

---

# Index

---

## Administration

Corporations and Markets Advisory Committee (CAMAC) proposals

external administration, 43, 45–46

voluntary administration, 43–46

pooling of assets, 90–95

regimes in Australia and United Kingdom, 118

winding up options, 44

## Administrator

appointment of, 224, 226

Harmer Report approach, 224, 227

insolvency of franchisor, where, 26, 27

proposals by CAMAC

disclosure where issue of s 443B(3) notice, 44

inability to attend second meeting, where, 44

website publication of creditor's details, proposal by CAMAC, 44

remuneration of administrator, 44

## Agency

traditional theories of, 224

## Australian Competition and Consumer Commission (ACCC)

franchisor insolvency, demarcation of responsibilities, 31

## Australian Law Reform Commission (ALRC)

personal property securities recommendations, 81

## Australian Securities and Investments Commission (ASIC)

CAMAC proposals for changes to powers, 45

electronic communications for creditors, 45

franchisor insolvency, administration role, 31

pooling directions, powers where, 93

regulation of practitioners' professional standards, 67

## Bankruptcy

considered business decision, as, 28–29

consumer bankruptcy systems, 118

contingent liability for insolvent trading, 102, 103–104, 106

decision in *Khouzame v The Leasing Centre*, 54–57

costs, 56

principles, 56–57

proof of debt, 55–56

sequestration orders, 54–56

trustees, implications for, 57

harmonisation of federal and state regimes, 43

relief for foreign representatives, 46–54

sham and alter ego trusts, 181–184

## Bankruptcy notices

## Index

---

compliance, importance of, 198–199  
counter-claim, set-off or cross demand, 106–108  
court's power to set aside, 106, 108  
decision in *Khera v Jones*, 106, 107–108  
    facts, 107  
service of, 195, 198–199, 210  
    calculating method and date of service by post, 195, 198  
    Document Exchange, by, 198  
    effective service, 195, 198–199, 210  
    elements of proposed code for, 195, 210  
    evidence of non-receipt, 199  
    “last known address”, 198  
    “ordinary course of post”, 195, 210  
    valid service, evidence of, 195, 199

### **Book reviews**

International insolvency law: Themes and Perspectives, 117–120

### **Code of Professional Practice for Insolvency Practitioners**

aspects of, 67  
limitations, 67  
release, 67

### **Company liquidations**

flow-on effect of collapse of US major financial institutions, 125  
statutory derivative actions, issues regarding, 7–25  
    applicant's conduct, 21  
    applications for leave, 9–10, 19, 23–24  
    conflicting judicial views, 10–12, 24  
    costs, 17, 23–24  
    court's inherent jurisdiction, 13–16, 25  
    empirical studies, 23  
    exceptional circumstances, where, 7, 16, 19  
    leave criteria, 16–18  
    liquidator's recovery actions, 20–21  
    liquidator's views on prospects of litigation, 21–22, 25  
    rejection by liquidator, 12–13  
    settlement funds, 18  
    standing of company members and other persons, 9–10, 13–16, 24–25  
    statutory jurisdiction, 13–16  
    usefulness of action, 20

### **Corporate Law Economic Reform Program (CLERP)**

policy statement, 46

### **Corporate Law Economic Reform Program Act 1999 (Cth)**

statutory derivative action, 7–8, 11, 13, 25  
    ratification, 24

**Corporations Act 2001 (Cth)**

- amendments, 5, 43, 84–85, 88–90, 92, 95–96
- debtor's property, under, 5
- director liability, 224
- directors' indemnities Pt 5.7B, 240–246
- franchisor's insolvency, under, 26, 36–37
- insolvent franchisee, where, 108–111
- Romalpa clauses, under, 69, 73, 74, 77, 79–82
- shareholders' interests under Pt 5.3A, 222–234
  - background, 223–225
  - comparisons, 225–228
  - external administration, where, 225, 226
  - indirect influence, 224
  - operation of rescue regimes, 228–230
  - recent amendments, 230–233
  - retrospective order under s 447A, 232–233, 237
  - takeover provisions, operation of, 232–233
  - voluntary liquidation, in initiating, 226–228, 233
- statutory derivative actions, under, 7, 9–10
- statutory notices of demand, under, 97, 185–188, 195, 196–198, 211–221
- unfair preferences and “relation-back day” under s 513C, 235–240
- voidable transactions, CAMAC proposals for changes, 45

