with some qualifications. The Explanatory Memorandum to the Treasury Laws Amendment (2017 Enterprise Incentives No 2) Bill 2017 identified the issue to be addressed as follows:

> "The threat of Australia's insolvent trading laws, combined with uncertainty over the precise moment a company becomes insolvent have long been criticised as driving directors to seek voluntary administration even in circumstances where the company may be viable in the longer term. Concerns over inadvertent breaches of insolvent trading laws are frequently cited as a reason that early stage (angel) investors and professional directors are reluctant to become involved in start-up."

Proposed s 588GA(1) would exclude liability for insolvent trading under s 588G of the Corporations Act if:

- at a particular time after a person starts to suspect a company may become or be insolvent, he or she starts developing one or more courses of action that are reasonably likely to lead to a better outcome for the company and

- the debt is incurred in connection with that course of action and during a specified time period.

The term "better outcome" is defined, in s 588GA(7), as a better outcome for the company than the immediate appointment of an administrator or liquidator. There may be complexities for both parties in an insolvent trading claim in which a "defence" under s 588GA is raised in proving the likely outcome of a hypothetical administration or liquidation that had taken place at

[13] For comment, see A Hargovan, "Governance in Financially Troubled Companies: Australian Law Reform Proposals" (2016) 34 *C&SLJ* 483.

the time the directors instead undertook an informal restructuring. There will be a question as to the extent of connection that is required to fall within the language "directly or indirectly in connection with course[s] of action", although the Explanatory Memorandum (at [1.48]) contemplates that trade debts will fall within the section.

The question whether the course of action is "reasonably likely to have a better outcome" for the company seems to be an objective question one, on its face.[14] However, the Court is to have regard to matters relating to what the director has done under proposed s 588GA(2). That subsection provides an inclusive list of matters relevant to determining whether the course of action was reasonably likely to lead to a better outcome for the company, including, inter alia, whether:

- the director properly informed himself or herself of the company's financial position;

- the director is taking appropriate steps to prevent misconduct that could adversely affect the company's ability to pay its debts;

- the director is taking appropriate steps to ensure the company is keeping appropriate financial records consistent with its size and nature;

- the director is obtaining appropriate advice from an appropriately qualified entity which was given sufficient information to give appropriate advice; and

- the director is developing or implementing a plan for restructuring the company to improve its financial position.

The fact that such steps are taken may make it more likely an informal restructuring would be reasonably likely to have a better outcome for the Company. It is, however, logically possible that, even after those steps are taken, the informal restructuring which is undertaken was misconceived, and would not be reasonably likely to lead to that better outcome for the company, and the "defence" would not then be available. The case law will need to determine what is the threshold at which steps taken are "reasonably likely" to lead to a better outcome for the company, and whether that comparison has regard only to the corporate entity or also to the interests of its creditors, and further complexity will arise if differing classes of creditors would have different interests.

Proposed s 588GA(3) would provide that a director relying on that defence has the "evidential burden" (as defined in proposed s 588GA(7)), and, if the director raised evidence that was sufficient to suggest that the facts relied on for the defence exists, then the liquidator or creditor bringing the insolvent trading claim must then displace that defence.

[14] S Maiden, "Safe Harbour: How will it Work? Will it Work?", presentation at Corporate Law Workshop, 29 July 2017, cited by permission of Mr Maiden.

There are several exclusions from the defence under s 588GA(4)-(5), applying where, when the debt was incurred, the company was:

- failing to pay employee entitlements when due or give returns etc as required by taxation law, and that failure amounts to less than substantial compliance with that obligation and was one of two or more failures to do those matters during the 12 month period ending when the debt was incurred; and

- after the debt was incurred, there was a substantial failure to furnish information or reports to an external administrator.

This exclusion is triggered by late payment of the employee entitlements, and not only by non-payment, and a question may arise, if a company makes some late payments or fails to lodge some taxation returns, whether that amounts to a "substantial" failure for the purpose of the exclusions. These exclusions do not apply if the court is satisfied on an application under s 588GA(6) that the relevant failure was due to exceptional circumstances or that it is otherwise in the interests of justice to make that order. There will no doubt be future issues as to when a court should make such an order.

