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# Update Summary

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**UPDATE 32**

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**Crutchfield's  
VOLUNTARY ADMINISTRATION**

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

### **Explanatory Memorandum – s 435A**

Section 435A defines the objects of Part 5.3A. However, those objects have no, or at least no direct, bearing on the interpretation of provisions in other legislation: *Fair Work Ombudsman v Foot & Thai Massage Pty Ltd (in liq) (No 8)* [2024] FCA 483. Entering into a deed to avoid proper investigation of potential causes of action is not consistent with the objects of the Part: *Chief Commissioner of State Revenue (NSW) v Gleeson* [2024] FCA 908. See [30.435A.20].

### **Background – s 435B**

Section 435B defines property and receiver for the purposes of Part 5.3A. in an insolvency context, property that a company holds on trust is generally not available for distribution among the company's creditors: *ASIC v Marco (No 15)* [2024] FCA 437. See [30.435B.30].

### **General – s 436E**

Section 436E defines the purpose and timing of the first creditor's meeting. Creditors' meetings may be conducted virtually provided notice is given about how participation and voting occurs, at least seven days before the meeting is held, and voting is taken by way of a poll, although relief from those requirements may be granted in appropriate circumstances: *Re Regional Express Holdings Ltd (admins apptd)* [2024] FCA 929. See [30.436E.20].

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

Section 438A requires administrators to investigate a company's affairs and consider possible courses of action. Administrators' work to investigate potential returns in the winding up of a related managed investment scheme is not necessarily part of their obligations: *ASIC v Marco (No 15)* [2024] FCA 347. See [30.438A.20].

### **Extending the convening period – reasons – s 439A**

A company administrator must call the final creditors' meeting to decide the company's future. If receiver and manager have been appointed may justify a longer extension: *Re Calidus Resources Ltd (recs and mgrs apptd) (admins apptd)* [2024] FCA 827. See [30.439A.85].

### **What is required to trigger s 441F rights?**

Section 441F defines when an owner or lessor is able to repossess property that is not perishable. The section will apply where the purchaser of a product had exercised a power in respect of it before the appointment of an administrator: *Re Qenos Pty Ltd* [2024] NSWSC 483. See [30.441F.80].

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

Section 443A makes an administrator personally liable for debts incurred when acting on behalf of the company, although orders may be sought to vary the section's usual operation under s 447A. The principles for a court to considering applications were summarised in *Re S&W Holdings Australia Pty Ltd* [2024] FCA 878. See [30.44A.50].

### **General indemnity – s 443D**

Section 443D indemnifies administrator is entitled, to be indemnified out of the company's property for debts of the company under ss 443A, 443B and 443BA. However, the section likely does not extend to unascertained amounts such as unliquidated damages: *Newstart 225 Pty Ltd v Condon* [2024] NSWSC 788. See [30.443D.20].

### **General – s 444A**

Section 444A allows creditors in a voluntary administration to enter into a deed of company arrangement. The section does not oblige a company to enter into any particular form of DOCA, save as prescribed by subsections (4) or (5): *Re Pacquola Group Pty Ltd* [2024] FCA 393. See [30.444A.20].

### **General – s 444DA**

Section 444DA mandates that employee entitlements be given priority in a deed of company arrangement as per ss 556, 560 and 561, subject to the court ordering or the employees themselves agreeing to not include such a clause. The court may make a direction under s 90-15 to allow the administrator to redraft the deed so as to include provisions in accordance with s 444DA: *Re Pacquola Group Pty Ltd* [2024] FCA 393. See [30.444DA.20].

### **Discretion – s 445D**

Section 445D enables the court to make orders to terminate a deed in certain circumstances. A deed may be set aside although the majority of creditors would be better off under it but one creditor would face major disadvantage: *Re Academy Construction & Development Pty Ltd* [2024] NSWSC 808. See [30.445D.35].

### **Who may apply? – s 445D**

The payment of a debt after the commencement of a proceeding to terminate the deed of company arrangement but before the hearing and the making of orders may not determine the decision that the court might make: *Chief Commissioner of State Revenue (NSW) v Gleeson* [2024] FCA 908. See [30.445D.40].