**Corporations Amendment (Insolvency) Act 2007**

- changes under, 43, 85, 88, 90, 95–96, 125
- effectiveness of, 85–96
- remuneration of insolvency practitioners, 125

**Corporations and Markets Advisory Committee (CAMAC)**

- discussion paper proposals, 43
  - external administration matters, 43, 45
  - liquidation, 44–45
  - receivership, 45
  - voluntary administration, 43–44, 233
- government response to proposals, 46
- submissions, date for, 46
- takeovers, 233

**Corporations and Securities Advisory Committee (CASAC)**

- pooling objectives and recommendations, 94–95

**Costs orders**

- directors' indemnities in insolvency, 240, 243–243, 245–246

**Cross-border insolvency**

- corporation's “centre of main interests” (COMI), 127–149
- foreign representatives, relief for, 46–47
  - case decisions in USA courts, 47–54

## Index

---

- implications of case decisions, 54
- Re Iida, 47–51, 54
- Re Jonathan A Loy, 51–54
- international insolvency law see **International insolvency law**
- overseas franchisor, where, 32–33, 42
- UNCITRAL MODEL Law see **UNCITRAL MODEL Law**
- Deed of company arrangement (DOCA)**
- CAMAC proposals for creditor notification by deed administrator, 44
- creditors bound by, 44
- employees, mandatory provisions for voluntary administration, 87–90
- High Court decision in International Air Transport Association v Ansett Australia Holdings, 5
  - clearing house arrangements, 5, 6
  - implications for parties, 6
- pooling of assets, 91
- Queensland Supreme Court decision in Re Octaviar Ltd (formerly MFS Ltd), 239–240
- shareholders' interests, where, 234
- Directors' indemnities**
- background to Pt 5.7B of Corporations Act, 240–241
- compensation for benefit of creditors, 240
- costs orders, 240, 243–243, 245–246
- decision in Commissioner of Taxation v Sims, 240, 243–246
  - appellate court decision, 243–244, 246
  - facts, 241–242
  - implications, 244–6
  - prior decision, 242–243
- statutory framework, 241
- Director's penalty notices (DPNs)**
- aspects of director's liability, 199, 206, 208–209
  - cases, 200, 209–210
- ATO Decision Impact Statement, 208
- compliance, 199, 206–210
- Deputy Commissioner of Taxation v Meredith, 198, 202–209
  - appeal decision facts, 202–204
  - consideration of decision, 205–208
  - implications of decision, 208–209
- purpose of scheme, 199, 206–208
- service of, 195, 199, 201–209
  - calculating method and date of service by post, 195, 199, 205–6, 209–10
  - cases, 201–209
  - effective service, 195, 201, 207–208, 209–210
  - elements of proposed code for, 195, 210
  - evidence of non-receipt, 201–204

“last known address”, 203  
“ordinary course of post”, 195, 210  
valid service, evidence of, 195, 199

**Employees**

creditor protection priority, 88–90  
franchisee, as, 27, 30–31  
mandatory provisions for voluntary administration, 87–90

