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Contents

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LexisNexis Butterworths

"Many Australian small businesses in particular have had the year from hell."[1]

A/Professor Anil Hargovan *UNIVERSITY OF NEW SOUTH WALES*

It will be difficult to disagree with the claim above, in light of the devastating bush fires across the country (2019–2020) followed in March 2020 by the economic ravages of a once in a century COVID-19 pandemic. The depth and magnitude of this solvency crisis for businesses in Australia, in particular small businesses, are of an epic and unprecedented scale.

Welcome to the start of a momentous year, where we have already witnessed Australia's largest insolvency law reform in almost three decades. The Australian Government's insolvency law reforms for small business, announced in late September 2020, introduced into parliament in November and passed in December, came into effect on 1 January 2021 via the Corporations Amendment (Corporate Insolvency Reforms) Act 2020 (Cth).

The Bulletin supports the need for insolvency law reform but has serious concerns about the process used to introduce a complex piece of legislation with serious implications for stakeholders. The break-neck speed in which these significant reforms were rushed through parliament is regrettable. The haste in which the reforms were pushed through are captured in the following observation made by a member of parliament:[2]

> Prior to the announcement, no small business group was consulted, and no insolvency experts or accounting bodies were consulted or engaged with by this government. And when the legislation regulations were released for consultation . . . stakeholders were given just four working days and a weekend to absorb and critique the complex reforms in this intricate area of law.

Readers will recall the article in the October 2020 edition of the Bulletin which provides the context for The Corporations Amendment (Corporate Insolvency Reforms) Act 2020 (Cth).[3] It was introduced as a response to the impact of the COVID-19 pandemic on the national economy and provides for a new debt restructuring process for eligible incorporated small business, a simplified liquidation process for such businesses in a creditors' voluntary liquidation and a new "class" of registered liquidator under the Insolvency Practice Rules.

As foreshadowed in the October edition of the Bulletin, there are a lot of regulations which support the Act. This trend, of "a thin stream of legislation meandering its way through lush fields of delegated legislation"[4] has, regrettably, become commonplace and does little for transparency, comprehensibility and certainty.[5] It remains to be seen how events unfold in the implementation of the large and complex Corporations Amendment (Corporate Insolvency Reforms) Act 2020 (Cth).

The Bulletin will keep a watchful eye and keep readers informed on key developments in this area. Lionel Meehan starts us off with his excellent detailed and lengthy analysis of the latest insolvency law reform in the new Pt 5.3B of the Corporations Act 2001 (Cth) with his article entitled "The Small Business Restructuring Process — Some Thoughts and Considerations".

The importance of the key touchstones (transparency, comprehensibility and certainty) for legislative drafting and statutory interpretation, and the perils of ignoring them, are underscored in the article in this edition of the Bulletin by Stephen Mullette "Don't go chasing waterfalls — unfortunately s 588GAAA was just not safe". Stephen, in this follow up piece to this original article in the Bulletin in 2020,[6] focuses on the legal interpretation of the poorly drafted s 588GAAA which offers directors temporary relief from liability for insolvent trading in respect of certain debts. The scope and intention of s 5888GAAA appears to be uncertain and contestable. In seeking to make sense of its wording, Stephen reminds us that that the section was drafted in extraordinary haste, with minimal consultation, in the middle of a pandemic, amidst sweeping legislative reforms (sounds familiar!). The Bulletin encourages contributions that seek to test and challenge the law, as Stephen has admirably done, and welcomes further thoughts and articles on this vexed issue.

Also, in this issue, we have two more interesting articles and two excellent book reviews by Michael Murray.

Following on her earlier article in the Bulletin on the New Zealand licensing regime for insolvency practitioners,[7] Trish Keeper discusses the gatekeeper role played by the Restructuring Insolvency & Turnaround Association of New Zealand (RITANZ) in her article entitled "RITANZ: Its new gatekeeper role and the intervention of natural justice". Under the new regime, membership of RITANZ now provides an alternative pathway to becoming licensed as a practitioner and its membership assessment processes came under critical scrutiny in this High Court of New Zealand judgment.

