



Précis Paper

The 2021 insolvency laws, in times of NSW lock-down

Abstract – Insolvency laws were 'hibernated' for nine months in 2020 in response to COVID-19. Now the pause is over, barrister and accountant insolvency expert Geoffrey McDonald and Senior Partner and business recovery services expert Giles Woodgate examine current law and trends emerging in the courts.

Discussion Includes

Part 1 – Changes in the law

- Insolvency provisions from 2020 (1:38)
- The laws now (4:40)
- Safe harbour (10:10)
- Simplified liquidation process (15:53)
- Simplified debt restructuring regime (24:28)
- Will this regime work? (40:23)

Part 2 – Emerging trends

- The Family Court (48:52)
- Applications for liquidator to be appointed receiver (56:34)
- Applications for directions (1:01:27)
- Where creditors have increased rights (1:03:42)
- Confidentiality orders, transfer of shares (1:07:20)
- Federal Court Guides (1:11:28)
- Phoenix companies (1:12:22)
- Creditor defeating transactions (1:18:00)
- One-year bankruptcy (1:24:50)
- Director Identification Numbers (1:27:33)

The 2021 insolvency laws, in times of NSW lock-down

1. In this edition of BenchTV, Geoffrey McDonald (barrister) and Giles Woodgate (senior partner) discuss where insolvency law is at now and trends emerging in the courts.

Part 1- Changes in the law

Insolvency laws from 2020

2. In March 2020 the insolvency provisions of the law were 'hibernated'. A director could not be sued for allowing the company to trade while insolvent. They were relieved of the obligations of paying their debts when they fell due from the end of March till revocation of the law.
3. The other relief for companies facing difficulties was to restrict the rights of creditors. The threshold for statutory demands and bankruptcy notices was increased, and the period of time to comply with them was dramatically extended – from 21 days to comply to 6 months.
4. Those laws ceased to have effect on 31 December 2020.
5. There was a permanent change to the minimum amount for a bankruptcy notice to \$10,000.
6. There is a Law Reform discussion about whether the statutory demand minimum should match the bankruptcy amount or be increased from \$2,000 to some other amount.

The laws now

7. The time for the operation of those laws ended on 31 December 2020, coinciding with some new laws. But a liquidator would still consider before March and after December. Insolvency law hasn't gone away.
8. To the *Corporations Act 2001* (Cth) s 588G, the Government enacted s 588GAAA Safe harbour – temporary relief in response to the coronavirus.
9. The argument is that if insolvency were declared on 1 January 2021, then the directors are liable.
10. It was a limited carve out, limited to insolvent trading. Directors' duties - Corporations Act s 180, s 181, s 182 were not changed,

Safe harbour

11. The law says that the advisor must be a suitably qualified entity. There is an increased risk for those carrying out that role that needs to be managed.

Simplified liquidation process

12. The process came in on 1 January as part of these Covid changes. In some respects it is not new in that the way a company is put into liquidation hasn't changed.
13. The opportunity to implement a simplified liquidation process is only available for small companies. There's a threshold test – the company liabilities must be less than \$1 million.
14. The company must have its tax returns up to date. Anything that's due to be sent to the tax department is a document that needs to be lodged. It's not the payment of the taxes, it's the lodgement of the paperwork. There could be a cost-benefit analysis on the cost of bringing documentation up to date to be able to use the simplified liquidation process.
15. A certain number of the creditors can elect to stop the company going into this process.
16. Unless the misconduct is at the highest end of the scale, the liquidator is not required to submit a s 533 report to ASIC on potential misconduct.
17. Formal creditors meetings are not held.
18. Preferential payments rules have changed in that the void transactions, the preferential payments that a liquidator could pursue in a simplified liquidation have been changed, the preferences for under \$30,000 are not able to be pursued and the period moves from six months down to three months.

Simplified debt restructuring regime

19. This commenced on 1 January 2021. The small business restructuring practitioner does the small business restructuring process which involves a small business restructuring plan.
20. It's a rushed law.
21. The process is not driven by creditors. It is a voluntary process by the directors.
22. Control of the company stays with the directors.
23. Will this regime work? Like Safe harbour, it will work in limited circumstances.

Part 2 - Emerging trends

Trends emerging in the courts include the transferring of insolvency cases to the Family Court, applications for liquidators to be appointed as receivers of trust assets and increasing applications for directions and confidentiality orders by liquidators and external administrators.

