

Insolvency Law & Practice

Tuesday 2 March 2021

Webinar duration: 4.00pm – 5.00pm

Presenter

Geoffrey McDonald
Barrister at Law

9 Windeyer Chambers

(<http://www.9windeyer.com.au/barristers/geoffrey-mcdonald/>)

zoom

The Presenter's background

Insolvency Accountant

1982 at Peter Rodgers and Associates (Love & Rodgers, Hall Chadwick)

1983 worked with Rod Sutherland and Rick Jirsch (Jirsch Sutherland)

1987 became a partner, the youngest ever of an accounting firm, on my 23rd birthday

1988 became a registered liquidator, then also registered as an auditor, tax agent and then

Trustee in bankruptcy

I was a leader in the uptake of the new law in 1993; Voluntary Administrations

What will come of VAs with the new law on Restructuring Plans and SBRPs?

As Albert Einstein once said;

“the fate of the old one, recognises the culture of the young”

The Presenter's background

I went to the Bar in the late 1990s.

I was told that I was the first person to be granted a Practicing certificate as a barrister whilst also practicing as an accountant.

I soon became National Chairman of Hall Chadwick.

From those beginnings, many insolvency firms have grown or many have employed staff who have had the experience of working with me.

I approach my work, as a relatively senior and experienced Barrister, with a deep grounding in the world of insolvency. What I do have, are a very particular set of skills, skills I have acquired over a very long career.

Web site: [Geoffrey McDonald — 9 Windeyer Chambers](#)

Past papers: [List.docx \(google.com\)](#)

Family business: <http://www.helpingclients.com.au/geoffrey.php>

Due to the relatively short duration of this Webinar, you will find that the presentation will bring issues to your attention, rather than answer all the questions and the PowerPoint paper will be a helpful resource for future guidance when issues arise (to be posted on the 9 Windeyer Website).

Please ask questions throughout, the Webinar, using the Zoom facility.

Endorsement; “Thank you for another generous invitation to attend your complimentary seminar. Unfortunately I will not be attending this one, nor any others. I retired as a solicitor at the end of 2018 after 50 years plus. ...

Your invitations and seminars always brought back memories of our many years of friendship and the characters we shared in our lives. Thank you for those. “

Outline of Insolvency Law & Practice Webinar

(1 hour on Tuesday 2 March 2021)

1. Out with the new and in with the old laws; or not?
2. Small Business Restructuring Practitioners and their Plans
3. Recent Superior Court cases
4. Creditor defeating transactions (briefly)

1. Out with the new and in with the old laws; or not?

For the period from 24 March 2020, to 31 December 2020,
the insolvency laws were changed to;

- Increase the current minimum threshold for creditors issuing a statutory demand on a company under the Corporations Act 2001 from \$2,000 to \$20,000.
 - Extend the statutory timeframe for a company to respond to a statutory demand from 21 days to six months.
 - Increase the threshold for the minimum amount of debt required for a creditor to initiate bankruptcy proceedings from its current level of \$5,000 to \$20,000 (BNs changed to \$10,000).
 - Increase the time a debtor has to respond to a bankruptcy notice from 21 days to six months.
 - Relieve directors of their duty to prevent insolvent trading with respect to any debts incurred in the ordinary course of the company's business (but not waive any related criminal provisions which involve intent, such as dishonesty or fraud).
- Corporations Amendment (Corporate Insolvency Reforms) Act 2020*

1. Out with the new and in with the old laws; or not?

CORPORATIONS ACT 2001 - SECT 588GAAA

Safe harbour--temporary relief in response to the coronavirus

(1) Subsection 588G(2) does not apply in relation to a person and a debt incurred by a company if the debt is incurred:

(a) in the ordinary course of the company's business; and

(b) during:

(i) the 6-month period starting on the day this section commences; or

(ii) any longer period that starts on the day this section commences and that is

prescribed by the regulations for the purposes of this subparagraph; and

(c) before any appointment during that period of an administrator, or liquidator, of

the company.

1. Out with the new and in with the old laws; or not?

Safe Harbour

“As we have previously highlighted, safe harbour is not a ‘state’ or ‘status’ that a company enters. It is a set of actions which may offer protection to directors from insolvent trading liabilities in the event the company ends up in liquidation.”