The Aircraft Protocol to the Cape Town Convention on International Interests in Mobile Equipment (CTC) has not received much scholarly attention but the contribution by A/Professor David Brown has arrested this development. His article "Give and Take: Virgin Australia, the Cape Town Convention and Aircraft Protocol" analyses the litigation arising in the Virgin Australia voluntary administration between the administrators and Wells Fargo, the lessor of aircraft engines leased to the Virgin group. The litigation in *VB Leaseco Pty Ltd (Admins Apptd) v Well Fargo Trust Co, National Association (trustee)* (2020) 384 ALR 378; [2020] FCAFC 168; BC202009745 is an international first under the CTC. Brown offers his insightful thoughts on the litigation and on the construction of the CTC adopted by the Full Federal Court in this case, which may yet be the subject of a High Court appeal.

Michael Murray, founding editor and current co-editor of the Bulletin, has been kept busy over the festive season by reading and reviewing not one but two excellent books for the benefit of our readers. We are grateful for the time and energy invested by Michael and for sharing his views on these recent publications which readers will find of interest:

- *Reinventing Bankruptcy Law: A History of the Companies' Creditors Arrangement Act*, by Virginia Torrie, with a foreword by Anthony Duggan, 2020, University of Toronto Press.
- *The Law of Bankruptcy Notices and Creditors' Petitions*, Nicholas J Simpson, LexisNexis, 2020.

We wish all of our readers a happy new year. As always, contributions to the Bulletin are also sought, including any letters to the editors or responses to the articles published.

A/Professor Anil Hargovan
General Editor of the Insolvency Law Bulletin
University of New South Wales
a.hargovan@unsw.edu.au

Footnotes

1. Mr Thistlethwaite, Second Reading of Corporations Amendment (Corporate Insolvency Reforms) Bill 2020 (8 December 2020) https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/93a920dc-d1e9-4d8f-ba5d-660d94de3e39/0025/hansard_frag.pdf;fileType=application%2Fpdf.
2. Mr B O Connor, Second Reading of Corporations Amendment (Corporate Insolvency Reforms) Bill 2020 (8 December 2020) https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/93a920dc-d1e9-4d8f-ba5d-660d94de3e39/0024/hansard_frag.pdf;fileType=application%2Fpdf.
3. A Hargovan "Australian Insolvency Law Reform for Small Business — Janus-Faced?' (2020) 21 *Insolvency Law Bulletin* 5.
4. Mr S Jones, Second Reading of Corporations Amendment (Corporate Insolvency Reforms) Bill 2020 (7 December 2020) https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/416a6e6c-248f-4d28-98cb-daf087380038/0277/hansard_frag.pdf;fileType=application%2Fpdf.
5. Dr Mulino, Second Reading of Corporations Amendment (Corporate Insolvency Reforms) Bill 2020 (7 December 2020) It has been a rushed consultation process. Stakeholders had only five days to make submissions on the exposure draft of the bill. Five days for something this complex, this momentous, is not enough ... so much of the detail of what we're going to see is going to be in the regs. This is something we see as a somewhat concerning trend in a number of areas of regulation. Given the complexity of this reform and how serious it is, if there is a lot of detail in the regs it only reinforces the appropriateness of a statutory review and a sunset clause. The fact that so much of the detail is not going to be seen by this parliament when we vote on this bill reinforces the need for this parliament to insist upon additional protection. https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/416a6e6c-248f-4d28-98cb-daf087380038/0281/hansard_frag.pdf;fileType=application%2Fpdf.
6. S Mullette, "When your safe harbour leads to a waterfall" (2020) 20(9) *INSLB* 180.
7. T Keeper, "New co-licensing regime for New Zealand's insolvency practitioners: the long journey to enhanced insolvency practitioner regulation" (2019) 20(3) *INSLB* 45.

Book review: The Law of Bankruptcy Notices and Creditors' Petitions

Michael Murray *MURRAYS LEGAL COMMENTARY*

As Judges have more or less said, if a creditor is applying to put an individual debtor into bankruptcy, it can at least get the legal process right. Bankruptcy has serious legal consequences and a creditor's compliance requirements are strict. And much hinges on getting it right, given that the act of bankruptcy based upon non-compliance with a bankruptcy notice can determine the defined "commencement" of the bankruptcy and indeed the grounding of the court to make a sequestration order.

Nicholas Simpson's six-chapter text starts with a very useful account of the long history of bankruptcy and our present Bankruptcy Act 1966. Legal history is too little covered in texts, and this puts the topics of the book and their importance in a relevant context.

The next two chapters deal with the law and case law on bankruptcy notices, and debtors' challenges to them; followed by the next three chapters in time sequence order — preparing the creditor's petition, invariably based on the act of bankruptcy created by the notice, the court hearing, and the various bases of contest.