### **Legislative effect – s 447A**

Section 447A confers general powers on a court to alter the operation of provisions in Pt 5.3A. The content of the “public interest” invoked under s 445D does not differ from that which is relevant to the exercise of the Court’s discretion under s 447A: *Commissioner of State Revenue (Qld) v McCabe (No 2)* [2024] FCA 662. See [30.447A.40].

### **Using s 447A to amend a deed**

Although a court may use s 447A to remove clauses from a deed, it may not be willing to do in some circumstances and prefer to terminate the deed instead: *Re Academy Construction & Development Pty Ltd* [2024] NSWSC 808. See [30.447A.100].

### **Notice – s 447A**

A court may order the alteration of notifications requirements to parties to the deed, as well as to order that meetings for all companies in a group to be held concurrently: *Re Redback Technologies Holdings Pty Ltd (admins apptd)* [2024] FCA 418. See [30.447A.120].

### **Introduction – s 453L**

Section 453L imposes limits on the transactions and dealings that can be entered into by a company or its officers while it is undergoing a small business restructure. The question of whether to allow the restructuring to continue or grant an application to have the company wound up is closely related to the financial benefit to be obtained from a restructuring as opposed to a winding up, although the creditors' other interests should also be borne in mind: *Re Redback Engineering & Sales Pty Ltd* [2024] NSWSC 1108. See [31.453L.20].

### **Introduction – Sch 2, s 60-5**

Section 60-5 sets out an entitlement of an external administrator to receive remuneration provided it was "necessary work properly performed". Where a court is to determine the remuneration of an external administrator the ultimate question for the court is whether the remuneration claimed is reasonable: *Re Bayview Eatery Pty Ltd (t/as La Boca Trattoria)* [2024] VSC 382. The section does not create a right to be paid out of property that is held on trust by the company if the trust property cannot be brought within the term company property: *Re PBS Building (Qld) Pty Ltd* [2024] QSC 108. See [35.60-5.10].

### **Introduction – Sch 2, s 60-10**

Section 60-10 empowers creditors to resolve to approve an external administrator's remuneration. It does not extend to disbursements (*ASIC v Marco (No 15)* [2024] FCA 347) or to receivers: *Re Martar Pty Ltd (in liq)* [2024] VSC 239. If the determination specifies that the external administrator is entitled to receive remuneration worked out wholly or partly on a time-cost basis, the determination must cap the amount of remuneration worked out on that basis. More than one determination may be made in relation to a particular external administrator of a company and a particular external administration of a company: *ASIC v Kaur (No 2)* [2024] FCA 760. See [35.60-10.10].

### **Other remuneration issues – Sch 2, s 60-12**

Section 60-12 sets out matters that the Court must consider when making or reviewing remuneration determinations. Disbursements are not determined by the court but they may be challenged: *ASIC v Marco (No 15)* [2024] FCA 347; *Hassan v Image Nominees Pty Ltd (in liq)* [2024] FCA 487. See [35.60-12.120].

### **Introduction – Sch 2, s 90-15**

Section 90-15 enables the court to make such orders as it thinks fit in relation to a company's external administration. While s 90-15(4) lists factors that the court may take into account, there is no requirement to take account of any of the factors: *Re Windsor Development Co Pty Ltd (in liq) (No 2)* [2024] VSC 297. The powers available to the court are not limited to situations where the only interest that is served is the public interest: *Re Qenos Pty Ltd* [2024] FCA 461. See [35.90-15.10].

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

In certain circumstances, a court may allow the administrator may execute a deed that is different in certain respects from that which was approved at the meeting of creditors

declare that the deed was not invalid as a result: *Re Pacquola Group Pty Ltd* [2024] FCA 393. See [35.90-15.15].

### **Directions – overview – Sch 2, s 90-15**

Directions may be given that the liquidator would be justified in treating the funds of one company in the group as those of another company in the same group (*Re Nat Logistics Australia Pty Ltd (In liq)* [2024] FCA 676) or in relation to a proposed set-off arrangement: *Re Fynfan Pty Ltd (in liq)* [2024] NSWSC 594. See [35.90-15.30].

### **ASIC materials**

#### **ASIC Regulatory Guides**

ASIC has issued a revised version of Regulatory Guide RG 16, *External administrators and controllers: Reporting of possible offences and misconduct*. See [RG 16].