**Foss v Harbottle**

exceptions to rule, 8, 9

**Franchise**

defective, where, 39  
definition, 26  
Official Assignee v Johnson, 60–62

**Franchisee**

franchise agreement, 30, 31–35, 37–41, 60–62, 109  
    “assets” as, 38–39  
    disclaimer by franchisor's liquidator, 32  
    pre-purchase disclosure, 29–30  
franchisor/franchisee relationship, 27, 29–30, 32  
    reward sharing, 29  
interests where insolvent franchisor, 26–42  
    challenges, 40–42  
    components of investment not recognised, 35–37  
    consumer protection, 29, 31, 41  
    contractual issues, 26, 37–38  
    insolvency law, under, 38–40  
    legal liabilities, 27–9, 32  
    legal rights, 29–31  
    liquidator's powers, 32, 35, 38, 39, 40, 41  
    minimal personal liability, 40–41  
    overseas franchisor, where, 32–3, 42  
    possible worst-case scenario, 40  
    trademark protection and goodwill, 38–39, 41  
lease of premises, where, 32, 33, 39  
    Australian premises occupancy outcomes, 33–35  
    master franchise agreement, under, 33, 41  
risk taking, 27, 28–29, 31–2, 40–41  
roles and rights, 27–29, 41–42  
    creditor, as, 27, 39–40, 41  
    “debtor” franchisee, as, 40  
    employee, as, 27, 30–31  
    financier, as, 28  
set off of mutual credits where insolvent franchisee, 108–110

## Index

---

- contingent liabilities, implications, 109–111
- JLF Bakeries v Baker's Delight Holdings, 108–111
- s 553C set off, 108, 109–111
- Sydney retail franchise, outcomes for, 36–37, 40–41
- Franchising Code of Conduct**
- contracts under, 26, 29–31
  - problems where insolvency of franchisor, 27, 31
- disclosure provisions, 31
- Franchisor**
- contract with franchisee, 26–27, 31–35
  - Official Assignee v Johnson, 60–62
- franchisee as labour force, 27, 30–31
- insolvency of, 26–42
  - indicators of impending insolvency, 35
  - strategic insolvency, 29
- owner of right, 26
- Harmer Review Committee**
- court ordered pooling, 93–94
- recommendations, 109, 216, 224
- voluntary administration, shareholders' role in, 224, 227
- Insolvency laws**
- Australian corporate insolvency regime, 43, 84–96
  - amendments to, 43, 85, 230–233
  - efficiency of distribution and transaction costs, 86–87, 95
  - issues relating to costs of insolvency practitioners, 125
  - jurisdictions issues, 127–129, 148
  - multiple purposes, 85–86
- creditor protection priority, 87–95, 222, 233
  - employee entitlements, 87–90
  - pooling of assets, 90–91
  - superannuation guarantee charge, 87–90, 95
- cross-border insolvency see **Cross-border insolvency**
- Cross-border insolvency**
- efficacy of, 5
- franchisee, rights of see **Franchisee**
- government response to CAMAC proposals, 46
- international insolvency law see **International insolvency law**
- International insolvency law**
- New Zealand, in see **New Zealand**
- shareholders' interests, under, 222–223, 228, 233–234
  - Australian context, in, 229–233
  - debt for equity swaps, where, 233
  - Harmer Report approach, 224, 227

- New Zealand, in, 226
- United Kingdom, in, 225–226
- United States and Canada, in, 226, 229
- Insolvency Practitioners Association of Australia (IPAA)**
- code of professional practice, 67
  - limitations, 67
- pooling determinations and orders, 91
- Insolvency procedures**
- High Court decision in *International Air Transport Association v Ansett Australia Holdings*, 5
  - dissenting judgment, 5
  - implications for parties, 6
- remuneration of insolvency practitioners, 125
- shareholders' interests see **Shareholders**
- statutory derivative actions see
- Statutory derivative actions**
- statutory notices of demand, 97, 195, 196, 211, 214
  - decision in *Aussie Vic Plant Hire v Esanda Finance Corp*, 97–99, 211–12, 214, 217–21
  - decision in *Jahe Pty Ltd v Aquatic Leisure Technologies Pty Ltd*, 185–188
- Williams v Scholz*, 99–102
  - defences, 100
  - facts, 99
  - findings, 101
- Insolvent trading**
- claims, practice points for, 99, 102
  - insolvency, indications of, 99–100
  - proof of debts, 100–101
  - reasonable grounds for suspecting insolvency, 100–101
  - substantive points of law, 101
  - Williams v Scholz*, 99–102
- contingent liability, for, 102, 103–104
  - decision in *Buzzle Operations v Apple Computer Australia*, 102–106
- equitable contribution for, 102, 104–106
- Interest rates**
- concern, 5
- International Air Transport Association (IATA)**
- High Court decision on *Ansett "clearing house" arrangements*, 5–6
- International insolvency law**
- background, 127–131
- book review, 117–120
- corporation's "centre of main interests" (COMI), 131–149
  - Australian legislation, under, 128–131, 136–137, 148–149
  - creditors' preference, 146

