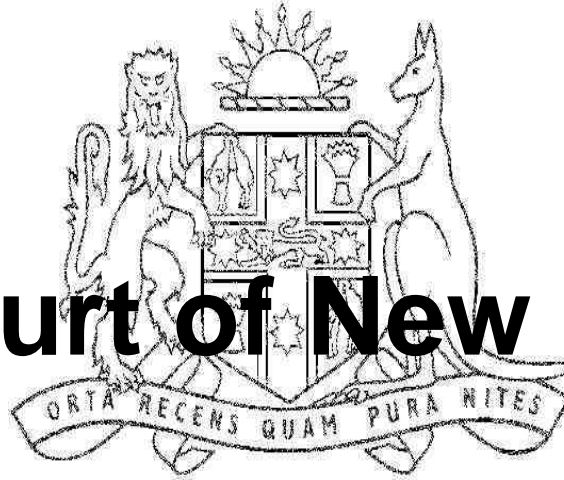


Supreme Court of New South Wales



ARITA NATIONAL CONFERENCE

9 August 2017

Recent developments in insolvency

Agenda

- Likely impact of the Insolvency Law Reform Act in court proceedings
- Wider issues in insolvency law reform
- Safe harbour from insolvent trading liability and ipso facto clauses
- Case law
 - creditors' schemes of arrangement
 - issues in liquidation of trustee companies
 - issues as to liquidators' remuneration
 - extensions of time to register security interests

Insolvency Law Reform Act

- Several sections commonly used in Court applications are repealed and others amended
 - ss 449B and 503 (removal of administrator or liquidator) repealed – new provisions in Insolvency Practice Schedule (Corporations) Div 90 (allows creditors to remove insolvency practitioner and confers supervisory powers on Court)
 - ss 447D, 479 and 511 (directions to administrator and liquidator and determination of questions in a voluntary liquidation) repealed – new provisions in Insolvency Practice Schedule (Corporations) Div 85 (creditors may give directions to external administrators and Div 90 (Court may give directions)
 - ss 447E and 536 (supervision of administrator of company or deed of company administration or liquidator) repealed – new provisions in Insolvency Practice Schedule (Corporations) Divs 45 and 90
 - Insolvency Practice Schedule (Corporations) Div 100 – external administrator can assign right to sue conferred by Corporations Act, but court approval required after action has begun
- Complex transitional provisions

Safe harbour from insolvent trading liability

- When the safe harbour applies under s 588GA(1)
 - person who starts to suspect the company may become or be insolvent starts developing one or more courses of action that are reasonably likely to lead to a better outcome for the company
 - debt incurred directly or indirectly in connection with that course of action in specified time period
- Matters relevant to whether course of action reasonably likely to lead to better outcome under s 588GA(2):
 - properly informed of company's financial position
 - taking appropriate steps to prevent misconduct that could adversely affect ability to pay debts
 - taking appropriate steps to ensure company is keeping appropriate financial records
 - advice from appropriately qualified entity
 - developing or implementing plan for restructuring to improve company's financial position
- Evidential burden on director under s 588GA(3)

Safe harbour from insolvent trading liability (2)

- Exclusions from safe harbour under s 588GA(4)-(5)
 - when debt incurred, company failing to pay employee entitlements when due or give returns etc as required by taxation law
 - failure amounts to less than substantial compliance with obligation and one of 2 or more failures to do those matters during 12 month period ending when debt incurred
 - substantial failure to furnish information or reports to external administrator
 - exclusions displaced if court is satisfied on application under s 588GA(6) that failure due to exceptional circumstances or otherwise in interests of justice to make order
- Information not delivered to administrator not admissible to establish safe harbour under s 588GB, unless court relieves from exclusion

Developments in case law

Creditors' schemes of arrangement

- Order restraining proceedings without leave pending determination of scheme under s 411(16) - *Re Boart Longyear Ltd* [2017] NSWSC 537
- 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
- Composition of classes - *First Pacific Advisors LLC v Boart Longyear Ltd* [2017] NSWCA 116
- Second hearing for approval of schemes contested

Issues in liquidation of trustee companies

- s 556 does not apply to assets held in trust and beneficially owned by parties other than the company - *Re Independent Contractor Services (Aust) Pty Ltd (in liq) (No 2)* (2016) 305 FLR 222, approved in *Woodgate, In the matter of Bell Hire Services Pty Ltd (in liq)* [2016] FCA 1583, *Re Amerind Pty Ltd (recs and mgrs apptd) (in liq)* [2017] VSC 127; *Kite v Mooney, in the matter of Mooney's Contractors Pty Ltd (in liq) (No 2)* [2017] FCA 653

Case law (2)

- Liquidators' remuneration
 - Most decisions in both State Supreme Courts and in the Federal Court of Australia have applied time costing at least as starting point
 - Court of Appeal in *Sanderson, as liquidator of Sakr Nominees Pty Ltd (in liq) v Sakr* [2017] NSWCA 38 - does not require a time-based approach to remuneration to be adopted in preference to a percentage-based approach to remuneration
 - Subsequent decisions - *Combis, Re Reehal Holdings Pty Ltd (in liq) (Trustee) v Reehal Holdings Pty Ltd (in liq) (Trustee)* [2017] FCA 793 at [32]; *Royds v Royds, Re Caloola Holdings Pty Ltd (in liq)* [2017] FCA 731; *Sakr Nominees Pty Limited* [2017] NSWSC 668; *Re Hunter Valley Dental Surgery Pty Ltd (in liq)* [2017] NSWSC 691
 - Insolvency Law Reform Act makes modest amendments
- Extensions of time to register security interests
 - *Re Accolade Wines Australia Ltd* [2016] NSWSC 1023
 - *Re OneSteel Manufacturing Pty Ltd (admins apptd)* (2017) 118 ACSR 307