For my own interest, I looked for some particular issues, and found them all well covered: that although the debtor does not challenge a notice at the time of its service, it may still be held to be invalid some long time later, thereby depriving the court of power to make a sequestration order: [6.9] and *Re Pollard*; issues with debtors overseas and their necessary connections with Australia, such as being "ordinarily resident" here: [4.21] and *Re Taylor*; the application of the slip rule, or otherwise, when a petition is adjourned beyond its life of 2 years: [4.31] and *Luck v University of Southern Queensland*; and defending a petition on the grounds of solvency [6.31] and *Re Sarina*.

The book does not refer to one of my perversely favourite cases — *Shannon v King*[1] — where the issue was whether the use of the term "creditor(s)" instead of "creditor" rendered a bankruptcy notice invalid, the debtor relying upon evidence from a Professor of Linguistics and a 90-page affidavit by an articled clerk, all described by the court as "a complete waste of time and effort".

That decision illustrates the overly technical approach to the validity of bankruptcy notices, evident to only some lesser extent in a series of earlier cases reported by the Bulletin displaying serious dissension among Federal Court judges as to the principles to be applied under the remedial s 306(1).[2] That led to a test case before a five member bench, which then split 3:2. Only when an appeal heard by the High Court in another matter was the issue resolved, in favour of the minority two: *Adams v Lambert*, a decision which the book explains throughout and well [3.50] and which seems to have restored a level of consistency in judicial decisions.

The focus on such highly technical challenges was a reason for the 1988 Harmer Report (unsuccessfully) recommending that the underlying features of relation back and acts of bankruptcy be reformed. Those unactioned reforms should again be considered but while ever the provisions remain, Nicholas Simpson's book will be needed; perhaps more so, as Jacqueline J writes in her foreword to the book, once the 2020 COVID-19 debtor protections end.

Most usefully, the book provides 29 precedents — from applications to set aside a bankruptcy notice, to affidavits of service, and of verification of the petition, and to notices and affidavits of opposition to a petition; and a good index and list of cases.

The book will necessarily appeal to a specialist bankruptcy readership, but not only among lawyers and counsel but also among judges, who should each use it to mutual and consistent effect. It stands on its own but well supplements LexisNexis' *Australian Insolvency Law*, and the Annotated Bankruptcy Act 1966.

The Law of Bankruptcy Notices and Creditors' Petitions, Nicholas J Simpson, LexisNexis, 2020.

Michael Murray
General Editor of the Insolvency Law Bulletin
Murrays Legal Commentary
micheal@murrayslegal.com.au

Footnotes

1. (2005) 223 ALR 776; 194 FLR 137; [2005] FMCA 1264; BC200506777.
2. See *Bankruptcy notices: professional mistakes, judicial confusion and legislative complexity* (2000) 1(4) *INSLB* 99, Murray.

Book review: Reinventing Bankruptcy Law

Michael Murray *MURRAYS LEGAL COMMENTARY*

It may be inadequate and perhaps presumptuous for an Australian lawyer to review Professor Virginia Torrie's *Reinventing Bankruptcy Law — A History of the Companies' Creditors Arrangement Act* of Canada. Reviews of the book report that her text "explode[s] conventional wisdom" about the history of what is now termed "Canada's premier corporate restructuring statute", despite its limited beginnings, and allow it and its re-interpretation and impact to be seen in a new and clearer light.

In its few sections, the CCAA was enacted in the depression year of 1933 as a remedy for secured creditors, and their protection from the debtor's liquidation. It had become, according to Professor Torrie, "essentially a dead letter" by the early 1980s. But changes in the approach to insolvency were occurring in Canada not only in secured lending and debtors' rights but also in organised labour, environmental concerns and proclaimed rights and freedoms. The Supreme Court itself was assuming a more policy-conscious role in developing the law, and the economic recessions at the time provided debtor led opportunities for the CCAA to be transformed into a significant avenue for corporate rescue. American finance and influence increased, with the CCAA coming to mirror US chapter 11 and adopt debtor-in-possession concepts, all far removed from its secured lender original focus.

