

# INSOLVENCY LAW JOURNAL

Volume 25, Number 2

July 2017

EDITORIAL ..... 57

## ARTICLES

### **The Consequences of a Corporate Trustee Entering Insolvency – Andrew Berriman**

The law surrounding the insolvency of corporate trustees has been rife with uncertainty for more than 30 years. This is in large part because the *Corporations Act 2001* (Cth) assumes that the corporation entering into insolvency is the beneficial owner of its assets. Usually, the primary asset of the insolvent corporate trustee is the trustee's equitable lien and indemnity that traces into the trust assets. Accordingly, the nature of the asset complicates the liquidator's statutory tasks. This article attempts to succinctly state the law in relation to those tasks and demonstrate that the cardinal principle of the law is that the insolvency must be conducted in accordance with the trust and its associated obligations. Further, it analyses the sources of power available to the liquidator to dispose of trust property and challenges the long-held assumption that the liquidator obtains the equitable lien and indemnity upon the entry of the corporate trustee into insolvency. The former is identified as a clear case for targeted law reform. ....

59

### **Timing is Everything: When Should a Security Be Valued for the Purpose of s 588FA(2) of the Corporations Act 2001 (Cth)? – Meena Hanna**

The issue of when a security should be valued for the purposes of the unfair preferences regime remains unresolved notwithstanding recent professional and judicial commentary. Commercial and practical consequences of this unsettled question of law have been exacerbated by conflicting judicial positions. This article seeks to identify the most appropriate position of the three competing possibilities – ie whether the security should be valued at: the date the security is granted; the date of the transaction sought to be avoided; or the date of the insolvent company's liquidation. This article canvasses the history of the preference payment regime, and undertakes an exercise of statutory interpretation having regard to the relevant provision's text, context, legislative history and purpose. It considers the countervailing arguments for and against each of the three possibilities, discusses the international position of comparative jurisdictions, and ultimately concludes that valuing the security at the date of liquidation is the appropriate view in the Australian legislative regime. ....

73

## RECENT DEVELOPMENTS – Dr David Morrison

**Does Holding Out Subvert the Intention of Part 5.3A? .....** 90

## REPORT FROM NEW ZEALAND – Lynne Taylor

**Cabinet Adopted Changes to New Zealand's Insolvency Practitioner Regulatory Regime .....** 98