There is also a limit, under s 588GB, on the director's ability to rely on information that is not delivered to an administrator or liquidator to establish the safe harbour, unless the court relieves the director from that limit. The inability of a director to rely on books or records which it had not delivered up to an administrator or liquidator should encourage cooperation with the liquidator.

There are arguments that are capable of being put each way in respect of these amendments. On the one hand, the Australian insolvent trading regime is significantly more onerous than comparable regimes in other developed economies[15] and there is a strong case that the insolvent trading regime operates as a significant practical disincentive to informal workout arrangements. The contrary view is that individual creditors, or creditors generally, may be left with the risk that a restructuring proposal fails and they are left without recourse for debts incurred in the course of it. In particular, the regime does not provide priority for debts incurred in the safe harbour period, and has the capacity to disadvantage creditors who extend new credit, or increase the amount of credit extended, in that period. The proposed amendments also do not draw a distinction between large public companies and proprietary companies, or between entrepreneurial companies and traditional trading businesses, although the case that has been put in support of them largely relates to the difficulties for large public companies in proceeding with a restructuring and to entrepreneurial entities, and the cases before the courts largely relate to traditional trading businesses.

There will also be a question whether the safe harbour will be available to, or appeal to, directors of smaller proprietary companies, where delays in

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[15] J Harris, "Director Liability for Insolvent Trading: Is the Cure Worse than the Disease?" (2009) 23 *AJCL* 266 at 269.

payment of employee entitlements or failures to comply with obligations to report withholding tax or superannuation guarantee liabilities may well have occurred when such a company came under financial pressure. The exclusions to the safe harbour may be triggered in that situation and there will also be a question as to the position of a director who seeks to rely on the "safe harbour" regime and receives a director penalty notices if the company has reported but not paid PAYG and superannuation guarantee liabilities.

The Treasury Laws Amendment (2017 Enterprise Incentives No 2) Bill would also impose a stay on the use of ipso facto clauses to amend or terminate contracts with a company that passes into administration. Proposed s 415D would provide for a stay in respect of a scheme of arrangement and proposed s 451E would provide for a stay where a company is under administration, in each case subject to leave of the Court under ss 415F and 451G respectively. That stay would also not apply to rights arising as a result of the appointment of a receiver or to rights arising under contracts entered into before the commencement date, and several contracts including contracts managing financial risk such as swaps and hedging contracts are to be excluded by regulation. The proposed legislation is expected to come into effect on 1 January 2018.

Recent developments in case law

Creditors' schemes of arrangement

Section 411 of the Corporations Act authorises the court to grant approval to a compromise or arrangement between a Pt 5.1 body and its creditors or a class of them or between a Pt 5.1 body and its members or a class of them. The Supreme Court of New South Wales has recently addressed two significant issues in respect of the use of schemes of arrangement to reorganise an insolvent or near insolvent company, Boart Longyear Limited ("BLY"). In that case, BLY had defaulted on its secured loans and was, or was likely to become, insolvent absent some form of debt restructuring, and had entered into a Restructuring Support Agreement with several of its lenders.

In its first decision in *Re Boart Longyear Ltd* [2017] NSWSC 537, the Court made an order under s 411(16) of the Corporations Act, prior to a first court hearing in respect of the relevant schemes of arrangement. That section provides that:

> "Where no order has been made or resolution passed for the winding up of a Part 5.1 body and a compromise or arrangement has been proposed between the body and its creditors or any class of them, the Court may, in addition to exercising any of its other powers, on the application in a summary way of the body or of any member or creditor of the body, restrain further proceedings in any action or other civil proceeding against the body except by leave of the Court and subject to such terms as the Court imposes."