Australian Restructuring Insolvency and Turnaround Association (ARITA)

1. Out with the new and in with the old laws; or not?

Simplified Liquidation Process

Guide; [Simplified liquidation](#) | [ASIC - Australian Securities and Investments Commission](#)

Where a liquidator has been appointed pursuant to a creditor's voluntary liquidation and they consider on reasonable grounds that the company meets the eligibility criteria, the liquidator may choose to adopt the small business liquidation process rather than the standard creditor's voluntary liquidation process.

- the liquidator is not required to submit a section 533 report to ASIC on potential misconduct unless there are reasonable grounds that misconduct has occurred.
- the liquidator is not required (entitled) to hold formal creditor's meetings and can instead distribute information to creditors, and proposals for voting, electronically.
- the unfair preference voidable transaction provisions are restricted to prevent the liquidator pursuing claims against unrelated entities.

1. Out with the new and in with the old laws; or not?

Simplified Liquidation Process

In order for a company to be eligible for the simplified liquidation it must satisfy a number of requirements under the legislation including:

- The company must already be in liquidation pursuant to a creditor's voluntary liquidation.
- The company must have liabilities less than \$1 million.
- The company must have its tax lodgements up to date (returns, notices, statements and applications as required by taxation laws).
- Creditors may also request in writing that the liquidator not follow the simplified liquidation process within 20 days* of the event triggering the simplified liquidation process, and the liquidator must cease the simplified liquidation process if the eligibility criteria are no longer met.

1. Out with the new and in with the old laws; or not?

Unfair preference claims are not to be pursued if:

- a. >3 months before liquidation
- b. <\$30,000

1. Out with the new and in with the old laws; or not?

Under the Retail and Other Commercial Leases (COVID-19) Regulation

2020 (and the Retail and Other Commercial Leases (COVID-19)

Regulation (No 3) 2020) commercial leases entered into before 24 April 2020 where the lessee (a) qualifies for the jobkeeper scheme; and (b) has turnover of less than \$5M (under Regulation No. 3), are 'impacted leases' and protections are afforded to lessees until 31 March 2021

Reductions in rent: If eligible, the lessee may be entitled to negotiate a reduction in rent proportional to the reduction in turnover during that period.

Rental Waivers: If eligible, the lessee may be entitled to a 50% rent reduction through rental waivers.

1. Out with the new and in with the old laws; or not?

Rent must not be increased during the extended period

other than by reference to turnover;

After the conclusion of the extended relief period,

prescribed action against the lessee must not be taken relating to a backdated rent increase;

Any reduction in statutory charges (e.g. Land Tax, local council rate or insurance payable) will be passed on to the tenant;

1. Out with the new and in with the old laws; or not?

If obligations imposed by renegotiating rent and dispute resolution clauses have been complied with, prescribed action may be taken on the grounds of a breach consisting of any of the following:

A failure to pay rent;

Failure to pay outgoings; or

The premises not being open for business during the hours specified in the lease.

The lessee may request to renegotiate the rent payable under the terms of the impacted lease;

Renegotiations must commence within 14 days after receiving the lessee's request (or another period agreed to by the parties).

2. Small Business Restructuring Practitioners and their Plans (“SBR Process”)

[Guide; Restructuring and the restructuring plan](#) | [ASIC - Australian Securities and Investments Commission](#)

Total Number of Appointments in Australia in two (2) months to 28 February 2021; 3 (see below)

NOTICE OF APPOINTMENT OF RESTRUCTURING PRACTITIONER FOR A COMPANY

Company details	
Company:	Southside Staffing Solutions Pty Ltd
ACN:	168 259 970
Status:	Registered
Appointment Date:	24 February 2021

Appointment Details

Notice is hereby given that Darren John Vardy was appointed restructuring practitioner(s) for the company under section 453B(1) on 24 February 2021.

2. Small Business Restructuring Practitioners and their Plans

Conflict of Interest

The Restructuring Practitioner is to assist the company in the preparation of a restructuring plan.

The RP is to make a Declaration, which includes a declaration or certificate as to whether the company is likely to be able to discharge the obligations created by the plan

as and when they become due and payable.

