



THOMSON REUTERS

Update Summary

PLEASE CIRCULATE IMMEDIATELY!

UPDATE 154

NOVEMBER 2024

ROBSON'S ANNOTATED CORPORATIONS LEGISLATION

Material Code 42881095

© Thomson Reuters (Professional) Australia Limited 2024

Looseleaf Support Service

You can now access the current list of page numbers at

<http://www.thomsonreuters.com.au/support/product-support.aspx?id=/mediaTree/58599>. If you have any questions or comments, or to order missing pages, please contact Customer Care LTA ANZ on 1300 304 195 Fax: 1300 304 196 Email: Care.ANZ@thomsonreuters.com

Update 10, 2024 – Robson’s Annotated Corporations Legislation

November 2024 update summary

Revisions to annotations on Part 5.3A of Chapter 5, by Colin Anderson

Outline – s 435A

Section 435A sets out the objects of Part 5.3A. The objects are only relevant to this Part and have no direct bearing on the interpretation of other legislation: *Fair Work Ombudsman v Foot & Thai Massage Pty Ltd (in liq) (No 8)* [2024] FCA 483. See [435A.10].

Practice and procedure: The beginning of the administration – s 435C(1)(a)

Section 435C defines when an administration begins and ends, focusing on the appointment of the administrator. It may affect the relation-back day for a subsequent winding: *Re City Steel Pty Ltd (in liq)* [2024] FCA 481. A deed of company arrangement must specify the day on or before which claims must have arisen if they are to be admissible; this date cannot be after the start of the administration: *Fair Work Ombudsman v Foot & Thai Massage Pty Ltd (in liq) (No 8)* [2024] FCA 483. See [435C.05].

Outline – s 436E

Section 436E sets out the process and requirements for the first meeting of creditors. Rule 75-75 of the *Insolvency Practice Rules (Corporations) 2016* (Cth) states the requirements for virtual meetings. Relief from the requirements of r 75-75 may be granted in appropriate circumstances: *Re Regional Express Holdings Ltd (administrators appointed)* [2024] FCA 929. See [436E.10].

Practice and procedure: Alteration of the operation of s 436E

If a group of companies is involved, the Court may vary the requirement for a committee of inspection for each company and allow a single committee to be formed: *Re Regional Express Holdings Ltd (administrators appointed)* [2024] FCA 929. See [436E.80].

Concepts: Powers of administrator generally – s 437A

Section 437A confers broad discretionary powers on administrators, like those granted to liquidators and receivers. It is that an administrator controls the company’s business, property and affairs and can dispose of any part of the property: *Newstart 225 Pty Ltd v Condon* [2024] NSWSC 788. See [437A.10].

Outline – s 437B

Section 437B states that the administrator acts as the company’s agent. If a company under administration is entitled to be on certain premises, the administrator cannot be liable for committing trespass: *Newstart 225 Pty Ltd v Condon* [2024] NSWSC 788. See [437B.10].

Practice and procedure: Extension of convening period – s 439A(6)

Section 439A requires the administrator to call the final meeting of creditors to decide the company’s future. The fact that a receiver and manager had been appointed may justify a longer extension of the period: *Re Calidus Resources Ltd recs and mgrs apptd (admins apptd)* [2024] FCA 827. See [439A.60].

Concepts: Performance of power in relation to property – s 441F(2)

Section 441F sets out the process where the recovery of property has begun before the administration. The meaning of “exercised a power” in relation to the property was discussed in *Re Qenos Pty Ltd (administrators appointed)* [2024] NSWSC 483. See [441F.10].

Outline – s 443BA

Section 443BA makes an administrator personally liable for amounts payable during the administration regarding the obligation to withhold certain amounts to cover taxation liability. “Attributable” carries its ordinary meaning; the intention is to refer to that part of each amount payable which was deducted and withheld during the administration period and not when the company was not in administration: *Newstart 225 Pty Ltd v Condon* [2024] NSWSC 788. See [443BA.10].

Outline – s 443D

Section 443D entitles administrators to be indemnified out of the company’s property. The right to remuneration in s 60-5 is derived from s 443D; it does not extend beyond the company’s property: *Re PBS Building (Qld) Pty Ltd* [2024] QSC 108. See [443D.10].

Outline – s 444A

Section 444A allows creditors in a voluntary administration to enter into a deed of company arrangement. There is no obligation to enter into any particular form of deed, save for the terms required in s 444A(4) and (5): *Re Pacquola Group Pty Ltd* [2024] FCA 393. See [444A.10].