## Index

---

- headquarters, 146–148
- how should concept be interpreted?, 144–148
- judicial interpretation, 134–144
- meaning of, 129, 131–148
- objective criteria utilised, 139–144
- presumption in favour of registered office, 137–139
- principal place of business, 146–148
- European Union Council Regulation on Insolvency Proceedings, 127, 131–134, 136, 145
  - cases, 139–144
  - rebuttable presumption, under, 138–139, 145–146
- jurisdictions, co-operation between, 127–129, 148
- UNCITRAL MODEL Law see **UNCITRAL MODEL Law**
- Khouzame v The Leasing Centre**
  - decision of Federal Magistrates Court, 54–55
    - costs, 56
    - facts, 54–55
    - principles, 56–57
    - proof of debt, 55–56
    - sequestration orders, 54–56
  - trustees, implications for, 57
- Liquidation**
  - Corporations and Markets Advisory Committee (CAMAC) proposals, 44–45
  - Gibbons v LibertyOne Ltd, 226
  - pooling of assets, 90–95
  - Rafferty's Resort case, 235–239
    - facts, 236–236
    - law reform issues, 238
    - potential unfair preferences, 236
    - section 447A, 237–239
    - slip rule, 237–238
    - voluntary administrators, optimum role, 237–238
  - shareholders' interests see **Shareholders**
  - statutory derivative actions, where see **Statutory derivative actions**
  - unfair preferences and “relation-back day” under s 513C, 235–240
- Liquidator**
  - insolvency of franchisor, where, 27
    - powers, 32, 35, 38, 39, 40, 41
  - pooling determination, 91, 92–93
  - postal voting by creditors, CAMAC proposals for change, 45
  - remuneration of, CAMAC proposals for change, 44
  - replacement of, CAMAC proposals for, 45
  - statutory derivative actions, 7, 18, 20, 25

litigation prospects, 7, 21–22, 25  
recovery actions or derivative proceedings, 20–21  
role in rejecting, 12–13, 25  
views on prospects of litigation, 21–22

**New Zealand**

arrangements under Insolvency Act, 247–249  
bankruptcy procedure, 247, 249  
Companies Act 1993, insolvency practitioners under, 150–151, 153–180  
    committees of creditors, 170  
    court orders, 171–176  
    court supervision of liquidators and administrators, 171–174  
    dispensing with creditors' review of liquidator's appointment, 168  
    first meeting of creditors, 164–168  
    further amendments proposed for, 155, 176–180  
    involuntary appointments, 162–163  
    liquidation committees, 170  
    meeting procedure, 165–166  
    meetings of creditors, 169–170  
    meetings of shareholders, 169  
    office of liquidator and administrator, 155  
    ongoing supervision of liquidators and administrators, 169–176  
    orders enforcing duties and prohibitions, 174–175  
    orders terminating a liquidation, 176  
    orders to repay money or return property, 175–176  
    process of appointment, 162–164  
    qualifications of liquidators and administrators, 156–161  
    register of companies, 170  
    replacement liquidators or administrators, appointment of, 166–168  
    successful applications against liquidators, 177–178  
    vacancies in office, 168–169  
    voluntary appointments, 163–164  
Companies Amendment Act 2006, 150–151, 152, 157, 160, 164, 167, 176–180  
company liquidations, numbers of, 152–153  
defeating creditors, 58  
    Official Assignee v Johnson, 60–62  
    Official Assignee v Wilson, 181–184  
    Regal Castings Ltd v Lightbody, 58–60  
    s 47 of Property (Relationships) Act 1976, under, 60–62  
    s 60 of Property Law Act 1952, under, 58–60  
directors and phoenix companies, 112–116  
    amendment to Companies Act 1993 (NZ) for inappropriate phoenix arrangements, 116  
    claim for breach of s 131(1) of Companies Act 1993, 113–114  
    facts in *Robb v Sojourner*, 112–113