The Court there restrained the commencement or continuance of proceedings against BLY until further order. The Court held that the announcement of the intended schemes to Australian Securities Exchange Limited was sufficient to

constitute a "proposal" of the schemes for the purposes of s 411(16) of the Corporations Act. The Court also followed the relatively broad view of that subsection taken by McLure J in *Re Glencore Nickel Pty Ltd* (2003) 4 ACSR 210; [2003] WASC 18, in holding that the term "further proceedings" under s 411(16) could extend to proceedings that had not yet been commenced. The Court found that matters that supported the relief sought included the risk that individual steps taken by creditors could give rise to a preference or frustrate the procedure for a compromise of creditors' claims under the schemes; that several substantial creditors of the company had committed to supporting the schemes; and that the schemes offered the possibility of a better return than a winding up. The Court also appointed the General Counsel and company secretary of BLY as a "foreign representative" of the proceedings under the Cross-Border Insolvency Act 2008 (Cth) and BLY subsequently made a successful application for recognition of the Court's orders in the United States under Chapter 15 of the US Bankruptcy Code.

A further issue as to the composition of classes for the proposed schemes was addressed in the Court of Appeal's decision in *First Pacific Advisors LLC v Boart Longyear Ltd* [2017] NSWCA 116. The Court of Appeal dismissed an appeal brought by First Pacific Advisors LLC ("First Pacific") against an order made under s 411 convening meetings of creditors of BLY and several associated companies, to consider and, if thought fit, agree to the proposed schemes. One of the proposed schemes was a secured creditors' scheme relating to senior secured notes and monies owed to affiliates of Centerbridge Partners LP ("Centerbridge") under two term loans. First Pacific held approximately 29% of the secured notes and contended that separate class meetings should be held of secured note holders in one class and Centerbridge as the term loan holder in the other class. First Pacific relied on several aspects of the secured creditors' scheme which it contended amounted to differences in the treatment of the secured notes debt and the term loan debt, and also pointed to several associated transactions that were conditions precedent to the schemes, and contended that they made it impossible for the parties to consult as one class.

At first instance, the Court held that those differences were not so great as to give rise to an inability of the secured note holders and Centerbridge to consult together with a view to their common interest. On appeal, Bathurst CJ (with whom Beazley P and Leeming JA agreed) recognised the well-established principle that separate classes should only be ordered where the rights of creditors are so different that consultation as to their common interests would be impossible, with the authorities indicating that that question is determined by reference to legal rights rather than commercial interests.[16] The Chief Justice observed that the context of the proposed scheme was important in considering whether any difference in rights or different treatment

[16] *Sovereign Life Assurance Company v Dodd* [1892] 2 QB 573; *Re Jax Marine Pty Ltd* [1967] 1 NSWR 145 at 148–149; *UDL Argos Engineering & Heavy Industries Co Ltd v Li Oi Lin* [2001] HKCU 1184; 3 HKLRD 634 at [27]; *Re Hills Motorway Ltd* (2002) 43 ACSR 101; [2002] NSWSC 897 at [12]; *Re HIH Casualty and General Insurance Ltd* (2006) 57 ACSR 791; 200 FLR 243; [2006] NSWSC 485 at [70]; *Re Opes Prime Stockbroking Ltd (No 2)* (2009) 179 FCR 20; [2009] FCA 813 at [64]; *Re Aston Resources Ltd* [2012] FCA 229 at [33].

of rights would make it impossible for creditors to consult together as a class, and the creditors' rights under the terms of the scheme should be compared with those that would arise in an insolvent liquidation. The Court of Appeal held that, in that context, and taking into account the company's financial position, the creditors' existing rights and the rights provided for by the scheme were not so dissimilar as to require separate class meetings.

Issues in liquidation of trustee companies

In *Re Independent Contractor Services (Aust) Pty Ltd (in liq) (No 2)* (2016) 305 FLR 222; 34 ACLC 16-004; [2016] NSWSC 106, Brereton J considered important issues in respect of the liquidation of trustee companies. His Honour held that debts that were properly incurred in the conduct of the trust, including liabilities to the Australian Taxation Office, were within the scope of the corporate trustee's right of indemnity, and were subject to the trustee's equitable lien over trust assets to secure that right of indemnity. However, his Honour held that the priority afforded to superannuation guarantee entitlements of employees, under s 556(1)(e) of the Corporations Act, did not extend to persons who fell within the extended definition of "employee" under s 12 of the Superannuation Guarantee (Administration) Act 1992 (Cth), but were not "employees" within the meaning of that term in s 556 of the Corporations Act. His Honour also held (at [23]) that s 556 of the Corporations Act applied only in respect of the distribution of assets that are beneficially owned by a company and available for division between its general creditors, and not to assets that were only held in trust and were beneficially owned by other parties.