The Reforms entitle the directors to rely on the advice of the Restructuring Practitioner. The advice is expressly to include the preparation of a restructuring plan.

The Restructuring Practitioner must, when forming an opinion on the company's likelihood of discharging the obligations under the plan (as part of the Declaration), in effect, provide advice to creditors. The advice is about that same plan, which he or she assisted the company prepare.

"officer" of a corporation means: (g) a trustee or other person administering a compromise or arrangement made between the corporation and someone else.

2. Small Business Restructuring Practitioners and their Plans

Conflict of Interest

ARITA Technical Paper

General law independence standards of Australian liquidators and administrators

Mark Wellard, Legal Director, 18 October 2017

“If one were to reduce the judgment of O’Callaghan J in Ten Network to one key statement of principle, it might be the proposition that as a potential administrator, you can ‘pre-plan’ a process, but you cannot ‘pre-pack’ an outcome”.

2. Small Business Restructuring Practitioners and their Plans

Eligibility criteria;

- Liabilities are under \$1m, excluding employee entitlements.

(check for any related parties loans, third party financing facilities)

- The Company has not been subject to a simplified liquidation or SBRP in the previous 7 years.
- Directors, including former directors acting in the preceding 12 months, have not been involved in a simplified liquidation or small business restructure in the previous 7 years.
- Tax obligations are up to date

(20 days to meet tax lodgment obligations).

- Employee entitlements are up to date

(20 days to meet outstanding employee entitlements including superannuation)

2. Small Business Restructuring Practitioners and their Plans

Reg 5.3B.18 Restructuring practitioner must make declaration

The declaration must:

- (a) (state) if the restructuring practitioner believes on reasonable grounds that:
 - (i) the eligibility criteria for restructuring are met in relation to the company; and
 - (ii) if the restructuring plan is made, the company is likely to be able to discharge the obligations created by the plan as and when they become due and payable;
- (b) (state) if the restructuring practitioner believes on reasonable grounds that all information required to be set out in the company's restructuring proposal statement has been set out in that statement; and
- (c) if the restructuring practitioner does not believe ... identify the matter in relation to which a belief on reasonable grounds could not be formed and set out the reasons

2. Small Business Restructuring Practitioners and their Plans

5.3B.18 Restructuring practitioner must make declaration

Offence

(4) The restructuring practitioner for a company commits an offence if:

(a) the restructuring practitioner prepares a declaration under this regulation; and

(b) the restructuring practitioner does not:

(i) make reasonable inquiries into the company's business, property, affairs and financial circumstances; or

(ii) take reasonable steps to verify the company's business, property, affairs and financial circumstances;

for the purpose of assessing the accuracy and completeness of the information provided by the company in the restructuring plan and restructuring proposal statement.

2. Small Business Restructuring Practitioners and their Plans

5.3B.19 Offence

if (i) the restructuring practitioner becomes aware that the information in the plan, or in the restructuring proposal statement that accompanies the plan, is incomplete or inaccurate; and

(ii) the restructuring practitioner has reasonable grounds to believe that, if the plan is made, the matter to which the incompleteness or inaccuracy relates is likely to affect the company's ability to meet its obligations under the plan; and

(b) the restructuring practitioner does not, as soon as practicable after becoming so aware:

(i) notify the company of the incompleteness or inaccuracy; and

(ii) provide an opportunity for the company to address the incompleteness or inaccuracy.

2. Small Business Restructuring Practitioners and their Plans

A plan is accepted if more than 50 percent of the creditors
by value that vote, vote to accept the plan.

Related party creditors (that is those linked to the company, its directors or its shareholders) are
not entitled to vote on a restructuring plan.

2. Small Business Restructuring Practitioners and their Plans

Restructuring Proposal Statement – Approved Form

Corporations Act 2001, Section 455B, Corporations Regulations 2001, Reg 5.3B.16(2)(a) and Reg 5.3B.65

Mandatory Information

1. Company property to be dealt with under the Plan
2. How company property is to be dealt with under the Plan
3. If asset sales are included in 2. above, then;
 - a. How the assets will be valued
 - b. The method of sale and any proposed marketing plan
 - c. Who will undertake the sale process
 - d. If the sale is to a related party – the relationship

