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Update Summary

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COMPANY RECEIVERS AND ADMINISTRATORS

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CRA Update 1 of 2024

Dr James O'Donovan has updated the commentary of the work, and the highlights are referred to below.

Purview of Corps Act 2001, s 588FB

It is noted that the Parliamentary Joint Committee on Corporations and Financial Services recommendation that insolvency be removed as a prerequisite for the avoidance of uncommercial transactions has not been adopted. See [7.5050].

Trust assets

The court can appoint a receiver to the trustee company of a unit trust where the directors of the company are not acting in the best interests of the unit holders: *Bargo Nominees Pty Ltd v Talbots Pty Ltd* [2023] NSWSC 1356 (where the directors were slow to take any steps to recover a loan to a third party).

The liquidators of a trustee company are justified in seeking directions to allow them to apply the proceeds of a cause of action under Corps Act 2001, s 588M in discharge of debts, claims or expenses regardless of whether they were incurred by the company in its own right or in its capacity as trustee: *Re Balsub Pty Ltd (in liq)* [2023] FCA 1635. See [19.710].

Background to the reforms

The author has included some interesting statistics relevant to the current industry:

- in October 2023 it was estimated that the total market capitalisation of zombie companies increased by 82% from \$11.7bn to \$3bn;
- the number of companies that collapsed in October 2023 soared 43%, with an increasingly aggressive tax office adopting a more pro-active strategy to collect tax debts;
- the most reported causes of failure are inadequate cash flow or high cash use, followed by trading losses;
- statistics regarding the assets, employees and liabilities of corporate insolvencies reported in the financial year ending 30 June 2023 are also included; and
- the number of company collapses for the first 5 months of the 2024 financial year hit 5623, up almost 40% from the 4020 recorded in the same period in the previous year.

See [32.60] and [32.1020].

Appointments by the company

Although ASIC RG22 Directors' solvency declaration (issued 29 March 2023) explains the requirements for the directors' solvency declaration under s 295 (4)(c) and s 303(4), it does not address the issue of whether the directors have grounds for forming an opinion that the company is insolvent or is likely to become insolvent at some future

time, for the purposes of Corps Act 2001, s 436A. However, ASIC has issued INFO 42 Insolvency: a guide for directors to address this.

Further, where a director purports to appoint administrators without calling a board meeting, the court may make an order under s 447C declaring the appointment invalid as an abuse of Pt 5.3A: *Windsor Family Assets Pty Ltd v Green Day Energy Pty Ltd (admins apptd)* [2023] FCA 1651. See [41.250].

Appointment by the court

Where an administrator becomes incapable of performing their duties due to a medical episode, the court can appoint special purpose administrators to perform their duties: *Re Regulated Debtors' Estates* [2023] FCA 1325. See [41.380].

Management and control

Where an administrator proposes to exercise the power in Corps Act 2001, s 442A to appoint new directors, the court can make the order under s 447A appointing the directors conditional upon:

- the extinguishment of the creditors' claims against the company pursuant to a deed of company arrangement; and
- the company having sufficient working capital to remain solvent: *Lucas v Blackwater Mine Workers' Club Ltd (in liq)* [2023] FCA 1636.

See [44.200].

Guidance and assistance – scope of directions

Administrators are entitled to seek directions from the court under Corps Act 2001, Sch 2, s 90-15 in respect of how to treat customers of a group of companies for the purposes of the administration, particularly in respect of voting entitlements for the second meeting of creditors: *Re FTX Australia Pty Ltd (admin apptd)* [2023] VSC 788. The court can even give directions under Corps Act 2001, Sch 2, s 90-15 as to the construction of inconsistent terms in a deed of company arrangement: *Re McCabe* [2023] FCA 1415. See [44.2400].

Extension of the convening period

Where the court grants an extension of the convening period under Corps Act 2001, s 439A(6) it may make an ancillary order allowing the second meeting of creditors to be held at any time within the relevant time period: *Re Sara Lee Holdings Pty Ltd* [2023] FCA 1408 and *Re Stanley Asphalt Pty Ltd (Admins Apptd)* [2023] FCA 1475. See [45.30].

Protection for eligible employees

A deed of company arrangement should preserve the priority available to creditors in a winding up under s 556(1), unless affected creditors agree to waive their priority. However, creditors of the administrator should be entitled to institute court proceedings to have the DOCA upheld if, in the court's view, the deed offered dissenting creditors a better return than they would obtain in a winding up. See [50.100].

Model Law to have force of law in Australia

The Parliamentary Joint Committee on Corporations and Financial Services acknowledged that UNCITRAL's Model Law does not deal with the problem of companies that deliberately set out to conceal assets and place them beyond the reach of legitimate claimants by using overseas companies or foreign transactions to deny access to creditors. See [58.45].

Implementing international obligations

The Australian Institute of Criminology estimated that serious and organised crime cost the Australian community up to A\$60.1 billion in 2020-21. Another estimate suggests that money laundering costs Australia between \$10 billion and \$15 billion per year. See [APX10.10].