

INSOLVENCY LAW JOURNAL

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EDITORIAL 133

ARTICLES

The constitutional basis of s 447A: Is it a power without limit? – Jason Harris

Section 447A of the *Corporations Act 2001* (Cth) provides the court with a unique power that allows it to mould the voluntary administration process to suit the needs of individual companies. The enactment of a federal corporations statute in 2001 has brought into question whether this power fits within the constitutional limitations that are imposed on federal law-making power. The suggestion has been raised recently that the power is so broad that it is constitutionally invalid. This article argues that the power is constitutionally valid principally on the basis that, despite its potential for broad application, the power has defined limits which retain its status as a judicial power. 135

Section 564: Creditor funding and preferential distributions – Kevin Kee

Section 564 of the *Corporations Act 2001* (Cth) provides a mechanism by which creditors of a company in a winding up are encouraged to fund the liquidator's activities in relation to the recovery, protection or preservation of property of the company (and the incurring of other expenses). It achieves this aim by empowering the court to order the preferential distribution of the property recovered, protected or preserved (or expense recovered) to those creditors who provided the funding. It is the purpose of this article to examine: the circumstances in which the court has a discretion to make an order under s 564 (including possible areas of reform for s 564 arising from this examination); how the court's discretion is to be exercised; and further areas of reform for s 564. 150

Creditor participation in insolvency proceedings – towards the adoption of international standards – Professor Roman Tomasic

Effective creditor participation in insolvency proceedings has been widely seen as an essential feature of any well-developed insolvency administration system. This notion has been expressed in different ways in national systems of insolvency law, ranging from principles such as the *pari passu* rule and the conduct of creditor meetings to decide matters of importance in the insolvency proceedings, to the role of insolvency representatives in such proceedings. The last decade has seen the emergence of a number of multilateral efforts to more clearly articulate insolvency norms or "best practice" guidelines; these have included such outcomes as the Asian Development Bank's 2000 Good Practice Standards, the World Bank and International Monetary Fund's 2005 draft Principles for Effective Insolvency and Creditor Rights Systems and the monumental 2004 UNCITRAL *Legislative Guide on Insolvency Law*. The emergence of these multilateral statements has recognised the regional and global significance of insolvency laws and the role that they play in providing a foundation for a market economy. This article examines the creditor participation standards evident in this body of international best practice norms. Ultimately, it is argued that creditor participation in insolvency is an essential element in a rule of law based market economy. 173

RECENT DEVELOPMENTS – <i>Dr David Morrison</i>	
More on bankruptcy notices – lessons from history?	188
The complex interaction of limitation of actions and bankruptcy legislation	192
Co-operatives and a liquidator’s power to examine	194
Australian Securities and Investments Commission v Edwards [2006] NSWSC 376 (5 May 2006)	195
REPORT FROM NEW ZEALAND – <i>Lynne Taylor</i>	
Reckless trading: the Court of Appeal speaks in Mason v Lewis	199

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