Family Court

24. *Rahman & Rahman* is a dramatic change in the way the law has been practised in this area for many years. The assets were not available for the creditors, they were all available for the ex-spouse.

25. A trend is for claims by liquidators against directors in the Supreme Court or Federal Court being transferred to the Family Court and on application of the director, a spouse that's a party to the Family Court proceeding to have the matters transferred. There are at least four cases in the last year in which the courts did order that transfer – *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; *In the matter of Peter G Ward Industries P/L* [2020] NSWSC 339 and *Liquidators of UUB Pty Ltd v NWO* [2020] SASC 121.

Applications for liquidator to be appointed receiver

26. 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.

Applications for directions

27. Liquidators and external administrators are more commonly making applications for direction, using s 90-15 of the Insolvency Practice Schedule of the Corporations Act,
28. Justice Black at the ARITA Conference on 12 November 2020 said: '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.'

Where creditors have increased rights

29. The incumbent liquidator can be removed. Creditors can also require the liquidator to provide information.
30. The courts have looked at what is reasonable in what should or should not be done by an administrator. 'In considering a request for document production under the Insolvency Practice Schedule, 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.' – *Re Pacific Biotechnologies Ltd* [2020] VSC 636.

Confidentiality orders, transfer of shares

31. There is a growing trend in the granting of confidentiality orders.
32. In *Virgin Australia (No 9)* [2020] FCA 1652 (10 November 2020) the court gave leave for the company administrator under a company arrangement to sell the shares in the company. Shares in a company are not property of the company.

33. A scheme of arrangement was a way of doing a takeover. Section 444GA is a relatively recent law allowing a court forcing of a sale of shares and prior to that if there was a takeover through a voluntary regime, shareholders could say no.

Federal Court Guides

34. The Federal Court has updated guides on the website: see Bankruptcy Information Sheets 1-5.

Phoenix companies

35. Technically, it is illegal phoenix activity, see *Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020* (Cth).
36. There isn't a definition of phoenix activity in the *Corporations Act 2001* (Cth). In New Zealand they do have a definition, in the *Companies Act 1993* (NZ), s 386B Definitions for Phoenix Company provisions: '... phoenix company means, in relation to a failed company, a company that, at any time before, or within 5 years after, the commencement of the liquidation of the failed company, is known by a name that is also – (a) a pre-liquidation name of the failed company; or (b) a similar name.'

Creditor defeating transactions

37. See the *Corporations Act 2001* (Cth) s 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 (as defined in section 9) for the disposition was made or, if there was no such agreement, at the time of the disposition: (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; ...'

One-year bankruptcy

38. Whether this comes in is likely to be a function of the economy.

Director Identification Numbers

39. As part of the 2020 Budget Digital Business Plan, the government announced funding to enable the full implementation of the Modernising Business Registers (MBR) program. This will include the introduction of director identification numbers.

BIOGRAPHY

Geoffrey McDonald

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Geoffrey McDonald has been admitted since 1993, as both a barrister and accountant. For 25 years he was an insolvency partner and ultimately the National Chairman of an Australian accounting firm.

Giles Woodgate

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During the last 33 years Giles has specialised in business recovery services including advisory, reconstruction, insolvency and business consulting services. He has Big Four insolvency experience and has extensive overseas experience, having worked on a number of foreign assignments and having been a director of a New Zealand insolvency practice. Much of Giles' work has involved advisory, business turnarounds, reconstructions, corporate insolvencies and providing specialist advice to directors, corporates and lenders in the early stages of a business problem.

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COVID-19 Omnibus (Emergency Measures) Commercial Leases and Licences Regulations 2020 (Vic)

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Australian Securities and Investments Commission Restructuring and the restructuring plan
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In the matter of Parkway One Pty Limited (No.2) [2020] NSWSC 191

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Companies Act 1993 (NZ)
Insolvency Law Reform Act 2016 (Cth)
Insolvency Practice Rules (Corporations) 2016 (Cth)
Personal Property Securities Act 2009 (Cth)
Personal Property Securities Regulations 2010 (Cth)
Treasury Laws Amendment (Combatting Illegal Phoenixing) Act 2020 (Cth)

Other

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)
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)