Outline – s 444D

Section 444D provides that the effect of a deed of company arrangement is to bind creditors. Secured creditors are generally protected, provided that they do not vote in favour of the deed: *Re NT Port and Marine Pty Ltd (No 3)* [2024] FCA 905. See [444D.10].

Outline – s 444DA

Section 444DA requires that employee entitlements be given priority in a deed of company arrangement. If a deed proposal is approved under s 439A but does not comply with s 444DA, under s 90-15 the court may direct the administrator to redraft the deed: *Re Pacquola Group Pty Ltd* [2024] FCA 393. See [444DA.05].

Concepts: False or misleading information – s 445D(1)(a)

Section 445D enables the court to terminate a deed of company arrangement in certain circumstances, including where information supporting the proposed deed was false or misleading. The failure to disclose the existence of a loan to the administrators and creditors may be enough to have a deed set aside as misleading and deceptive: *Yan v Won Capital Pty Ltd* [2024] NSWSC 758. See [445D.20].

Concepts: Oppressive etc – s 445D(1)(f)(i)

The differing treatment of creditors without a rational basis may satisfy the test of oppression or unfair prejudice: *Re Academy Construction & Development Pty Ltd* [2024] NSWSC 808. See [445D.50].

Practice and procedure: Potential applicants – s 445D(2)

The payment of a debt after the commencement of the proceeding but before the hearing and the making of orders may not alter the status of a person as a creditor: *Chief Commissioner of State Revenue (NSW) v Gleeson* [2024] FCA 908. See [445D.80].

Outline – s 446A

Section 446A states that, in certain circumstances, the administrator becomes the liquidator. For such matters, the commencement date of the winding up will be the day that the administration began: *Re City Steel Pty Ltd (in liq)* [2024] FCA 481. See [446A.10].

Practice and procedure: Order amending a DOCA – s 447A(1)

Section 447A confers wide powers on the court to alter the operation of sections in Pt 5.3A. Although it is possible for the court to use s 447A to sever clauses from the deed, it may not always be willing to do so: *Re Academy Construction & Development Pty Ltd* [2024] NSWSC 808. See [447A.50].

Practice and procedure: Possible orders under s 447A – s 447A(2)

The court may vary the form or manner of delivery of notices to creditors, including to direct that meetings for all companies in a group be held concurrently: *Re Redback Technologies Holdings Pty Ltd (Administrators Appointed)* [2024] FCA 418. See [447A.60].

Revisions to annotations on Part 5.4 of Chapter 5, by David Edney

Practice and procedure: Who may serve demand and how – s 459E(1)

Section 459E states the requirements for serving a creditor's statutory demand on a debtor company. A demand may be emailed to a company's solicitor: *Re Roxton Commercial Builders Pty Ltd* [2024] VSC 289. See [459E.20].

Practice and procedure: Specification of debt and amount – s 459E(2)(a)

It is doubtful that a demand may be issued for the payment in the form of cryptocurrency, in that it does not so much function as "money" as it functions as an "object of commercial intercourse" similar to a commodity: *ASIC v Bit Trade Pty Ltd* [2024] FCA 953. See [459E.40].

Practice and procedure: Supplementing the supporting affidavit – s 459G

Section 459G allows a debtor company to apply to the court to set aside a statutory demand on the basis of a genuinely dispute debt or an offsetting amount. The fact that an affidavit in support does not state the source of the deponent's knowledge or explain their authority to make the affidavit on behalf of the applicant will not be invalidating, with those being matters that may be dealt with in supplementary evidence: *Re Biznerve Consulting and Accounting Pty Ltd* [2023] VSC 737. See [459G.35].

Practice and procedure: Filing and service of application and affidavit – s 459G(3)

The plaintiff may serve a copy of the application. To be a "copy of the application" in the relevant sense, the document should reflect the form of the originating process accepted by the Court, evidence the fact of the Court's acceptance, and include the application's return date: *Dyirraanga Ltd v Deputy Commissioner of Taxation* [2024] FCA 411. See [459G.40].

Outline – s 459J

Section 459J allows a debtor company to apply to the court to set aside a statutory demand that is defective or for some other reason. *Re TZI Australia Pty Ltd* [2024] NSWSC 493 includes a summary of the principles regarding defects. See [459J.10].