## Index

---

- relief under s 301 of Companies Act 1993, 115–116
- insolvency practitioners, regulation of, 150–180
  - background, 151–155
  - lessons from the existing regulatory framework, 176–180
  - regulatory framework, 155–180
- licensing scheme for insolvency practitioners, 151–180
  - competitive licensing, 153–154, 179
  - Discussion Document, 151–153
  - Law Commission report, 151
  - negative licensing scheme, 154–155, 180
  - opposition by industry bodies, 151, 153–154
  - voluntary accreditation, 179–173
- no-asset procedure under Insolvency Act 2006, 247–249
  - application by Assignee, 247
  - aspects of entry, 247–248
  - discharge, 249
  - effect of debtor's entry, 248
  - fast uptake of, 249
  - long-term consequences of, 249
  - statistics from Insolvency and Trustee Service's website, 249
  - termination, 248
- Official Assignee, 162, 163, 170–171
  - Official Assignee v Johnson, 60–62
  - Official Assignee v Wilson, 181–184
- sham and alter ego trusts, 181–184
- shareholders' interests, 226
- Personal Properties Securities Bill 2008**
  - broad concerns, 67–68, 81–83
  - national online register of interests, 67
  - recommendations of Australian Law Reform Commission, 81
  - release, 67
  - significant changes, under, 68, 82–83
- Phoenix companies**
  - New Zealand, in, 112–116
    - amendment to Companies Act 1993 (NZ) for inappropriate phoenix arrangements, 116
    - claim for breach of s 131(1) of Companies Act 1993, 113–114
    - Court of Appeal decision in *Robb v Sojourner*, 112–116
    - relief under s 301 of Companies Act 1993, 115–116
- Pooling of assets**
  - court ordered pooling, 90, 93–95
    - limitations, 95
    - objectives of pooling orders, 94
  - facilitation of, 90–92, 94–95

voluntary pooling by liquidator, 90, 92–93

**Rafferty's Resort case**

facts, 236–236

law reform issues, 238

potential unfair preferences, 236

section 447A, 237–239

slip rule, 237–238

unfair preferences and “relation-back day” under s 513C, 235–9

voluntary administrators, optimum role, 237–238

**Receivership**

Corporations and Markets Advisory Committee (CAMAC)