2. Small Business Restructuring Practitioners and their Plans

Restructuring Plan Standard Terms (s 455B and Reg 5.3B.27)

A restructuring plan made by a company is taken

to include all the following terms:

- a) all admissible debts and claims rank equally;
- b) if the total amount paid by the company under the plan in respect of those debts or claims is insufficient to meet those debts or claims in full, those debts or claims will be paid proportionately;
- c) a creditor is not entitled to receive, in respect of an admissible debt or claim, more than the amount of the debt or claim;
- d) the amount of an admissible debt or claim will be ascertained as at the time immediately before the restructuring began; and
- e) if a creditor is a secured creditor ... (“shortfall”)

Note: A restructuring plan is void to the extent that it is inconsistent with any of the matters set out above.

2. Small Business Restructuring Practitioners and their Plans

“Part IX for Companies”

3. Recent Superior Court cases

Family law

A. The Full Court of the Family Court determined that a lump sum payable under property settlement Orders made by the Family Court was not a provable debt and that the solvent wife continued to have a claim against the bankrupt husband's assets, which did not vest in the husband's trustee

(see <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FamCAFC/2020/279.html>)

B. PRACTICE AND PROCEDURE – application for transfer of insolvent trading proceeding to the Family Court of Australia pursuant to s 1337H(2) of the Corporations Act 2001 (Cth) – whether having regard to the interests of justice it is more appropriate for the proceeding to be determined by the Family Court of Australia – application allowed

Shepard, in the matter of Grainpro Pty Ltd (in liq) v Bonfante [2020] FCA 1618 (9 November 2020), *Yeo, in the matter of Armstrong and Shaw Pty Ltd (in liq) v Whiteman* [2020] FCA 849 (Yeo) at [29]-[30], *In the matter of Peter G Ward Industries P/L* [2020] NSWSC 339 and *Liquidators of UUB Pty Ltd v NWO* [2020] SASC 121

3. Recent Superior Court cases

A. On 20 November 2020, the NSW Court of Appeal upheld the decision refusing the applicants leave to sue the court-appointed liquidator in negligence: *Aardwolf Industries LLC v Tayeh* [2020] NSWCA 301 and stressed the requirement to obtain leave.

B. It is now common practice in large administrations for Orders to be made modifying the manner in which notice of meetings of creditors are given: see, for example, *Strawbridge, Re Virgin Australia Holdings Ltd (admins apptd)* [2020] FCA 571 at [27]-[29].

C. If a director has failed to defend an insolvent trading claim or filed any material which discloses a disputed issue of fact, it is open to a liquidator to proceed with a summary judgment application: *Hambleton, in China Cooking v Zhang* [2020] FCA 1879.

3. Recent Superior Court cases

D. There are many successful applications for the appointment of a Liquidator to be receiver of trust assets:

see, for example, *Re Aberdeen All Farm Pty Ltd (in liq)* [2020] NSWSC 770; *Re Glenvine Pty Limited (in liq)* [2020] NSWSC 866; *Structum Pty Ltd v CWCN Pty Ltd* [2020] NSWSC 1314 and *In the matter of Parkway One Pty Limited (No.2)* [2020] NSWSC 191.

E. In the distribution of personal assets of a bankrupt, the “hotchpot” principle applies;

“108. ... one liquidation may, by statute (such as s 116(3) of the Insurance Act ...), have within it separate funds to be administered. Where that is so, and where the claims (even if to be met out of particular funds at successive stages) are claims of equal degree the appropriate approach is by way of hotchpot, involving treatment of claims of equal degree as if in several concurrent windings up of the same entity in different jurisdictions.”

3. Recent Superior Court cases

F Confidentiality;

“Pursuant to s 37AF(1)(b)(iv) of the Federal Court of Australia Act 1976 (Cth) and on the ground that it is necessary to prevent prejudice to the proper administration of justice, the deed of assignment (identified as xxx) are to remain confidential and are prohibited from disclosure to any person, except pursuant to an order of the Court, until 30 June 2021”.

Nicols, in the matter of Anatax Pty Ltd (in liq) [2020] FCA 1320

G. If an application is made for “directions” under s90-15, the court is likely to require that the external administrator has at least formed a view as to what he or she proposes to do, as to that which he or she seeks a direction.