Professor Torrie describes the resurrection of the CCAA through what is accurately described as a "meticulously researched and multi-disciplinary" analysis, enlisting the disciplines of legal history, socio-legal theory, political science and doctrinal legal analysis. She brings in insights based on concepts of "historical institutionalism" and "recursivity of law", concepts initially explained by Professor Anthony Duggan in his foreword, to explain the mix and flow of competing interests impacting the use of the Act and the dynamics of how it changed over time. In that respect, the book acknowledges and bears favourable comparison with *Rescuing Business*,[1] and its comparative socio-legal analysis of late 20th century English and US insolvency law reforms, and the institutions and professions involved.

It is no slight on Professor Torrie's work to say that while her analysis of the CCAA would be of interest in Australia, its greater interest and potential impact should arise from the realisation that we have no comparable published analysis, nor comparable thinking, and those with insight would see us as being the poorer for it. Professor Torrie shows what useful insight an analysis like this could bring to Australian insolvency law — its history for one thing, little researched and yet holding much of the sources of current thinking; the sociology, and how the various interest groups seek to mould the law to their own expertise and interests; processes such as path dependency, influenced at least in Australia by its rigid historic constitution-based structure and its under-appreciation of entrepreneurial risk, resisting any "US style" debtor in possession models, at least until now; and the continued strong influence of secured creditor rights in Australia, perhaps impeding their co-administration with the rights of unsecured creditors comparable with the UK's major 2002 reforms. Deeper analysis might reveal an understanding of Australia's, or more particularly its individual states', lack of adoption of an Official Receiver in corporate insolvency, following the UK's significant policy decision to do so in the late 19th century, and then New Zealand's, despite our corporate insolvency laws otherwise largely following English law and practice.

As to the Australian courts, I myself could not see them having the influence of the Canadian courts, which Professor Torrie describes as having "switched roles" with the legislature, functioning "like a modern-day Court of Chancery". In modest comparison, we do have the recent example of the High Court's acceptance of the "holding deed of company arrangement";[2] and the flexible uses of s 447A of the Corporations Act 2001,[3] and the acceptance by the courts of the need to adopt modern communication methods and more, evident in the recent Virgin Airlines matter.[4] But the judicial comparison may need to take into account that while Australian insolvency reform is rather slow and path dependent, its receipt of a somewhat greater level of attention does lessen any undue calls for judicial activism, and we have no law with quite the peculiar history of the CCAA.

The book is timely given the economic circumstances and impact of COVID-19 and the prompt that the crisis has given to the need for insolvency law reform. All jurisdictions are facing what is and may well continue as unprecedented economic and social disruption. An understanding of Professor Torrie's analyses of the interests and dynamics of the various competing parties present in insolvency law reform would assist in directing any law reform process more effectively and transparently.

Apart from the present crisis, it is said by many that Australia's insolvency laws, based on needs and aims and concepts of last century and before, are in need of review and reform. Their "reinvention' would be much assisted by the sort of insights and analyses found in this book.

And beyond insolvency law reform, the book offers insightful and useful approaches to the analysis of any body of law, in showing how it continually evolves to address on-going change.

Reinventing Bankruptcy Law: A History of the Companies' Creditors Arrangement Act, by Virginia Torrie, with a foreword by Anthony Duggan, 2020, University of Toronto Press.

Michael Murray
General Editor of the Insolvency Law Bulletin
Murrays Legal Commentary
micheal@murrayslegal.com.au

Footnotes

1. Carruthers and Halliday, "*Rescuing Business: The Making of Corporate Bankruptcy Law in England and the United States*", Clarendon Press Oxford, 1998.
2. *Mighty River International Ltd v Hughes* (2018) 265 CLR 480; 359 ALR 181; [2018] HCA 38; BC201808317, with an interesting historical analysis given in "The evolution of bankruptcy and insolvency laws and the case of the deed of company arrangement", James Edelman, with Henry Meehant and Gary Cheung, 2019 Oxford Law and Finance Distinguished Speaker Series, University of Oxford, 14 January 2019. Justice James Edelman was a member of the High Court of Australia which gave that decision.
3. Corporations Act 2001 (Cth).
4. For example, *Strawbridge, Re Virgin Australia Holdings Ltd (Admins Apptd) (No 6)* [2020] FCA 1172; BC202007687.

