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# Update Summary

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**Crutchfield's  
VOLUNTARY ADMINISTRATION**

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## Crutchfield's Voluntary Administration - Update 2, 2023

### October 2023

Dr Colin Anderson and Dr David Morrison have updated commentary and annotations. Highlights include:

#### **Corporate insolvency review 2022**

The report of the Inquiry into the effectiveness of Australia's corporate insolvency laws has been released. A total of 28 recommendations were made to the government including a comprehensive, independent review of insolvency law, encompassing both corporate and personal insolvency, and other near-term actions. See [10.100].

#### **The resolution – s 436A**

Section 436A facilitates the start of an insolvency procedure with a minimum of delay and at a minimum cost. Directors may resort to it before the company becomes insolvent, and thereby ensure that it does not trade while insolvent: *Anchorage Capital Master Offshore Ltd v Sparkes* [2023] NSWCA 88. See [30.436A.40].

#### **Approval to appoint himself or herself as administrator – s 436B**

Section 436B enables a liquidator to appoint a voluntary administrator under certain circumstances. A liquidator may not be appointed without leave of the court. However, the test for leave is not onerous, and a liquidator will usually be permitted to appoint themselves, unless there are distinct reasons why: *Re NR Complex Pty Ltd (in liq) (recs and mgrs apptd)*; *Ex parte Mansfield* [2023] FCA 614. See [30.436B.60].

#### **Importance of investigations – s 438A**

Section 438A requires administrators to investigate a company's affairs and consider possible courses of action. The section may be used to justify the administrator gaining an extension of time to complete their task under s 439A: see *Re 2 Mornings Pty Ltd* [2023] VSC 283. See [30.438A.40].

#### **Varying the operation of s 443A under s 447A – s 443A**

Section 443A makes a company administrator liable for debts they incur in the exercise of their duties. It ensures that administrators do not recklessly incur debts in the administration: *Re The GO2 People Ltd (Admins Apptd)* [2023] WASC 142. See [30.443A.50].

#### **Required contents of deed of company arrangement – s 444A**

Section 444A allows creditors in a voluntary administration to enter into a deed of company arrangement. The nature of the funds contributed under the deed will depend upon the terms of the deed, but s 444A(4)(b) requires the deed to specify the property that is to be available to pay creditors' claims: *Re ACN 613 909 596 Pty Ltd* [2023] NSWSC 801. See [30.444A.40].

#### **Orders relating to lessors – s 444F**

Section 444F enables the court to impose limits on a secured creditor realising a security interest. An application for an order may be refused where a lessor would not be

adequately protected by an administrator's proposal: *Vincent Cold Storage Pty Ltd v Centuria Property Funds No 2 Ltd (No 2)* [2023] VSC 314. See [30.444F.120].

### **Impact of s 445A**

Section 445A enables the creditors to approve a variation in a deed of company arrangement. The court may vary the notice required to be given to creditors to facilitate the meeting being held in time to enable the proposed variation to be effective: *Re Ellume Ltd* [2023] FCA 374. See [30.445A.20].

### **Grounds for termination – defects in information – s 445D**

Section 445D allows the court to resolve problems with a deed by terminating it, including situations where there are deficiencies in information in relevant documents. The principles were set out in *Sino Group International Ltd v Toddler Kindy Gymparoo Pty Ltd* [2023] FCAFC 110. See [30.445D.80].

### **Grounds for termination – undue delay – s 445D**

Injustice or delay may be inherent in the terms of the deed itself or might arise when the terms of the deed are to be applied to the circumstances. An order terminating a deed may be made if the deed cannot be effected without injustice; the element of injustice may be established if its effect would be to avoid a proper investigation: *Re ACN 613 909 596 Pty Ltd* [2023] NSWSC 801. See [30.445D.90].

### **Legislative effect – s 447A**

Section 447A confers general powers on a court to alter the operation of provisions in Pt 5.3A. It may be used to have the liquidation priority for employees paid whilst the company is in administration: *Re Wiluna Mining Corporation Ltd; Ex parte Ryan* [2023] WASC 194. See [30.447A.40].

### **Ending the administration – s 447A**

An administration may be ended under s 447A(2) if the company is solvent or likely to be solvent where finance has been obtained to enable the company to continue: *Re IOUpay Ltd* [2023] NSWSC 568. See [30.447A.50].

