

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- Several sections commonly used in Court applications are repealed and others amended
 - ss 449B and 503 (removal of administrator or liquidator) repealed new provisions in Insolvency Practice Schedule (Corporations) Div 90 (allows creditors to remove insolvency practitioner and confers supervisory powers on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479 and 511 (directions to administrator and liquidator and determination of questions in a voluntary liquidation) repealed – new provisions in Insolvency Practice Schedule (Corporations) Div 85 (creditors may give directions to external administrators and Div 90 (Court may give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 - ss 447E and 536 (supervision of administrator of company or deed of company administration or liquidator) repealed – new provisions in Insolvency Practice Schedule (Corporations) Divs 45 and 90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