

# INSOLVENCY LAW JOURNAL

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## ARTICLES

### **When general powers become unconstitutional: s 447A and the infringement of the separation of powers doctrine – Dr Rebecca Collins**

The enactment of the *Corporations Act 2001* as a Commonwealth law subject to the separation of powers doctrine coupled with the current interpretation of s 447A as conferring plenary powers, is a potent combination for successfully challenging the constitutional validity of s 447A in an appropriate case. This article discusses the limitations imposed by the separation of powers doctrine, and in particular the *Boilermakers'* principle, on the powers which may be validly conferred on a Federal Court. It argues that s 447A, as interpreted by the courts, appears to confer legislative powers on a Federal Court and thereby infringes the separation of powers doctrine. In the alternative, it argues that, by means of s 447A, the Commonwealth legislature purports to confer non-judicial powers on the Federal Court and thereby contravenes the *Boilermakers'* principle. It is suggested that, to the extent that the unconstitutionality of the section is a function of how widely the court construes the section, the *Boilermakers'* principle should inform the courts' interpretation of the section to avoid a constitutional challenge. Finally, those parties likely to have an interest in challenging the constitutional validity of s 447A are identified. .... 72

### **Electronic payments and the pull back – Robin Edwards**

When a payer receives nothing in return for his or her payment and the payee becomes bankrupt or goes into liquidation, the payer will often attempt to revoke the payment. Whether the payer can do this will depend on the form of payment. The cash payer is in the worst position and will become an unsecured creditor whilst other forms of payment such as cheques, credit cards and possibly electronic payment may allow revocation of payment. It is undesirable that the payment position can vary so radically depending on the method of payment. A uniform outcome would seem desirable and there may be an argument on consumer protection grounds to allow the payer to recover small payments where the payer has received nothing in return. .... 81

### **Tracing into an overdrawn mixed bank account – Susan Barkehall Thomas**

This article examines the rights of trust beneficiaries to recover their money when it has been held in an account which has gone into overdraft. The traditional position is that a beneficiary cannot trace into an account which has gone into overdraft after the beneficiary's money is deposited. The rules which govern this position are the "nil balance rule" and the "lowest intermediate balance rule". This article considers how the rules are related and how they are applied to trust accounts in which beneficiary moneys are mixed. The argument is developed that it may not be appropriate for the "nil balance

rule” to apply in such cases. Instead, it may be appropriate to treat funds in which beneficiary moneys have been mixed as “blended” funds, in which no beneficiary can point to specific property, and in relation to which the “nil balance rule” has no operation. If this is the case, the timing of contributions will become irrelevant, and beneficiaries will be able to share equally in any balance subsequently deposited in the account. .... 95

**Who wants to be a deemed director? – *Peter Agardy***

The *Corporations Act 2001* (as well as other legislation) imposes personal obligations on directors of companies. For example, a director can be personally liable for the debts of the company if there has been insolvent trading. The effect of the extended definition of “director” in the Act is that others, who have not been appointed and who may not consider themselves to be directors, could also be at risk. This article considers the risks for deemed directors, with special emphasis on professional advisers. It also suggests precautions to minimise those risks. .... 104

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5. Austin, n 4, p 56.

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7. Sheehy et al, n 6 at 221.

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