### **Introduction – s 453A**

Section 453A sets out the commencement and ending of an administration of a company undergoing a small business restructure. While it might be advantageous for the employees and their FEG claim to proceed as soon as possible, the court must take into account creditors' best interests as a whole: *Re Aurora Metals Ltd; Ex parte Tucker* [2023] FCA 869. See [31.453A.20].

### **General – Sch 2, s 5-15**

Sections 5-15 and 5-20 of Sch 2 set out the circumstances where Sch 2 applies. They now extend to companies under restructuring or a restructuring plan in Pt 5.3B: *Deputy Commissioner of Taxation v Pope Joan Hospitality Pty Ltd* [2023] FCA 872. See [35.5-15.20].

### **Introduction – Sch 2, s 65-5**

Section 65-5 requires the external administrator to pay into an administration account. The court may make directions in respect of a pooled group, including where the

financial aspects of a group of companies are so intertwined that funds be paid into one account for all of the companies: *Re PBS Building Pty Ltd (Admins Apptd)* [2023] FCA 276. See [35.65-5.20].

### **Introduction – Sch 2, s 70-5**

Section 70-5 requires the external administrator lodge administration returns annually. A court may order that only one administration return must be prepared for a group of companies: *Hathway v Stacey Apartments Pty Ltd (in liq)* [2023] FCA 776 See [35.70-5.20].

### **Court orders - Examples – Sch 2, s 90-15**

Section 90-15 specifies the types of orders that a court may make and the matters it may consider in doing so. The section may be used to abridge the time for giving notice of meetings required under the *Insolvency Practice Rules (Corporations) 2016* (Cth) (*Re Ellume Ltd* [2023] FCA 374) and to remove and replace a liquidator where there is doubt that s 499 applies: *Sino Group International Ltd v Toddler Kindy Gymparoo Pty Ltd (in liq)* [2023] FCA 904. See [35.90-15.15].

### **As an alternative to s 447A – Sch 2, s 90-15**

The court may make orders about transfers of shares under s 444GA, and to empower the deed administrator to execute share transfers under s 447A and s 90-15: *Re KHC Group Pty Ltd* [2023] FCA 1006. See [35.90-15.20].

### **Introduction – Sch 2, s 100-5**

Section 100-5 confers on the administrator the right to sue under the Corporations Act. The section enables statutory rights of action to be assigned by liquidators: *Lifestyle Holdings Australia & New Zealand Pty Ltd v Wu* [2023] FCA 795; *Aquisite Pty Ltd v Moss* [2023] FCA 410. See [35.100-5.20].

### **Sending of notices**

The content of the notice of a meeting of creditors and its manner of issue are set out in the *Insolvency Practice Rules (Corporations) 2016*, rr 75-10 and 75-15. Where extensions of the convening period are granted, orders may enable variations to the notice requirements: *Re Schramm Australia Holding Pty Ltd* [2023] FCA 261; *Re BWX Ltd (recs and mgrs apptd) (admins apptd)* [2023] FCA 465; *Re Plumbfirst Pty Ltd (admins apptd)* [2023] FCA 441; *Re Ten Sixty Four Ltd; Ex parte Ford* [2023] FCA 862. See [40.540].

### **Examining a person about a corporation: Part 5.9**

The court may summon and examine persons who have had dealings with the insolvent company to facilitate the insolvency practitioner's task of locating and recovering assets on behalf of the estate. An examination summons may be authorised to be served outside Australia: *Krejci v Myoora Land Pty Ltd* [2023] FCA 620; *Re Ochre Group Holdings Ltd (in liq)* [2023] FCA 687. Where a person fails to comply with an examination summons, the court may issue an arrest warrant: *Re Property Asset Consultancy Services Pty Ltd (t/as Property Asset Consultancy Services Pty Ltd) (in liq)* [2023] NSWSC 357; *Livingstone v Lutui* [2023] FCA 609. See [50.20].

