



THOMSON REUTERS

Update Summary

PLEASE CIRCULATE IMMEDIATELY!

UPDATE 33

FEBRUARY 2025

**Crutchfield's
VOLUNTARY ADMINISTRATION**

C Anderson and D Morrison

Material Code 41725058

© Thomson Reuters (Professional) Australia Limited 2025

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

Dr David Morrison has updated commentary and annotations. Highlights include:

General – s 436A

Section 436A enables company directors to appoint a voluntary administrator in certain circumstances. It may be available where a company is part of family law proceedings: *Re Childcare Development Opportunities Pty Ltd* [2024] FCA 1133. See [30.436A.20].

Leave of the Court – s 444GA

Section 444GA enables a deed administrator to sell existing shares in the company without the owners' consent. In considering whether shares to be transferred in fact have value, and in calling in expert valuers to assist the court in making a determination, it is necessary to consider expert evidence of asset values as well as expert evidence as to share value; the difference between those values may include *inter alia* "distressed sale discount" applied to a sum proffered to the court: *Kipoi Holdings Mauritius Ltd v Kirman (No 4)* [2024] WASCA 145. See [30.444GA.40].

Reversal – s 444GA

In some circumstances, restitutionary relief is allowed. The general principle that an appellate court cannot order restitution against a third party to litigation does not exclude a person to be accorded procedural fairness. An appellant is not necessarily precluded from seeking or obtaining reversal of judgment restitution on the basis that the s 444GA grant of leave constitutes an authorisation to transfer rather than requiring same, consistent with the objects of Pt 5.3A: *Kipoi Holdings Mauritius Ltd v Kirman (No 4)* [2024] WASCA 145. See [30.444GA.60].

Ending the administration – s 447A

Section 447A confers general powers on a court to alter the operation of provisions in Pt 5.3A. An application to set aside the alleged improper appointment of administrators may also seek a court order for a general meeting of club members to elect new directors: *Re Cyprus Community of NSW Ltd* [2024] NSWSC 1629. 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. The court may grant relief against forfeiture because the fact of insolvency is a discretionary consideration, rather than being decisive: *Okami SA Newton Pty Ltd v Newton SC Pty Ltd* [2024] SASC 151. See [31.453A.20].

Introduction – s 454N

Section 454N imposes a stay on enforcing rights merely because the company is under restructuring: The indefinite stay provided by s 454N(4)(b) does not arise by reason of restructuring but by reason of the company having come or been under restructuring before the end of the stay period: *Okami SA Newton Pty Ltd v Newton SC Pty Ltd* [2024] SASC 151. See [31.454N.20].

Introduction – s 458A

Section 458A enables a court to make orders to alter the operation of the provisions of Part 5.3B. The court may make an order to extend the proposal period when it has ended has come to an end, providing that the order is expressed in terms of the language of the provision's operation to the company: *Re Sprys Coating Services Pty Ltd (Restructuring Practitioners Apptd)* [2024] FCA 1152. See [31.458A.20].

Introduction – Sch 2, s 60-10

Section 60-10 empowers creditors to resolve to approve an external administrator's remuneration. Where an administrator's remuneration was determined by s 60-10(1)(a) by resolution of the creditors, s 60-10(1)(c) was not engaged and it is not possible to award additional remuneration: *Re Wave Pty Ltd (admins apptd)* [2024] WASC 453. See [35.60-10.10].

Directions – overview – 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. For an outline as to scope and purpose of directions, see *Re Chang Jiang Financial Pty Ltd (in liq)* [2024] VSC 721. See [35.90-15.30].

Examining a person about a corporation (Division 1)

The examination procedure enables the court to summon and examine persons who have had dealings with the insolvent company to facilitate the insolvency practitioner's tasks of locating and recovering assets and maximise the return to creditors, and also to provide evidence necessary to support action against the liquidator if required. An application for a stay of orders may be dismissed if there is no abuse of process and the court is satisfied that there is a genuine and reasonable point to be argued on appeal and that the stay sought is both premature and too broad: *Iris Energy Ltd v PricewaterhouseCoopers Inc* [2024] FCA 1297. An arrest warrant may be granted for failing to attend an examination: *Re Parwan Valley Mushrooms Pty Ltd (in liq)* [2024] FCA 1164. See [50.20].

ASIC materials

ASIC Regulatory Guides

ASIC has issued revised versions of:

- Regulatory Guide RG 217, *Duty to prevent insolvent trading: Guide for directors* (see [RG 217]); and
- Regulatory Guide RG 258, *Registered liquidators: Registration, ongoing obligations, disciplinary actions and insurance requirements* (see [RG 258]).