In *Woodgate, In the matter of Bell Hire Services Pty Ltd (in liq)* [2016] FCA 1583, Farrell J adopted the approach in *Independent Contractor Services (Aust) Pty Ltd (in liq) (No 2)* above and observed (at [37]) that:

> "It is inconsistent with principle to apply the statutory order of priority for payment out of the company debts out of its own property to the order of distribution of trust property. That this might result [in] two regimes (for trust property and property of the company) is unfortunate, but it is something which courts have had to accommodate."

In *Re Amerind Pty Ltd (recs and mgrs apptd) (in liq)* [2017] VSC 127, Robson J similarly held that the trustee's right of indemnity is not property of a corporate trustee for the purposes of s 433 of the Corporations Act, which provides for the circumstances in which payments of specified debts are to have priority in respect of property that is subject to a circulating security interest. In that case, several parties, including the Commonwealth Department of Employment which had paid out accrued wages and entitlements to the company's former employees, contended that the trustee's right of indemnity was "property of the company" for the purposes of s 556 of the Corporations Act; that surplus monies from the receiver's sale of the company's assets were subject to the priorities specified in ss 433 and 556 of the Corporations Act; and that the Commonwealth had the same right of priority for its advances as those employees would have had by reason of s 560 of the Corporations Act.

Robson J recognised the conflict in the authorities as to that question but followed the view expressed by Brereton J in *Re Independent Contractor Services (Aust) Pty Ltd (in liq) (No 2)* above and held that the same approach was applicable to s 433 of the Corporations Act on the basis that it incorporates, by reference, the priorities in s 556 of the Act. His Honour preferred that view to the view taken in *Re Enhill Pty Ltd* [1983] 1 VR 561; (1982) 7 ACLR 8; 1 ACLC 415 that a right of indemnity of a trustee is a personal right of an insolvent corporate trustee and observed (at [94]) that:

> "[T]he proper course for me is to adopt the reasoning of Brereton J in *Re Independent* [*Contractor Services (Aust) Pty Ltd (in liq) (No 2)* above], being that s 556 of the Corporations Act only applies to property of company and does not apply to trust assets, that the trustee's right of indemnity is not property of the company, and that where there are multiple creditors of the trust, the creditors share pari passu in the right to be subrogated to the trustee's equitable lien to enforce the trustee's indemnity."

His Honour also held that a trustee's right of indemnity was not personal property within the scope of s 340(5) of the Personal Property Securities Act 2009 (Cth) and was not a circulating asset for the purposes of that Act, and was not property subject to a circulating security interest for the purposes of s 433(3) of the Corporations Act.

Issues as to liquidators' remuneration

There is some resolution to recent controversies as to liquidators' remuneration in Australian case law. Under Australian law, a liquidator is entitled to reasonable remuneration for his or her services and a liquidator seeking such remuneration bears the onus of establishing that the remuneration claimed is fair and reasonable, having regard to factors previously specified in ss 473(10) and 504(2) of the Corporations Act. The ARITA Code of Professional Practice for Insolvency Practitioners also includes several principles relevant to the remuneration of insolvency practitioners.

Most decisions in both State Supreme Courts and in the Federal Court of Australia have applied time costing as at least the starting point for a calculation of remuneration, although those decisions also emphasise the need for proportionality between the cost of the work done and the value of the services provided.[17] However, several recent decisions had emphasised the significance of the percentage that a liquidator's remuneration bears to the level of asset realisations achieved, and applied percentages of recoveries where time-based calculations would have led to unreasonable results.[18]

[17] *Venetian Nominees Pty Ltd v Conlan* (1998) 20 WAR 96; 16 ACLC 1653;*Templeton v Australian Securities and Investments Commission* (2015) 108 ACSR 545; [2015] FCAFC 137; *Warner, Re GTL Tradeup Pty Ltd (in liq)* (2015) 104 ACSR 633; [2015] FCA 323.