recommendations regarding controller provisions, 45

**Romalpa clauses**

commercial significance of Romalpa decision, 69–70, 74–77

Corporations Act, public registration under Ch 2K, 69, 73, 74, 79–82

distinguished from retention of title clauses, 69

equity, and, 69, 72–77

equity and property 72–74

personal property securities reform, 81–83

registrable charge, 73–74

registration of, 77–83

retention of title clauses, 70–72

High Court decision in Associated Alloys, 77–81

**Shareholders**

insolvent company, issues where, 222–225, 226–233

interests under Pt 5.3A of Corporations Act, 222–234

background, 223–225

comparisons, 225–228

external administration, where, 225, 226

indirect influence, 224

operation of rescue regimes, 228–230

recent amendments, 230–233

retrospective order under s 447A, 232–233, 237

takeover provisions, operation of, 232–233

voluntary liquidation, in initiating, 226–228, 233

rights in corporate insolvency, 222–223, 228, 233–234

Australian context, in, 229–233

debt for equity swaps, where, 233

Harmer Report approach, 224, 227

New Zealand, in, 226

United Kingdom, in, 225–226

United States and Canada, in, 226, 229

Sons of Gwalia case, 222

## Index

---

### **Statutory demands**

- compliance with, 196, 211, 214
- concepts of fairness and justice, 211
- Corporations Act, under, 97, 185–188, 196–7, 211–221
  - operation of s 70, 211–213, 215, 216, 217, 219, 220
  - statutory scheme of Pt 5.4, 212–13, 216, 217, 218, 219, 220
- decision in *Aussie Vic Plant Hire v Esanda Finance Corp*, 97–99, 211
  - background, 97
  - Bleak House compared, 219–220
  - facts, an overview, 214
  - High Court decision, 98, 211–212, 214, 217–221
  - proceedings at first instance, 97
  - Victorian Court of Appeal decision, 97–98, 211, 212, 216–217, 220
- decision in *Jahe Pty Ltd v Aquatic Leisure Technologies Pty Ltd*, 185–188
- extending time for, 211, 212, 213–221
  - David Grant case, 214–15, 216
  - emergence of two-part theory, 216–217
  - expiry rule, origins of, 215–216
  - inherent right of appeal, 218–219
  - irregularities, 213–214
- order setting aside, 218
- presumption of insolvency where non-compliance, 196, 211, 214, 220
- service of notice of, 195–198, 210
  - calculating method and date of service by post, 195, 196
  - effective service, 195, 196, 210
  - elements of proposed code for, 195, 210
  - interaction of legislation, 196–198
  - “ordinary course of post”, 196, 210
  - valid service, evidence of, 195

### **Statutory derivative actions**

- application to companies in liquidation, whether, 7, 9, 11, 19, 24–25
  - statutory jurisdiction, 13–16, 24–25
- definition, 9
- derivative proceedings, 7–8
  - applicant's conduct, 21
  - applications for leave, 9–10, 19, 23–24
  - conflicting judicial views, 10–12, 24
  - costs, 17, 23–24
  - court's inherent jurisdiction, 13–16, 25
  - leave criteria, 16–18
  - liquidator's recovery actions, 20–21
  - settlement funds, 18

- standing of company members and other persons, 9–10, 13–16, 24–25
- empirical studies, 23
- exceptional circumstances, where, 7, 16, 19
- liquidator's views on prospects of litigation, 21–22, 25
- person aggrieved, who is, 14–15
- ratification, 24
- rejection by liquidator, 12–13
- usefulness of action, 20
- Superannuation guarantee**
- charge, 87–90, 95
- Trusts**
- Regal Castings Ltd v Lightbody, 58–60
- sham and alter ego trusts, 181–184
  - Official Assignee v Wilson, 181–184
- UNCITRAL Model Law**
- cross-border insolvency, 46–47, 117, 127
  - advantages accorded a main proceeding, under, 130–131
  - determination of principle location of main office, 12–36, 144, 148–149
  - foreign proceedings, defined, 138–139
  - presumption, under, 131
  - purpose, 46, 127–128
- Legislative Guide on Insolvency Law, 150
- United States, in, 46
  - implications of case decisions, 54, 129
  - issues in Re Jonathan A Loy, 51–54
  - questions in Re Iida, 47–51, 54
- United Kingdom**
- corporate rescue regime, 117–118
- shareholders' interests, 225–226
- United States**
- cross-border insolvency, in, 46–54, 117
- financial institution rescue, 5, 117–118
- shareholders' interests, 226, 229
- Voidable transactions**
- CAMAC proposals for changes, 45
- Pt 5.7B of Corporations Act, under, 240–241
  - decision in Commissioner of Taxation v Sims, 240, 243–246
- Voluntary administration**
- CAMAC proposals, 43–44
- mandatory provisions, 87–90
- remuneration of insolvency practitioners, 125
- shareholders' interests, where, 222, 226–228

## Index

---

- unfair preferences and “relation-back day”, 235–240
  - definitions under s 513C of Corporations Act, 235–236
  - operation of s 447A, 237–241
  - Rafferty's Resort case, 235–239
  - Re Octaviar Ltd (formerly MFS Ltd), 239–240