

INSOLVENCY LAW JOURNAL

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EDITORIAL 77

ARTICLES

Corporate group insolvencies: Charting the past, present and future of “pooling” arrangements – Jason Harris

This article examines the problems associated with the collapse of corporate groups; in particular, the tension that arises during insolvency between the application of the separate legal entity principle and the common commercial practice of managing corporate groups as a single economic entity. Specific attention is given to the difficulties faced by insolvency administrators dealing with extensive (and often inadequately documented) intermingling of assets between corporate group members and creditor confusion concerning the precise identity of the debtor corporation. One solution to these problems has been the use of pooling arrangements, with a range of statutory powers currently being used by different courts to facilitate the consolidation, for liability purposes, of the assets of the pooled group companies. However, each of the current methods of pooling has at least some measure of judicial uncertainty, which has prompted the introduction of a statutory pooling regime. This article will discuss how the proposed new pooling powers will overcome the problems that have arisen under the current methods for implementing pooling arrangements and attempt to provide some guidance as to how these new powers may be interpreted by the judiciary. 78

Should administrators be concerned about misleading and deceptive conduct under the Trade Practices Act? – Amelia L Wheatley

Administrators may not consider the possible implications of s 52 of the *Trade Practices Act* to their actions during the course of an administration. Many reasons may be offered for this, including the nature of the administrator’s appointment, being personal, the role of the administrator to report to creditors, and what loss would flow in any event. This article evaluates the role and position of the administrator in terms of the requirements for an action pursuant to s 52 of the *Trade Practices Act* and considers whether or not the administrator should be concerned about this potential liability. 100

Is “due and payable” a magic phrase? – Andrew Marshall

“Due and payable” is one of the best-known legal doublets. But does each word serve a purpose? The phrase was inserted into s 95A of the *Corporations Law* in 1993 to solve some problems with the definition of insolvency. While it generally succeeded in this aim, the phrase also inflamed an existing debate about the timing of debts that could lead to insolvency – one side seized upon “due” while the other championed “payable”. Fortunately, some recent cases have extricated this phrase from the underlying conflict, showing that there is no relevant difference between “due” and “payable” in this context. The doublet should therefore be reduced to simply “payable”, creating a clearer test for insolvency in the *Corporations Act* and in the many contracts that mimic it. This would benefit all of the stakeholders in a corporate insolvency: the distressed company, its creditors, directors and financiers, as well as the broader community. 115

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