Editorial — September 2021

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The Bulletin continues to receive and publish across a range of issues, as our several articles in this issue show, supplemented by some further comment and analysis in our editorial comments.

MSME insolvency

We have an article from Professor Casey Watters and Matyas Szuk — *Micro, Small and Medium Enterprise Simplified Insolvency: Lessons from UNCITRAL* — who both attended online the last two sessions of UNCITRAL's.[1] Working Group V — Insolvency — in December 2020 and May 2021 — at which guidance on laws for the insolvency of MSMEs was finalised. Their article discusses two major issues common to all jurisdictions when dealing with more expedited processes required for MSMEs — the rights of creditors to be informed even if by deemed approval and the rights of employees.

UNCITRAL, World Bank

This work of UNCITRAL and the comparable World Bank Insolvency Principles 2021 shows how far removed Australia's MSME insolvency reform is from what is published as international best practice. UNCITRAL's threshold MSME guidance, particularly in the wake of the Coronavirus pandemic, is that business debts of a person should be dealt with in a single simplified insolvency proceeding or at least by way of procedural consolidation or coordination of linked insolvency proceedings. In Australia, many small businesses operate as sole traders and partnerships, with their main insolvency option being a 3-year bankruptcy, also available for those who guarantee their company's debts. UNCITRAL recommends any period before discharge be short and with limited conditions.

Arrium and the level of certainty of meeting future liabilities

Mark Wellard has given us another excellent analysis of an important insolvency decision — *Arrium:* "Is it 'commercial reality' to conclude that a company is solvent until it is 'certain that it cannot pay' its future debts?" — one that raises an issue not too often confronted — that of the relevance of future debts and the timing and nature of their assessment to a company's insolvency. It is an issue that typically arises in relation to insurers and financial institutions, Wellard referring to, among others, the Associated Dominions Assurance Society decision of the High Court[2] as to an inability of the insurer to meet its liabilities over the following 7 years, although not quite supporting the decision in *Arrium* as to the level of certainty required.

Arrium — examinations

The difficulties of Arrium Mining inevitably produced some complex outcomes and contested litigation. In the Bulletin's recent case note, *Use of Liquidator's Examination Documents in Litigation Assigned to Funders*,[3] the authors Justin Ward and Marcel Fernandes explained that the High Court hearing of the appeal from the NSW Court of Appeal decision in *Arrium*[4] may shed further light on the question. That hearing is being heard by the High Court on 6 October 2021, as to a claimed abuse of the public examination process.

Halifax and the joint appeals process

We also have a report from Professor Trish Keeper in New Zealand on the continued progress of the joint hearing between the High Court of New Zealand and the FCA in Halifax.[5] That has now taken an interesting turn with appeals being filed against an aspect of the two courts' joint decision. On 23 September 2021, the Full Court of the Federal Court in Sydney and the Court of Appeal of New Zealand jointly heard the appeals, brought by a representative party from particular findings in the trial judge decisions.

As Professor Keeper explains, the trial decisions are important in themselves as they represent the first cases to be heard concurrently in New Zealand and Australia with both courts reaching their own independent decisions. Although there are now appeals, the grounds of appeal do not relate to the processes of the joint hearings. The outcome of the appeal hearings will also be significant. One could contemplate a variety of mixes of decisions from what was a joint trans-Tasman sitting of six judges, and the possibility of further appeals (by leave) to the HCA and the New Zealand Supreme Court.

The interesting comparison in Australia is with the 2019 joint appeal to the HCA from the related decisions[6] of the Full Federal Court of Australia in *Westpac Banking Corp v Lenthall*[7] and the New South Wales Court of Appeal in *BMW Australia Ltd v Brewster; Westpac Banking Corp v Lenthall*.[8] The High Court set aside orders made in both matters on important issues in relation to litigation funding and common fund orders but unrelated to the joint sitting processes.[9]

Letters of comfort or discomfort

In *Parent Company Letters of Support: A Real or False Sense of Security?* by Alistair Fleming and Adriano Poncini, we are pleased to have an article on a novel but sometimes fundamental issue in proving insolvency, as to what financial support the company in question had at the relevant time that its insolvency is later being assessed. A letter of comfort might be given by a parent to a subsidiary, for audit purposes, as the authors explain, which might later become elevated to liquidation purposes. The authors borrow from Warren Buffett's comment that "only when the tide goes out do you discover who's been swimming naked", such that the scrutiny of the wording of such comfort may itself cause some discomfort either in relation the drafting or that the letter is in fact being relied upon.