Concepts: “Substantial injustice” – s 459J(1)(a)

Substantial injustice may be indicated by the inclusion of debts that are not yet due with debts that are due: *Re Forte Sydney Construction Pty Ltd* [2024] NSWSC 495. See [459J.30].

Practice and procedure: “an order under section 459H”– s 459M

Section 459M enables the Court to attach conditions to orders it makes under ss 459H or 459J. The question of whether payment into Court should be required as a condition of setting aside a demand is to be determined at the final hearing of the application to set aside the demand and not ordered by way of a separate or summary process: *Re Buildlux Pty Ltd* [2024] NSWSC 614. A condition sometimes imposed is that a company asserting an offsetting claim commence proceedings in pursuit of the claim within a certain period: *Re Platypus Impact Housing Australia Ltd* [2024] NSWSC 753. See [459M.10].

Practice and procedure: Extension of period for determination – s 459R(2)

Section 459R sets the period for determining an application for a winding up order. Any order extending the time to determine an application pursuant to s 459R(2) must be to a definite date. An order purporting to extend time by an indefinite period will be ineffective and therefore not prevent the deemed dismissal of the application: *Bryant v Badenoch Integrated Logging Pty Ltd* [2024] FCA 97. See [459R.20].

Practice and procedure: Deemed dismissal of application – s 459R(3)

Because s 459R only relates applications that a company be wound up in insolvency, if an application is brought on the grounds of insolvency as well as other grounds, the deemed dismissal will only affect the application on the grounds of insolvency, and the balance of the application may proceed: *Bryant v Badenoch Integrated Logging Pty Ltd* [2024] FCA 97. See [459R.30].

Revisions to annotations on Chapters 5A and 5B, by Dr David Morrison

Outline – s 601AD

Section 601AD states that a company ceases to exist when it is deregistered. It is not a consideration for the court in determining the operation of the provision to include in its deliberations the possibility of a taxation debt arising where the company is reinstated: *Re Loreno Pty Ltd* [2024] NSWSC 1081. The section does not empower the court to deprive the company of its corporate existence notwithstanding that it was not properly formed because subscribers neglected to sign its memorandum: *Frigger v Professional Services of Australia Pt Ltd (No 5)* [2024] FCA 420. See [601AD.05].

Practice and procedure: Nature of the “property” which vests – s 601AD

Vested property includes a chose in action: *Morgan v McMillan Investment Holdings Pty Ltd* [2024] HCA 33. See [601AD.20].

Outline – s 601AG

Section 601AG enables a person to proceed directly against the insurer of a deregistered company, without seeking the company's reinstatement. Together with s 601AH, it provides a remedy for unjust consequences of a company's deregistration. The two sections are to be read together in order to be construed to give the fullest relief that their language will allow. The use of s 601AG does not preclude other mechanisms for plaintiff relief: *Romaro v ASIC* [2024] WASC 276. See [601AG.10].

Practice and procedure: Satisfied that it is “just” – s 601AH(2)(b)

Section 601AH enables ASIC to reinstate a deregistered company. An honest and inadvertent mistake are grounds for reinstatement: *Zare v ASIC* [2024] WASC 82. A comprehensive examination of the bases of reinstatement is included in *Ligon 158 Pty Ltd (in liq) v Shield Holdings Australia Pty Ltd* [2024] FCA 144. See [601AH.50].

Practice and procedure: Orders the court can make – s 601AH(3)

Section 601AH(3)(d) is sufficiently broad to enable the court to determine the members of the reinstated company and to declare the form and content of the register of members: *Endless Solar Corporation Ltd v ASIC (No 3)* [2024] FCA 236. See [601AH.120].

Practice and procedure: Effect of reinstatement – s 601AH(5)

The court is not empowered by s 601AH(5) to summarily remove a director upon the company's reinstatement without a specific power to do so: *Yi Li v ASIC* [2024] NSWSC 514. See [601AH.130].

Outline – Part 5B.2, Division 2

Division 2 of Part 5B.2 relates to foreign companies. The *Foreign States Immunities Act 1985* (Cth) must be viewed in the context of purpose, namely being directed to bodies corporate in and of the Commonwealth rather than private companies: *Greylag Goose Leasing 1410 Designated Activity Company v PT Garuda Indonesia Ltd* (2024) 98 ALJR 828; [2024] HCA 21. See [Pt5B.2Div2.10].