## Crutchfield's Voluntary Administration - Update 1, 2023

### April 2023

Dr Colin Anderson and Dr David Morrison have updated commentary and annotations. Highlights include:

#### **The resolution – s 436A**

Section 436A facilitates the start of an insolvency procedure with a minimum of delay and at a minimum cost. The fact that a director is not ordinarily resident of Australia does not necessarily invalidate the appointment of an administrator; a Court may make orders to ensure that the appointment is valid: *Re Big Village Australia Pty Ltd (Admns Apptd)* [2023] FCA 48. See [30.436A.40].

#### **Procedure for calling the meeting – s 436E**

Section 436E sets out the process and requirements for the first meeting of creditors. A Court may permit the use of proprietary claims management “platforms” that enable many creditors to be dealt with although the manner of dealing with them may not comply strictly with the *Insolvency Practice Rules (Corporations) 2016* (Cth): *Re Murray & Roberts Pty Ltd (admins apptd)* [2022] FCA 1506. See [30.436E.60].

#### **Requirements of administrators – s 438A**

Section 438A requires administrators to investigate a company's affairs and consider possible courses of action. The importance of the investigation is reflected in it often being the basis for extensions being granted: *Re FTX Australia Pty Ltd* [2022] VSC 763. See [30.438A.20].

#### **Adjourning the winding-up application – s 440A**

Section 440A(2) enables a Court to adjourn a winding-up application. The late appointment of a voluntary administrator would count against making an adjournment: *Re Vietnam Industrial Investments Pty Ltd* [2022] NSWSC 1411. See [30.440A.40].

#### **Time – s 447A**

Section 447A confers general powers on a Court to alter the operation of provisions in Pt 5.3A. It may be used to allow the administrator to not hold the required first meeting of creditors under s 436E and to not require directors' reports under s 438B: *Re Zivaust Pty Ltd (in liq)* [2022] FCA 1325. See [30.447A.70].

#### **General – s 451E**

Section 451E(1) provides a stay on enforcing rights against a company under administration if the right arises through a contract, agreement or arrangement. The stay operates for the length of the administration and, if the administration concludes because of a resolution or order for the company to be wound up, until the winding up is complete: *Re Citius Property Pty Ltd (Administrator Appointed)* [2023] FCA 26. See [30.451E.10].

#### **General comments – Sch 2, s 1-1**

Section 1-1 of Schedule 2 sets out the objects of the Schedule. Division 90 must be construed by reference to s 1-1 (*Frigger v Kitay* [2022] WASC 347) which may lead to the

refusal of an application under s 90-15: *Re Pindan Group Pty Ltd (Administrators Appointed) (No 5)* [2022] WASC 469. See [35.1-1.10].

### **Introduction – Sch 2, s 60-16**

Section 60-16 sets out the matters which a court must consider when determining whether a provisional liquidator's remuneration is reasonable. The principles in s 60-12 also apply to s 60-16 *Higgins v JSS Logistics Pty Ltd (in liq)* [2022] FCA 1320. See [35.60-16.10].

### **Introduction – Sch 2, s 90-15**

Section 90-15 specifies the types of orders that a court may make and the matters it may consider in doing so. The section cannot be used to authorise the distribution of a company's or unregistered scheme's assets except to those entitled to the assets, in proportion to their entitlements, although there may be situations where it is either not possible or not feasible to ascertain particular claims: *ASIC v Marco (No 13)* [2023] FCA 83. See [35.90-15.10].

### **Court orders - Examples – Sch 2, s 90-15**

A Court may order that creditors register with the administrator's specific platform to vote at the second meeting of creditors: *Re Murray & Roberts Pty Ltd (admins apptd) (No 2)* [2022] FCA 1563. See [35.90-15.15].

### **Introduction – Sch 2, s 90-35**

Section 90-35 specifies how and when a company's creditors may remove an external administrator and appoint another. A Court may be prepared to forgive a breach of s 90-35(2) and confirm their appointment under s 1322 and s 90-15: *Re Bel Investments Pty Ltd (in liq)* [2022] VSC 638. See [35.90-35.10].

### **When and where is the meeting to be held?**

A Court may make orders enabling the notices and some other aspects of dealing with creditors to be dealt with in ways that do not strictly comply with the rules, provided that creditors are otherwise protected: *Re Murray & Roberts Pty Ltd (admins apptd)* [2022] FCA 1506. See [40.520].

## **Index and tables**

The index has been updated and reissued.