[18] *Re AAA Financial Intelligence Ltd (in liq) (No 2)* (2014) 32 ACLC 14-052; [2014] NSWSC 1270; *Re Gramarkerr Pty Ltd* [2014] NSWSC 1299; *Re Gramarkerr Pty Ltd (No 2)* [2014] NSWSC 1405; *Re Independent Contractor Services (Aust) Pty Ltd (in liq) (No 2)* (2016) 305 FLR 222; [2016] NSWSC 106; *Re Sakr Nominees Pty Ltd* [2016] NSWSC 709.

In *Sanderson, as liquidator of Sakr Nominees Pty Ltd (in liq) v Sakr* [2017] NSWCA 38, Bathurst CJ (with whom the other members of the Court of Appeal agreed) observed (at [54]) that the onus is on a liquidator to establish that the remuneration claimed is reasonable, and it is the Court's function to determine that remuneration by considering the material provided to it and bringing an independent mind to bear on the relevant issues; that many of the factors specified in s 473(10) of the Corporations Act have the concept of proportionality as an underlying theme, and that concept is an important consideration in determining whether remuneration is reasonable, so that the work done must be proportionate to the difficulty and importance of the task in the context in which it needs to be performed (at [55]); and that the fact that work does not increase the funds available for distribution to creditors or contributories does not mean that the liquidator is not entitled to be remunerated for it, where it was reasonable to carry out that work and the amount charged is reasonable (at [57]–[58]). The Court of Appeal's decision in *Sanderson, as liquidator of Sakr Nominees Pty Ltd (in liq) v Sakr* above does not prefer any of the particular approaches to remuneration to which I have referred above to any other of those approaches and, in particular, does not require a time-based approach to remuneration to be adopted in preference to a percentage-based approach to remuneration.

The Federal Court of Australia has since referred to the decision in *Sanderson, as liquidator of Sakr Nominees Pty Ltd (in liq) v Sakr* above and recognised that it, and the decision of the Full Court of the Federal Court in *Templeton v Australian Securities and Investments Commission* (2015) 108 ACSR 545; [2015] FCAFC 137, emphasise that "it is incumbent upon liquidators who seek approval for their fees, costs and remuneration to identify why the amounts sought are reasonable in the circumstances of the liquidation": *Combis, Re Reehal Holdings Pty Ltd (in liq) (Trustee) v Reehal Holdings Pty Ltd (in liq) (Trustee)* [2017] FCA 793 at [32]; see also *Royds v Royds, Re Caloola Holdings Pty Ltd (In Liq)* [2017] FCA 731 at [23]. Mr Sanderson ultimately achieved an order for time-based remuneration, but only after leading significantly more evidence than had been led before Brereton J to establish that the amounts claimed were reasonably based and proportionate: *Re Sakr Nominees Pty Limited* [2017] NSWSC 668. Another application for time based remuneration was recently adjourned to allow the liquidator to lead further evidence to establish that the amounts he claimed were reasonably based and proportionate: *Re Hunter Valley Dental Surgery Pty Ltd (in liq)* [2017] NSWSC 691.

