

Insolvency law in Queensland: 2019 in review

As 2019 comes to a close, now is a good time to take stock of the developments in corporate insolvency law over the past year. To help you stay on top of changes that may affect you, we've prepared a short summary of the key regulatory news and judgments over the past 12 months – so you can start 2020 in front.

NEWS



ASIC prepared an updated guide to commonly lodged forms

In September 2019, ASIC reissued its *Information Sheet 29: External administration, controller appointments and schemes of arrangement – most commonly lodged forms*, to help insolvency practitioners comply with their lodgement requirements. The revised information sheet reflects the changes made to the Corporations Act by the *Insolvency Law Reform Act 2016* (Cth) and includes a number of helpful flowcharts.



Former liquidator David Leigh sentenced to seven years' imprisonment for fraud

A former partner of PPB Advisory, David Leigh, was sentenced to seven years' imprisonment in May 2019 after pleading guilty to three counts of fraud under the Queensland Criminal Code. An ASIC investigation commenced in February 2018 revealed that, between July and November 2017, Mr Leigh, as co-liquidator of Neolido Holdings Pty Ltd (**Neolido**), had dishonestly re-directed \$800,000 from the Neolido external administration bank account into a bank account controlled by him and used that money to pay for personal expenses.



NSW company director convicted and sentenced for engaging in illegal phoenix activity

- Soutsakhorn Chanthabouly, a shadow director of MK Asbestos Removal Pty Ltd (**MK Asbestos**), was convicted and sentenced to a one year, \$500 good behaviour bond and ordered to pay \$22,000 in reparations after pleading guilty to charges related to illegal phoenix activity.
- Prior to MK Asbestos going into liquidation, Ms Chanthabouly transferred \$22,000 from MK Asbestos' bank account to the bank account of another company of which she was a director, Express Asbestos Removals Pty Ltd. ASIC commenced the investigation into potential phoenix activity after receiving a funded report from the liquidator of MK Abestos.
- The liquidator's report was funded by ASIC through the Assetless Administration Fund (**AA Fund**). ASIC has a helpful guide for registered liquidators who may be interested in seeking funding from the AA Fund on its website.

JUDGMENTS

**The High Court handed down a significant decision concerning the payment of priority debts out of trust assets, where those trust assets are held by an insolvent corporate trustee.**

- In *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* [2019] HCA 20, the High Court unanimously held that the priority regime existing under the Corporations Act applied to a trading trust; a vehicle commonly used for carrying on a business.
- The High Court also took the opportunity to clarify some conflicting authorities in this area. Prior to this decision, there were competing authorities about how trust assets could be used to satisfy debts. The Victorian Court of Appeal had held that trust assets could be used to pay non-trust creditors; the Full Court of the Supreme Court of South Australia and, more recently, the Full Court of the Federal Court of Australia, had held that trust assets could only be used to pay trust creditors. The High Court agreed with the latter; confirming that trust assets can only be used to pay trust creditors.
- The decision provides some welcome clarification on complex legal issues which arise on the insolvency of corporate trustees.

**The Supreme Court handed down a judgment which helpfully summarises the law on effecting service of applications to set aside statutory demands (and similar documents) by email**

- In *SGR Pastoral Pty Ltd v Christensen* [2019] QSC 229 (*SGR Pastoral*), Bowskill J considered a dispute over whether an application to set aside a statutory demand and supporting affidavit had been properly served within the 21 day period specified by s 459G(2) of the Corporations Act. Given the breadth of arguments canvassed in that case, the decision provides a useful summary of the authorities on this issue.
- Most notably, the Respondents attempted to argue that the application had not been served at its nominated place for service, as the solicitor was at home when he read the email instead of his office. This argument was rejected.
- The judgment also suggests that practitioners should be cautious about effecting service of time-sensitive materials by Dropbox and other file-sharing links.

**Another reminder to be careful about using statutory demands “simply in an endeavour to obtain prompt payment”**

- Following the principal judgment in *SGR Pastoral*, Bowskill J also ordered that the creditor pay the Applicant’s costs of the application to set aside the statutory demand, pursuant to the Court’s discretion under s 459N of the Corporations Act. In doing so, her Honour stated that the creditor ought to have been aware that there was a genuine dispute about at least some of the debt, and that there did not appear to be a real basis for believing that the Applicant was actually insolvent. See *SGR Pastoral Pty Ltd v Christensen (No 2)* [2019] QSC 239.
- The judgment cites Higgins J in *Ayrton Investments Pty Ltd v Andriik* [2000] 34 ACSR 643 at [27]:

“Thus, even if it appeared to a creditor that there is no genuine dispute as to the existence of the debt, an adverse costs order might also be made if the creditor had no genuine belief that the debtor was insolvent. It is not appropriate to invoke winding up proceedings merely as pressure upon a reluctant debtor to pay sooner rather than later”.

JUDGMENTS



ASIC intervened to fix liquidators' remuneration for winding up three Adelaide companies and obtained orders that they repay \$1.9m plus interest back of the companies

- In *Lock, in the matter of Cedenco JV Australia Pty Ltd (in liq) (No 3)* [2019] FCA 879, Besanko J of the Federal Court (South Australia division) fixed the remuneration sought by liquidators employed by Sheahan & Lock for the voluntary administration and liquidation of three Adelaide companies. Remuneration was fixed at \$3.9 million compared to the \$5.8 million sought by the liquidators, and his Honour ordered that the liquidators repay the difference (of \$1.9m million) plus interest to the relevant companies.
- ASIC intervened in the matter in 2015 following concerns about the level of remuneration sought, and the volume of work undertaken, by the liquidators.



A former director was denied standing to commence proceedings in the name of the company in liquidation

- In *BDO Corporate Finance (Qld) Ltd v Russell* [2019] QCA 39, a former director of BRGOC Group Finance Pty Ltd was denied leave to appeal against an order made in October 2012 that the company be wound up in insolvency.
- In a Queensland first, the Court of Appeal applied the decision of the New South Wales Court of Appeal in *Chahwan v Euphoric Pty Ltd* [2008] 65 ACSR 661, holding that the derivative actions in Part 2F.1A of the Corporations Act are not available where the relevant company is in liquidation. The Court also declined to exercise the discretion conferred by its inherent powers to grant the director standing to appeal.



Consideration of the interaction between the rule against double proofs and the insolvent trading provisions in ss 588V and 588W

- In *Re Octaviar Limited (in liq)* [2019] QSC 235, the liquidators of Octaviar Limited (**Octaviar**) applied to the court under s 90-20(1)(d) of the Insolvency Practice Schedule (Corporations) for judicial advice on whether they were entitled to reject proofs of debt lodged by two of Octaviar's subsidiaries, which were also in liquidation.
- The liquidators of the subsidiaries sought to recover from Octaviar, as their holding company, under the insolvent trading provisions in ss 588V and 588W of the Corporations Act. However, Octaviar's liquidators argued that the proofs submitted by the subsidiaries were, in effect, double proofs, as the relevant creditors had also filed their own proofs of debt in Octaviar's liquidation for the sum of the guarantees. There was a dispute as to whether the rule against double proofs applied to insolvent trading provisions, given their policy aims.
- Martin J held that Octaviar's liquidators were entitled to reject the subsidiaries' proofs of debt.

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