

INSOLVENCY LAW JOURNAL

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EDITORIAL 119

ARTICLES

Voidable transactions – extending the limitation period under s 588FF(3) of the Corporations Act 2001 (Cth) – Matthew Broderick

The annotated Lawbook Co 2009 *Corporations Legislation* aptly states – “The issue of when an extension of time may be given to a liquidator seeking to take action in respect of voidable transactions is a complex area of law. One reason for the difficulty in this area is that the legislation (s 588FF(3)) is expressed in strict terms. There are sound policy reasons for a strict approach as the liquidator is effectively reclaiming property the company disposed of perhaps years earlier. When a company fails, its officers (and their insurers) may naturally feel uncertain about their potential vulnerability, thus the law allows liquidators only a limited amount of time to determine whether to commence proceedings. However, balanced against this need for a timely commencement of actions is the difficulty faced by liquidators of complex insolvent corporations such as HIH and One.Tel. Court action requires sufficient evidence and, in complex insolvencies, simply gathering the evidence may take a very long time and involve numerous interlocutory steps. There may be quite legitimate reasons for an extension of time to be granted.” 121

Mediation and the insolvency practitioner – Peter Agardy

Litigation is only one way of resolving disputes. Mediation has become a widely accepted form of dispute resolution. It has been embraced by the courts and it is here to stay. This article reviews the elements of a conventional mediation of a commercial dispute. It recognises the importance of private sessions, in which parties can speak freely and confidentially with the mediator. It is because of the threat to private sessions that there can be serious reservations about the “med-arb” process, which is being discussed. Insolvency practitioners understand that litigation is expensive and that it takes time, so any potential saving must present an attractive option. Insolvency practitioners have some special issues at mediation. One of these is the matter of their fees. They ought not let the quantum of outstanding fees cloud their responsibility to make a realistic assessment of offers made at mediation, based on an objective view of the merits. Insolvency practitioners are, by and large, officers of the court. In any event, they are all subject to the supervision of the court. Even though insolvency practitioners are not bound by the model litigant code, which applies to the Commonwealth and its agencies, they could look to that code as a guide. The Insolvency Practitioners Association of Australia has a Code of Professional Practice which contains standards of conduct. Members of the Association are, by virtue of those standards, effectively required to be model litigants. 135

The treatment of employee priority in a Deed of Company Arrangement – Colin Anderson

This article examines one of the changes implemented in the *Corporations Amendment (Insolvency) Act 2007* (Cth). It is argued that the insertion of s 444DA raises some matters that go to the nature of the insolvency process generally and the operation of Pt 5.3A in a particular. The position of employees in insolvency is a matter that is the subject of much

comment from a policy perspective. This article does not cover that debate but provides some initial explanation of the need to protect employees. The second part of the article covers the particular background to the voluntary administration system as far as employee rights are concerned as well as the arguments put forward by the government to justify the change in the legislation which inserted s 444DA. It suggests that there was little evidence provided for the need to protect employee priority rights in this particular way. An alternative explanation is given for the change adopted by the government. The third part of the article suggests that the manner in which the legislation seeks to better protect employee creditors is somewhat clumsy in its operation. It raises a number of questions about how the legislation may operate and argues that given the stated aims, some alteration to it would improve its effectiveness. 147

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