RITANZ: Its new gatekeeper role and the intervention of natural justice

Trish Keeper VICTORIA UNIVERSITY OF WELLINGTON

Introduction

Recently, Mr Justice Muir of the New Zealand High Court in *Grant v Restructuring Insolvency & Turnaround Association New Zealand Inc*[1] heard an application by Mr Grant for judicial review of a decision by the Restructuring Insolvency and Turnaround Association of New Zealand (RITANZ) to decline his application for membership. The grounds for this decision was that Mr Grant did not satisfy the "good character" requirement for RITANZ membership. Before considering the judgment, this note outlines the background to the application and explains how under the new statutory framework. For some insolvency practitioners, membership of RITANZ is a condition that must be met before they are eligible to apply to be licensed. The case highlights that RITANZ in this new gatekeeper role, when evaluating membership applications, is required to act in accordance with the principles of natural justice and in accordance with administrative law principles[2] and any decision to decline an application is now potentially reviewable by the High Court.[3]

The background to this new licensing regime is explained in my earlier Bulletin article — *New co-licensing regime for New Zealand's insolvency practitioners: the long journey to enhanced insolvency practitioner regulation*.[4] It should also be pointed out that, in contrast to Australia, this regime concerns only corporate insolvency practitioners. While New Zealand licensed practitioners share the corporate insolvency market with the Official Assignee, the Official Assignee alone handles all personal insolvencies, to the exclusion of the private profession.

RITANZ background and objectives

RITANZ was established as an incorporated society in 2014 by members of the insolvency profession to promote high standards of practice and professional conduct in insolvency and corporate restructuring work.[5] It was a response to the ongoing failure by successive governments to regulate the profession and it introduced a form of private self-regulation for insolvency practitioners. RITANZ's 2014 Rules provided for members to apply to be Accredited Insolvency Practitioner (AIP). Being designated as an AIP affords practitioners with the "ability to distinguish the quality of services provided by them from those provided by persons undertaking insolvency engagements generally".[6]

The Rules specify that RITANZ may have different classes of membership, including AIP members, general members and student members. Rule 8.1 states that only AIP members may accept insolvency engagements.[7] The general qualifications for membership for all classes of members are the same and include that an applicant has an insolvency connection, agrees to abide by the Rules, be of good character (as determined by the Board "in its absolute discretion") and not banned from providing corporate insolvency services either in New Zealand or elsewhere. The Rules further provide the Board, or its delegate may determine to admit an applicant at its sole discretion and is not required to give any reason for determining not to admit an applicant to membership.[8]

RITANZ's gatekeeper role for non-accountant practitioners

However, in 2020 membership of RITANZ became the only realistic pathway for any person who is not a member of the New Zealand Institute of Chartered Accountants (NZICA), to be eligible to apply to NZICA to become a licensed insolvency practitioner.[9] From 1 September 2020, insolvency practitioners in New Zealand are required to be licensed before undertaking certain forms of insolvency engagement[10] as a consequence of the Insolvency Practitioner Regulation Act 2019 ("IPR Act") coming into force on that date. Licensing of practitioners under the Act is the responsibility of frontline regulators, known as accredited bodies, who have been approved by the Registrar of Companies. Currently, the only accredited body is NZICA. Section 9(2) of the IPR Act provides that an accredited body is required to issue a license to a person (P) if it is satisfied that P meets the prescribed minimum standards, is otherwise a fit and proper person to hold a licence and P is either a member of NZICA or one of the exceptions in s 57 of the Act applies in respect of P. The s 57 exceptions include that P is a member of a recognised body. To date, the only entity that has been granted this status is RITANZ.[11]

Good character is a requirement for membership of RITANZ. This term is not found in the IPR Act or to become a member of NZICA. As stated above, s 9(2) of the Act provides that the applicant meets the prescribed minimum standards (as established by the Registrar of Companies)[12] and is "otherwise a fit and proper person" to hold a license. The "fit and proper" test is also found in Appendix VI[13] of the Rules of NZICA for licensing of insolvency practitioners. It is outside of the objectives of this note to consider whether the two tests are identical, although being a "fit and proper" person would appear central to a "good character" test. Justice Muir in the High Court appears to use the terms interchangeably and agreed with a submission by RITANZ that the "good character requirement . . . is mirrored in a fit and proper requirement within the legislation itself".[14]

Mr Grant and his application for membership

Mr Grant is the sole director and shareholder of Waterstone Insolvency, an insolvency firm which now employs over 20 staff. He is not qualified as an accountant and therefore membership of RITANZ is his only pathway to continue accepting insolvency engagements once the Act came into force. Mr Grant initially applied in January 2020 and this application was declined on 2 June without the Board providing reasons.[15] Mr Grant then commenced judicial review proceedings which were discontinued after RITANZ agreed to appoint a new Panel of Board members to conduct a rehearing of his application before 31 July 2020. At the rehearing, Mr Grant provided 20 affidavits of support from a variety of senior and respected business and professional individuals. Mr Grant's application was declined on the basis that he did not satisfy the good character criteria for membership. The Panel's decision and the accompanying statements of reasons were released on 10 August 2020.