ARITA conference 12 November 2020, Justice Ashley Black NSWSC

3. Recent Superior Court cases

H. The decision in *Jahani (liquidator) v Commissioner of Taxation*

[2020] FCA 1642 is an example of a recent trend where courts are appointing referees to determine the question of insolvency.

I. The Federal Court has made orders granting leave to deed administrators to transfer shares in a company from its members to a third party in accordance with the terms of the DOCA, noting unfair prejudice to members as the key consideration: *Dickerson, in the matter of McWilliam's Wines Group Ltd (subject to Deed of Company Arrangement) (No 3)* [2020] FCA 1564 and *Virgin Australia (No 9)* [2020] FCA 1652 (10 November 2020).

3. Recent Superior Court cases

J. In *Ford, Re Scentre Management Ltd* [2020] FCA 1023; the Federal Court held that rent payable by a company during an extended period in which the administrator had been excused from personal liability for rent under s 443B of the Act was an expense properly incurred by the administrator in carrying on the company's business and was a priority debt under s 556(1)(a) of the Act.

H. "s 467 of the Corporations Act expressly confers a discretion upon the Court to dismiss a winding up application in an appropriate case, even if a ground has been proved on which a company might have been wound up. ... "avoid the result...that a company that is significantly impacted by the circumstances of the Covid-19 pandemic should be wound up in the midst of the pandemic, with adverse consequences to its employees..."

Re Ryals Hotel Pty Ltd [2020] NSWSC 1906 and *In the matter of GT's Cooking Oils Pty Ltd* [2021] NSWSC 93

3. Recent Superior Court cases

Complying with demands/requests of creditors (case I)

“13. The liquidator is of the preliminary opinion that the Direction is not reasonable on the basis that:

- (a) calling a meeting of creditors for the purpose of voting on a resolution to remove him as liquidator at this juncture would substantially prejudice the interests of one or more creditors or a third party, and that prejudice outweighs the benefits of complying with the Direction; and/or*
- (b) the Direction is vexatious.*

40. In my view, the fact that the liquidation is at an early stage is a matter which may be taken into account, (as a) transfer to another liquidator would be less problematic, involve less duplication, result in lower costs being incurred by creditors, than if the liquidation was at a more advanced stage. In that sense it would be less prejudicial to creditors”

3. Recent Superior Court cases

Complying with demands of creditors (case I)

“66. In the present context the liquidator’s opinion should be informed by the fact that:

- the stated purpose of the proposed meeting is to remove and replace the liquidator not merely to remove the liquidator;*
- the relevant text of the Schedule and the Rules show that related friendly creditors have equal voting rights to unrelated creditors;*
- the liquidation is at an early stage, although this is a factor which cuts both ways;*
- while there are no funds currently in the liquidation (other than pursuant to the funding agreement), the funding agreement appears to bind a replacement liquidator*
- Creditor appears to be offering to provide \$10,000 towards the cost of the meeting*
- a replacement liquidator would have duties to the Court and to creditors.”*

3. Recent Superior Court cases

Complying with demands/requests of creditors (case I)

“67. Senior counsel for the liquidator submitted that the Court is part way through a process for the giving of judicial advice prior to the formation of a concluded opinion by the liquidator. I accept that characterisation.”

AXF Group Pty Ltd & Anor v AXF Holdings Pty Ltd & Ors [2020] VSC 375

3. Recent Superior Court cases

Complying with demands of creditors (case J)

“36. In sum, in considering a request for document production under the IPS, the administrators must establish that it is ‘not reasonable’ to comply with the request. In order to do so, the administrators must establish that they, acting in good faith, held any of the opinions in r 70-15(2) of the Insolvency Practice Rules.”

“46. The issue of privilege which Mr Gladman was required to consider in coming to his opinion raised a difficult issue of law. ... the administrator must establish reliance on some reasonable basis for coming to the legal opinion he or she is required to form. Without being exhaustive, that basis could include taking legal advice, or establishing that the administrator instructed himself or herself on the relevant legal principles.”

