

INSOLVENCY LAW JOURNAL

Volume 12, Number 4

December 2004

EDITORIAL	209
-----------------	-----

ARTICLES

Insolvent trading – An empirical study – Paul James, Ian Ramsay and Polat Siva

This article is an empirical study of judgments of Australian courts which have dealt with insolvent trading by directors. A director of a company who allows their company to trade while insolvent may be held personally liable for the debts incurred by the insolvent company. The article commences by an examination of the law of insolvent trading and the policy arguments relevant to the duty imposed on directors to prevent insolvent trading. The issues examined in the study include (1) the distribution of insolvent trading cases over time; (2) the distribution of cases according to the type of legal action (ie whether criminal or civil); (3) the distribution of cases between different courts; (4) the proportion of cases in which the defendant is found liable for insolvent trading and the amount of compensation ordered to be paid by directors found liable for insolvent trading; (6) the type of company which it is alleged has traded while insolvent (ie public or private) and the type of business the company undertook; (7) the type of director alleged to have engaged in insolvent trading (ie executive director, non-executive director, chairperson, de facto director, shadow director); (8) the type of action alleged to be the incurring of the debt for the purposes of insolvent trading; (9) whether the defendant director argued that a defence applied and whether the defence was successful; and (10) who was the plaintiff (ie creditor, liquidator or regulator)210

Miracle workers or ambulance chasers? The role of administrators in the Part 5.3A process – Colin Anderson

This article considers the role of the administrator under a voluntary administration and also briefly under a deed of company arrangement. There has been some criticism that the procedure does not permit proper standards to apply to administrators and this article seeks to examine that question and, in doing so, rejects some of that criticism. The article examines how an administrator may be removed by the court as well as outlining the duties of the administrator under the legislation. The issue of the fiduciary duties of the administrator is also considered. As a result of this discussion it is argued that with proper supervision by ASIC, as the registering authority for administrators, the current method of appointment of administrators by directors should remain. However, it is suggested that the administrator should not have a casting vote in relation to deadlock between the number and value of creditors as this unnecessarily reduces the administrator's perceived independence. The article concludes by providing a broader policy analysis which focuses on why an independent administrator is a preferred option to the North American model of debtor in possession and how this may be consistent with economic efficiency.....238

RECENT DEVELOPMENTS

Flexibility in the 21 day time limit to set aside a statutory demand: The element of fairness considered.....	256
--	------------

REPORT FROM NEW ZEALAND

Individual Insolvency Law Reform – At last!	259
--	------------

VOLUME 12

Table of authors	271
Table of cases	273
Index	279

GUIDELINES FOR CONTRIBUTORS

Submission and licence agreement instructions

All contributions to the journal are welcome and should be sent, with a signed licence agreement, to the Production Editor, *Insolvency Law Journal*, Lawbook Co., PO Box 3502, Rozelle, NSW 2039 (mail), 100 Harris St, Pyrmont, NSW 2009 (courier) or by email to insolvjl@thomson.com.au, for forwarding to the Editor. Licence agreements can be downloaded via the internet at http://www.lawbookco.com.au/authorsupport/d_authorJournals.asp. If you submit your contribution via email, please confirm that you have printed, signed and mailed the licence agreement to the attention of the Production Editor at the mailing address noted above.

Letters to the Editor

By submitting a letter to the editor of this journal for publication, you agree that Thomson Legal & Regulatory Limited, trading as Lawbook Co., may edit and has the right to, and may license third parties to, reproduce in electronic form and communicate the letter.

Manuscript

- Manuscript must be original, unpublished work that has not been submitted for publication elsewhere.
- Personal details (name, qualifications, position) for publication and a delivery address, email address and phone number must be included with the manuscript.
- Manuscript must be submitted electronically via email or on disk in Microsoft Word format.
- Manuscript should not exceed 15,000 words for articles or 1,500-2,000 words for section commentary or book reviews. An abstract of 100-150 words is to be submitted with article manuscripts.
- Proof pages will be sent to contributors. Authors are responsible for the accuracy of case names, citations and other references. Excessive changes to the text cannot be accommodated.
- Contributors of articles receive 25 free offprints of their article and a copy of the part in which the article is published. Other contributors receive a copy of the part to which they have contributed.
- Articles published are critically appraised or reviewed by an academic or professional peer of the author for the purpose of maintaining the standards of the journal.

Style

1. **Levels of headings should be clearly indicated (no more than four levels).**
2. **Cases:**
 - Case citation follows case name. Where a case is cited in the text, the citation should follow immediately rather than as a footnote. Give at least two and preferably all available citations, the first listed being the authorised reference.
 - Australian citations should appear in the following order: authorised series; Lawbook Co./ATP series; other company series (ie CCH, Butterworths); media neutral citation.
 - "At" references should only refer to the best available citation, eg: *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 34; 66 ALJR 408; 107 ALR 1.
 - Where only a media neutral citation is available, "at" references should be to paragraph, eg: *YG v Minister for Community Services* [2002] NSWCA 247 at [19].
 - For international cases best references only should be included.
3. **Legislation should be cited as follows:**
Trade Practices Act 1974 (Cth), s 51AC. The full citation should be repeated in footnotes.
4. **Books should be cited as follows:**
Macken JJ, O'Grady P, Sappideen C and Warburton G, *The Law of Employment* (5th ed, Lawbook Co., 2002) p 55.
 - In footnotes do not use ibid or op cit. The following style is preferred:
 4. Austin RP, "Constructive Trusts" in Finn PD (ed), *Essays in Equity* (Law Book Co, 1985).
 5. Austin, n 4, p 56.
5. **Journals should be cited as follows:**
Odgers S, "Police Interrogation: A Decade of Legal Development" (1990) 14 Crim LJ 220.
Wherever possible use official abbreviations not the full name for journal titles.
 - In footnotes do not use ibid or op cit. The following style is preferred:
 6. Sheehy EA, Stubbs J and Tolmie J, "Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations" (1992) 16 Crim LJ 220.
 7. Sheehy et al, n 6 at 221.
6. **Internet references should be cited as follows:**
Rickatson S, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (Lawbook Co., subscription service) at [16.340], <http://subscriber.lawbookco.com.au> viewed 25 June 2002. Underline the URL and include the date the document was viewed.

For further information visit the Lawbook Co. website at <http://www.lawbookco.com.au> or contact the Production Editor.

SUBSCRIPTION INFORMATION

The *Insolvency Law Journal* comprises four parts a year.

Customer Service and sales inquiries:

Tel: 1300 304 195

Fax: 1300 304 196

Web: www.lawbookco.com.au

Email: LRA.Service@thomson.com

Editorial inquiries:

Tel: (02) 8587 7000

HEAD OFFICE

100 Harris Street PYRMONT NSW 2009

Tel: (02) 8587 7000 Fax: (02) 8587 7100



© Thomson Legal & Regulatory Limited ABN 64 058 914 668 trading as Lawbook Co.

ISSN 1039-3293

Typeset by Lawbook Co., Pyrmont, NSW
Printed by Ligare Pty Ltd, Riverwood, NSW