Law reform

Turning now to some current law reform and recent cases, what the editorial in a recent issue referred to as an "insolvency law reform juggernaut" was, in retrospect, a rather tame affair. The insolvency reforms for small corporate businesses under Pt 5.3B[10] which the federal government claims are the most significant insolvency law reforms in three decades have attracted very few matters to date.

Schemes of arrangement

The government has now moved on to the reform of the law for large company schemes of arrangement including by introducing a moratorium on creditor enforcement while a scheme is being negotiated.

This consultation is rather shown up by the submission of TMA[11] which apart from saying that any moratorium was not needed and was in fact ill-based, also says that such piecemeal insolvency law reform that the government is proposing is not good enough, echoing our own concerns.[12] TMA then proceeds to offer a comprehensive range of reforms with international comparisons for Treasury to consider.

In that respect, it is apparent that the government is slowly working through its May 2017 responses to the 2015 Productivity Commission Report on Business set-up, transfer and closure, having dealt with safe harbour and *ipso facto* clause recommendations with a scheme moratorium being another one of the Commission's recommendations.

The Commission also made recommendations about personal bankruptcy which the government seems to have missed. As mentioned earlier, Australia's bankruptcy laws do not sit well with the government's stated desire to ensure "as many businesses as possible have the opportunity to turnaround, restructure and survive".

Safe harbour — s 588GA

The government is consulting on the safe harbour protection from insolvent trading liability, a review having been due under s 588HA of the Corporations Act in 2019. Had the review been conducted then, say late 2019 to early 2020, it might have been seen as premature and not that useful. In late 2021, so much has changed in light of the impact of the Coronavirus pandemic, and continues to change, that now is probably an even less opportune time to conduct the review. In any event, we will read its final report with interest.

Trusts

The government is also consulting on how trusts, which it says are commonly used by small businesses, are treated under insolvency law. As to the impact of trusts in corporate insolvency law, a regime for this topic was the subject of recommendations in the 1988 Harmer Report which were never considered by the government. This topic may usefully be re-examined along with more recent efforts.[13]

As to the use of trusts by many of those in business, Stephen Mullette's 2006 article, *Trustbusters — Asset Protection and the Art of the Alter Ego Entity*, looked at the question of discretionary trusts and their use in protecting assets, in light of the potential to look through a trust raised in case law.[14] While that potential was not realised,[15] the issue remains.[16]

The terms of reference for this inquiry will no doubt confirm its more limited but important corporate focus and these may raise the idea of a separate insolvency regime for trading trusts.

Corporate collective investment vehicles

Such a separate regime is being created for Corporate Collective Investment Vehicles (CCIVs), being "an investment vehicle with a corporate structure — designed to be an alternative to a trust-based managed investment scheme". The government is consulting on the Treasury Laws Amendment (Corporate Collective Investment Vehicle) Bill 2021 which would introduce a new Ch 8B in the Corporations Act, containing the core provisions

outlining the establishment of CCIVs and their regulatory requirements. A CCIV would operate through sub-funds each operated as a separate business, which are then each subject to an external administration process. The new law sets out a single and particular insolvency regime for CCIVs that is based upon Ch 5 of the Corporations Act but modifies its various provisions.

Follow ups

Mining royalties

Following the article by Cameron Belyea and Cayli Bloch in the last issue of the Bulletin,[17] concerning the rights of royalty holders in the external administration of a mining company, the Federal Court gave a decision in *Goldus Pty Ltd*[18] that a security deed did not create a security interest in or charge over mining tenements in a joint venture, and hence that the purported appointment of receivers and managers over those tenements was invalid. Justice Colvin queried whether such a provision purporting to create an interest in the mining tenements would be void in any event without the consent of the Minister under the Mining Act but this question ultimately did not need to be addressed.

Based on the analysis by the authors in this Bulletin, and having regard to Colvin J's observation, it is now open to question whether a security grant over a royalty is enforceable without registration or notice under applicable mining statutes and whether ministerial consent is required. In the meantime, the authors suggest that the market may well respond conservatively by making relevant registrations or lodging of notices (caveat like) and seeking, if required, relevant approvals.