3. Recent Superior Court cases

Complying with demands/requests of creditors (case J)

“69. I acknowledge that the Liquidator may have formed the opinion that production of the (valuation report prepared for the administrators) would substantially prejudice the company’s interests. However, Pacreef has offered to undertake to the court to use those documents solely for the purposes of this proceeding. Pacreef is also privy to a substantial portion of that confidential information. I am satisfied that if an undertaking were in place, the prejudice to PRF Holdco would be minimal. I am not satisfied that Mr Gladman has established his opinion was based on a reasonable basis.”

Re Pacific Biotechnologies Ltd [2020] VSC 636

3. Recent Superior Court procedure

Federal Court of Australia Practice

[Bankruptcy Information Sheet 1: Presenting a creditor's petition \(fedcourt.gov.au\)](#)

[Bankruptcy Information Sheet 2: Creditor's petition checklist \(fedcourt.gov.au\)](#)

[Bankruptcy Information Sheet 3: Opposing a creditor's petition \(fedcourt.gov.au\)](#)

[Bankruptcy Information Sheet 4: Setting aside a bankruptcy notice \(fedcourt.gov.au\)](#)

[Bankruptcy Information Sheet 5: Substituted service applications \(fedcourt.gov.au\)](#)

Updated January 2021

[Corporations Information Sheet 1: Winding up proceedings based on an unsatisfied Statutory Demand \(fedcourt.gov.au\)](#)

[Corporations Information Sheet 2: Winding up checklist \(fedcourt.gov.au\)](#)

3. Recent Superior Court procedure

FCA REGISTRARS' CORPORATIONS MATTERS - STANDARD ORDERS

Winding-up based on presumed insolvency

Winding-up on other grounds

Dismissal

Substituting Plaintiff

Adjournment/Notification

Extension of Time

Administrator Appointed as Liquidator

Reinstatement

Affidavit in Support of Adjournment

Filing of Evidence

4. Phoenix Companies

- enable the Australian Securities and Investments Commission to make orders to recover, for the benefit of a company's creditors, company property disposed of or benefits received under a voidable creditor-defeating disposition (see section 588FGAA “ASIC may order undoing of effect of creditor-defeating dispositions by company being wound up”);

4. Phoenix Companies

From 18 February 2021 the effectiveness of a director's resignation will be dependent on when he/she lodges the resignation form with ASIC.

If it is lodged over 28 days after the resignation, then the date of lodgement is the date of resignation.

Any resignation of a director of a company does not take effect if, on the date of that resignation, the company does not otherwise have at least one other director. Furthermore, any resolution purporting to remove a director, in circumstances where there is no other director available, will be void (section 203CA).

Guide; [Resigning or removing a company director | ASIC - Australian Securities and Investments Commission](#)

5. Creditor Defeating Transactions

Corporations Act; Section 588FDB “Creditor-defeating disposition”

(1) A disposition of property of a company is a creditor-defeating disposition if: (a) the consideration payable to the company for the disposition was less than the lesser of the following at the time the relevant agreement ... was made ... :

- (i) the market value of the property;
- (ii) the best price that was reasonably obtainable for the property, having regard to the circumstances existing at that time; and ...

5. Creditor Defeating Transactions

Corporations Act; 588GAC

“Procuring creditor-defeating disposition”

- (1) A person must not engage in conduct of procuring, inciting, inducing or encouraging the making by a company of a disposition of property that results in the company making the disposition of the property ..., if:
- (i) the company is insolvent;
 - (ii) the company becomes insolvent because of the disposition or a number of dispositions made at the time of the disposition;
 - (iii) less than 12 months after the disposition, the start of an external administration (as defined in Schedule 2) of the company occurs as a direct or indirect result of the disposition;
 - (iv) less than 12 months after the disposition, the company ceases to carry on business altogether as a direct or indirect result of the disposition; ...

Note 1: Failure to comply with this subsection is an offence: see subsection 1311(1).

6. Other Proposed changes in law and practice

[Increasing the Statutory Demand Threshold | Treasury.gov.au](#)

Increasing the Statutory Demand Threshold

“Until 2010, there was alignment between the threshold for issuing a corporate statutory demand on a company and the threshold for initiating bankruptcy proceedings against an individual debtor through issuing a bankruptcy notice. In 2010, the threshold for issuing a bankruptcy notice was raised from \$2,000 to \$5,000. This threshold was increased again, to \$10,000, on 1 January 2021.”

Geoffrey McDonald

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