It seems to me several issues remain open following the Court of Appeal's decision in *Sanderson, as liquidator of Sakr Nominees v Sakr* above.[19] First, these issues will continue to be of difficulty, as they have always been. Second, a standard hourly rate that is applied to both large and small insolvencies still has the inherent difficulty that large and small insolvencies are arguably different in character, and creditors face real risks, including of

[19] I have drawn this summary partly from a paper delivered, prior to the Court of Appeal's decision in *Sanderson, as liquidator of Sakr Nominees* above at the Federal Court of Australia/Law Council of Australia Corporations Law Conference August 2016, "Three recent developments in insolvency law".

nil returns, from the application of undiscounted standard hourly rates in smaller insolvencies. In a competitive market, hourly rates would be (and in the case of legal practitioners, are) negotiated, including by reference to the size of the relevant transaction. Third, a claim for remuneration based on hourly rates is likely to be, at least, tested by reference to a percentage of realisations and possibly, in an appropriate case, displaced by remuneration on that basis or by a mixed approach. That approach will not necessarily lead to different outcomes, in quantum, from a court applying a discretionary discount to hourly rates by reference to the factors specified in ss 473(10) and 504(2) of the Corporations Act.

Fourth, there will still be cases where the complexity of the issues in an insolvency, or the scarcity of assets, are such that the insolvency practitioner's remuneration for work that is reasonably necessary to address those issues, if charged at his or her ordinary rates, and costs and disbursements, would exhaust or substantially dissipate the assets of the insolvent estate, extinguishing or significantly reducing any return to creditors. That difficulty cannot always be resolved by a suggestion that the insolvency practitioner should not undertake that work, because that work may be required by statutory requirements, or because assets may not be recoverable, or a distribution to creditors may not be possible on any reasonable basis, without undertaking that work. Fifth, Courts will also continue to recognise that fairness, and necessity, require that insolvency practitioners are reasonably remunerated for their work, however the quantum of that remuneration is determined. Where insolvency practitioners are not bound to accept appointment in smaller or more complex insolvencies, then parties would potentially have difficulty in obtaining their consents to such appointments, and courts would have consequential difficulty in making such appointments, if those appointments were generally unprofitable for insolvency practitioners and their firms.

The Insolvency Law Reform Act 2016 (Cth) makes modest amendments to the process for remuneration of insolvency practitioners from the commencement of these amendments on 1 September 2017, subject to relatively complex transitional provisions. Creditors, a committee of inspection or the court are able to make a remuneration determination and the court has power to review such a determination.[20] A cap is required for remuneration that is determined on a time costing basis.[21] There is provision for appointment of a registered liquidator to review another insolvency practitioner's remuneration and costs or expenses, by resolution of the creditors and, subject to limitations, by one or more creditor(s).[22]

Extensions of time to register security interests

Section 588FL of the Corporations Act deals with vesting of PPSA security interests (defined in s 51 as, broadly, a security interest within the meaning of the Personal Property Securities Act) if collateral is not registered within time.

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[20] Insolvency Practice Schedule (Corporations) Div 60 Subdiv B.
[21] Insolvency Practice Schedule (Corporations) Div 60, s 60-10.
[22] Insolvency Practice Schedule (Corporations) Div 90, s 90-24.

The effect of s 588FL(2) is that, if a company is wound up, an administrator is appointed or a deed of company arrangement is executed, any PPSA security interest which was perfected, registered or enforceable after the later of six months before the critical time (as defined in s 588FL(7)[23]) or 20 days after the security agreement came into force or such later time as the Court may order under s 588FM vests in the company for the benefit of creditors and the secured creditor loses the benefit of the security.[24]

Section 588FM in turn allows a company or an interested person to apply to the court for an order fixing a later time for the purposes of s 588FL(2)(b)(iv). The court may make such an order if it is satisfied that: (1) the failure to register the collateral earlier was accidental or due to inadvertence or some other sufficient cause; or (2) is not of such a nature as to prejudice the creditors' or shareholders' position; or (3) it is just and equitable to grant relief: s 588FM(2). The case law indicates that that section is directed to late registration as distinct from a failure to register a security.[25] For example, in *Re Accolade Wines Australia Ltd* [2016] NSWSC 1023, the Court granted extensions of time for registration of securities under s 588FM of the Corporations Act and s 293 of the Personal Property Securities Act, where the application for those extensions of time was made in respect of apparently solvent companies, and prior to any insolvency administration. The recent case law indicates that an extension of time can be ordered under this section if a security interest was registered before the critical time, even if the application for an extension of time is brought after the company was placed in administration or liquidation, and s 267 of the Personal Property Securities Act does not apply to vest a security interest in the grantor in that situation.[26]

