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Update Summary

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Revisions to annotations on Part 5.7B of Chapter 5 by Matthew Broderick

Concepts: Benefits to other parties to the transaction of entering into it – s 588FB

Section 588FB defines uncommercial transactions, including a bargain of such magnitude that cannot be explained by normal commercial practice. A debt forgiveness linked to a deed to facilitate a director's resignation may not be uncommercial if the resignation is of no reciprocal benefit: *Sprowles v Rouse* [2024] FCA 988. See [588FB.70].

Concepts: Timing of insolvency – s 588FC

Section 588FC defines insolvent transactions and is to be read in conjunction with s 95A which defines insolvency in a consideration of the terms of each relevant debt and whether it is due and payable at the relevant time. This includes ascertaining and reviewing contractual terms for any obligation that arises under contract, and a consideration of the relevant statutory terms where an obligation arises on the statute: *Re Shire Lind Developments (NSW) Pty Ltd (in liq)* [2024] NSWSC 1454. See [588FC.30].

Concepts: Benefit – s 588FF(1)(c)

Section 588FF allows a court to set aside a voidable transaction if it was entered into within a particular time before the appointment of a liquidator. An order may be made to transfer funds that were paid into a bank account of its customer who was an errant director who procured an unreasonable director-related transaction: *Re Allscope Concrete & Pumping Pty Ltd (in liq)* [2024] NSWSC 1476. See [588FF.70].

Practice and procedure: Declaration of voidness – s 588FF(1)(h)

Rather than declaring an entire deed of arrangement to be void, a court may declare specific clauses to be void or unenforceable: *Sprowles v Rouse* [2024] FCA 988. See [588FF.120].

Practice and procedure: Criteria for extension – s 588FF(3)(b)

While a liquidator should not delay action unduly, a delay itself will not necessarily disentitle to an extension; it is to be considered when determining whether, in all the circumstances, an extension would be fair and just: *Re Futurepower Developments Pty Ltd (in liq)* [2024] NSWSC 1021. See [588FF.180].

Practice and procedure: Redaction or non-publication of affidavit material in support of application – s 588FF

Suppression orders are extremely rare in applications under s 588FF(3)(b) and potentially unfair. This is because the need for assistance of the Court in granting an extension is a result of a liquidator not commencing recovery proceedings in the period required by s 588FF(3)(a), which needs to be inquired into: *Re My Shared Services Pty Ltd (in liq)* [2024] FCA 1146. See [588FF.380].

Concepts: Taxation debts – s 588G

Section 588G provides that a director of a company has a duty to prevent it incurring further debts while insolvent. In a liquidator's recovery proceedings against a director based on breaching s 588G for taxation debts, the Running Balance Account statement

of the Australian Taxation Office is prima facie evidence of a company's liability RBA deficit debt: *Copeland v Murace (No 2)* [2024] FCA 957. See [588G.42].

Concepts: Insolvent – s 588G(1)(b)

While the question of solvency is to be determined by reference to the circumstances as they were known, or ought to have been known, at the date that the question of solvency is assessed, the court may consider what subsequently happened, to the extent that actual events shed light on what was likely at the time: *Re Shire Lind Developments (NSW) Pty Ltd (in liq)* [2024] NSWSC 1454. See [588G.50].

Concepts: Reasonable grounds to expect company was solvent and did expect solvency – s 588H(2)

Section 588H provides statutory defences against proceedings under Part 5.7B. There are two elements to establish for a director to establish a defence: the director must have reasonable grounds to expect that the Company is solvent, and would remain solvent; and the director's actual expectation as to those matters: *Re Shire Lind Developments (NSW) Pty Ltd (in liq)* [2024] NSWSC 1454. See [588H.10].

Concepts: Competent and reliable person to provide information – s 588H(3)

To be able to use this subsection in a defence, a director must establish that they had reasonable grounds to believe, and did believe, that another person was responsible for providing adequate information on the company's solvency, that that person was competent and reliable, that they were providing information that was adequate to assess the company's solvency and the information was sufficient to expect that the company was solvent at the time that debts were incurred and would remain solvent once the debts were incurred: *Copeland v Murace (No 2)* [2024] FCA 957. See [588H.20].

Revisions to annotations on Parts 5.8 and 5.8A of Chapter 5 by Eugene Chan

Concepts: Makes or causes gift or transfer of property – s 596(1)(b)

Section 596 prohibits a person, in their capacity as an officer or employee of a company, from engaging in conduct amounting to fraud. To prove an offence about the transfer of property, it is not necessary to prove that property had actually been taken away or deprived from creditors. Section 596(1)(b) focuses on the *intention to defraud*; there need not be *actual* fraud: *Eco-Pact Pty Ltd v Law Society of NSW* [2023] NSWSC 283. See [596.30].

Revisions to annotations on Chapter 5C, by Bianca Kabel

Concepts: In the business of promoting managed investment schemes – s 601ED(1)(b)

Section 601ED states when a managed investment scheme must be registered. A person who has also been involved in the promotion of other managed investment schemes may held to be in the business of promoting such schemes: *Chu v Lin* [2024] FCA 766. See [601ED.40].

Outline – s 601EE

Section 601EE provides that unregistered managed investment schemes may be wound up by the Court. The power is broad and the appropriate orders will depend on the nature

of the unregistered managed investment scheme that is being wound up: *ASIC v Marco (No 16)* [2024] FCA 1000. See [601EE.10].

Practice and procedure: Right of indemnity – s 601GA(2)

Section 601GA specifies what should be in the constitution of a scheme, including the rights of the responsible entity in relation to the proper performance of its duties. The consideration of “proper” performance of duties reveals that certain breaches of duties will be regarded as sufficiently serious as to deprive a responsible entity of recourse to indemnity, while other situations will call for closer consideration of the particular actions and duties whose performance exposed the entity: *Re Traditional Values Management Ltd (in liq)* [2024] FCA 74. See [601GA.25].

Practice and procedure: Modification by special resolution – s 601GC(1)(a)

Section 601GC enables the modification of the constitution of a managed investment scheme. It confers a wide power for alteration: *Re Magellan Asset Management Ltd* [2024] NSWSC 603. See [601GA.25].

Practice and procedure: Directions as to winding up – s 601NF(2)

Section 601NF enables the Court to make orders about the winding up of a scheme and defines who may apply for an order. The power extends to settling entitlements between members: *Trilogy Funds Management Ltd* [2024] FCA 944. See [601NF.20].