CATSI Act reforms

Also in the last Bulletin, Professor Chris Symes reported[19] on the recommended insolvency changes that came out of the March 2021 review report on the operation of the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSI Act). Very promptly, a Corporations (Aboriginal and Torres Strait Islander) Amendment Bill 2021 has been introduced into parliament, adopting, we are told, "either in whole or in part, a large majority of the recommendations made . . .".

Cape Town Convention — Virgin Airlines

On 3 November 2021 the High Court will hear the appeal in *Wells Fargo v VB Leaseco*[20] — in relation to the obligations of the administrators of Virgin Airlines to return leased equipment at some expense. Professor David Brown has explained the significance of the issues in his recent Bulletin article *"Give" and "Take": Virgin Australia, the Cape Town Convention and Aircraft Protocol*.[21]

And more

Space considerations limit reports on other significant issues raised by our editorial panel, such as Dr Garry Hamilton's reports of a pending Full Federal Court decision on the use of set-off as a defence to a preference claim and a special leave application to the High Court on the peak indebtedness rule and Stephen Mullette's views on the five judge Federal Court decision on the powers of the court when setting aside a sequestration order. We look forward to further contributions on these significant issues.

Contributions

We thank our various contributors to this issue of the Bulletin and those on the editorial panel who offer or prompt articles and otherwise offer their expertise.

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Footnotes

1. United Nations Commission on International Trade Law.
2. *Insurance Commissioner v Associated Dominions Assurance Society Pty Ltd* (1953) 89 CLR 78; BC5300580.
3. J Ward and M Fernandes "Use of liquidator's examination documents in litigation assigned to funders" (2021) 21(5&6) INSLB 70.
4. *ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq) v Walton* (2020) 383 ALR 298; [2020] NSWCA 157; BC202007056.
5. See P Apathy and H Li "Classic Cross-border Cooperation: Joint Court Hearings in the Halifax insolvency" (2019) 20(4&5) *INSLB* 68.
6. *Westpac Banking Corp v Lenthall* (2019) 265 FCR 21; 266 ALR 136; [2019] FCAFC 34; BC201901353 and *Brewster v MW Australia* (2019) 366 ALR 171; 343 FLR 176; [2019] NSWSC 35; BC201901361, respectively.
7. *Westpac Banking Corp v Lenthall* (2019) 265 FCR 21; 366 ALR 136; [2019] FCAFC 34; BC201901353.
8. *BMW Australia Ltd v Brewster; Westpac Banking Corp v Lenthall*; [2019] HCATrans 158.
9. *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* (2019) 374 ALR 627; [2019] HCA 45; BC201911310.
10. Corporations Act 2001.
11. Turnaround Management Association to Treasury, 17 September 2021.
12. A Hargovan "Many Australian Small Businesses in Particular Have Had the Year from Hell" (2021) 21(1&2) *INSLB* 2.

13. See P Agardy, *Trading Trusts Explained,* Lexis Nexis, 2018. Also see N D'Angelo, *Commercial Trusts*, Lexis Nexis 2014 and *Transacting with Trusts and Trustees*, Lexis Nexis 2020.
14. *Re Australian Securities and Investments Commission (ASIC), Richstar Enterprises Pty Ltd v Carey (No 6)* (2006) 153 FCR 509; 233 ALR 475; 58 ACSR 141; [2006] FCA 814; BC200604846.
15. See *Fordyce v Ryan; Fordyce v Quinn* [2016] QSC 307; BC201611351.
16. See P Agardy, *Risky Business*, Federation Press, 2012 and M Murray and P Agardy "Asset Planning — A Risky Business" (2012) 13(3) *INSLB* 50.
17. C Belyea and C Bloch "Royalty Holders' Rights to Future Payments in Australian Mining Insolvency Processes" (2021) 21(5&6) *INSLB* 56.
18. *Goldus Pty Ltd (Subject to a Deed of Co Arrangement) v Cummins (No 4)* [2021] FCA 1095; BC202108480.
19. C Symes "Proposed Changes to Insolvency Processes of Indigenous Corporations" (2021) 21(5&6) *INSLB* 63.
20. *Wells Fargo Trust Co, National Association (As Owner Trustee) v VB Leaseco Pty Ltd (Admins Apptd)* [2021] HCATrans 63.
21. D Brown "'Give' and 'Take': Virgin Australia, the Cape Town Convention and Aircraft Protocol" (2021) 21(1&2) *INSLB* 21.