However, an extension under s 588FM is not available where a security interest existed and was unperfected immediately prior to and at the critical time, where that security interest vests in the grantor under s 267 of the Personal Property Securities Act rather than under s 588FL of the Corporations Act.[27] For example, in *Re OneSteel Manufacturing Pty Ltd (admins apptd)* (2017) 118 ACSR 307; [2017] NSWSC 21, Brereton J dealt with the position where a security interest had been registered against a corporate grantor's Australian business number rather than its Australian company number and that registration was not effective under ss 164 and 165

[23] The critical time is there defined, broadly, as the day of the event by which the winding up is taken to have begun or commenced under s 513A or 513B, in a winding up, and otherwise the section 513C day for the company.

[24] *Re Cardinia Nominees Pty Ltd* [2013] NSWSC 32 at [11]; *Re Black Opal Pty Ltd* [2013] NSWSC 1225 at [6]; *Re Appleyard Capital Pty Ltd, Re; 123 Sweden AB v Appleyard Capital Pty Ltd* (2014) 101 ACSR 629; [2014] NSWSC 782 at [8]; *4 in 1 Wyoming Pty Ltd* [2017] NSWSC 407 at [30].

[25] *Re Cardinia Nominees Pty Ltd* above at [11].

[26] *Re Quality Blended Liquor Pty Ltd* [2015] 2 Qd R 381; (2014) 102 ACSR 451; [2014] QSC 234 at [83]; *Re Carpenter International Pty Ltd* (2016) 307 FLR 37; 111 ACSR 477; [2016] VSC 118 at [127]; *Re OneSteel Manufacturing Pty Ltd (admins apptd)* (2017) 118 ACSR 307; [2017] NSWSC 21; *4 in 1 Wyoming Pty Ltd* [2017] NSWSC 407 at [55]; *Kaizen Global Investments Ltd, Re Australia New Agribusiness and Chemical Group Ltd (in liq) v Australia New Agribusiness and Chemical Group Ltd (in liq)* [2017] FCA 431.

[27] *Re OneSteel Manufacturing Pty Ltd (admins apptd)* above at [72]–[74], [82]; *NFT Specialized In Tower Cranes LLC v Machforce Pty Ltd (in liq)* [2017] WASC 95 at [80].

of the Personal Property Securities Act, and the company that had granted the security was placed in administration before any application was made to extend the time for registration of the security interest. His Honour held that the Court could not there make an order under s 588FM of the Corporations Act to extend the time for registration of the security interest, for the purposes of s 588FL(2)(b), because that interest was not perfected at the time administrators were appointed, and that unperfected security interest had vested in the company under s 267(2) of the Personal Property Securities Act. His Honour also held that such a vesting was not an acquisition of property other than on just terms for the purposes of s 252B of the Personal Property Securities Act or s 51(xxxi) of the Commonwealth Constitution.

Conclusion

I have sought to identify a number of recent developments in insolvency law. These include the introduction of the Insolvency Law Reform Act which, putting aside any wider benefits, is likely to give rise to a range of transitional issues in matters before the courts after 1 September 2017.

The proposed safe harbour provisions from insolvent trading liability will likely raise a range of practical questions, before any questions under them arise in the Courts. These will include the extent to which they will be available to and utilised by smaller proprietary companies, given the exclusions from them and any risk of liability for unpaid tax under director penalty notices; the extent to which trade creditors will seek contractual protections from directors to avoid, or at least ensure they have the opportunity to assess, the risk of dealing with a company which is under an informal restructuring; and the extent of losses suffered by a company’s new and existing creditors as a result of failed restructurings relying on the safe harbour provisions. They will also raise several questions of construction, which I have noted above, when they reach the courts.

I have also noted developments in the case law, including as to complex creditors’ schemes of arrangement; the consensus developing in the case law that the statutory priorities do not apply to assets held by companies in trust; issues as to liquidators’ remuneration; and the case law as to extensions of to register personal property security interests within time.