The Panel observed that the "good character requirement in the rules imposes an objective test necessitating an evaluative judgment rather than an exercise of pure discretion". The Panel also noted that "the purpose of applying the good character requirement in the Rules is . . . to protect the public and to promote the integrity of the profession as a whole and public confidence in it". Furthermore, its approach to Mr Grant's membership was "to consider and weigh the aggravating factors associated with Mr Grant's convictions against 'evidence of insight into them, remorse and reform from those acts and present positive qualities that demonstrate integrity, probity and trustworthiness'".[16]

Central to the determination of good character were Mr Grant's 34 prior convictions for dishonesty. These involved a series of credit card fraud and other related dishonesty offences when he was 22 years of age and more serious share theft frauds, with two other offenders, 7 years later which resulted in a 30-month sentence of imprisonment. The degree of Mr Grant's responsibility for these offences was discussed in some detail by Muir J as Mr Grant had given evidence in the High Court on behalf of the Crown in the criminal case against one of his co-offenders, Mr Paton. Subsequently, the New Zealand Court of Appeal held that Mr Paton's conviction was unsafe as subsequent evidence provided to the court had indicated that Mr Grant had been responsible for planning and instigation of the frauds.[17] However, no subsequent charges were brought against Mr Grant. He had not reoffended since 1994, he completed a tertiary degree in economics and established the insolvency firm of "Waterstone Insolvency". He has been appointed to over 800 insolvencies and has developed a significant media profile, writing for national newspapers.

Judicial Review decision

Mr Grant argued the Panel's decision was both procedurally and substantively incorrect. Procedurally, he argued that the Panel's determination was the result of an unfair process, apparent bias, and predetermination. The claim of the alleged bias by the Panel arose because its members were potential competitors of Mr Grant. His Honour held that the statutory regime precludes a challenge on these grounds because RITANZ had been approved by the Registrar of Companies as a recognised body. This approval was given based on the 2014 Rules which provided for membership decisions to be made by the Board who are industry participants.[18]

However, Muir J expressed concern about a number of matters taken into account by the Panel which Mr Grant had not been invited to comment upon. These included a reference to a several judicial decisions which were critical of Mr Grant, the conflicts of interests between his roles as an insolvency practitioner and his ownership of factoring and litigation funding businesses, and the Court of Appeal's judgment in Paton, although the Panel had made a copy of this judgment available to Mr Grant. Justice Muir noted that adverse information can subconsciously affect a decision-maker and that it is unfair to refuse or allow a person, whose interest is likely to be affected by the decision, an opportunity to comment on any such information.[19] In addition, the Panel noted that Mr Grant had not provided any medical or psychological evidence although he had not been notified that the Panel would take this into consideration. Overall, Muir J observed that procedural fairness requires a decision-maker to inform an applicant of the standard they are required to meet.

In addition to the substantive claim that the decision was made in error of law, Mr Grant also made a separate claim that the Panel's decision took into account irrelevant matters and failed to take into account relevant ones. His Honour dealt with both submissions at the same time as he concluded that the Panel had applied the wrong legal test which had "set the Panel off in a direction which has resulted in it overemphasising the retrospective position".[20] His Honour further elaborated his criticism of the Panel's weighting or balance approach as:[21]

> . . . that presupposes a relevancy in respect of his previous convictions which may no longer be the case. In expressing the test in the way it did, I consider the Panel sowed the seeds for an approach that unduly focused on the historic position and insufficiently on:
> (a) evidence of reform;
> (b) the very extended period since the offending;
> (c) Mr Grant's significant contribution to the commercial and media worlds in the intervening period; and
> (d) the substantial number of prominent New Zealanders who considered that his admission to the Association would, in light of the completeness of his redemption, bring no ill-repute to it.

Instead, Muir J preferred the legal test recently outlined in the Supreme Court decision in *Stanley v New Zealand Law Society*,[22] which was released a week after the Panel's decision declining Mr Grant's admission. In *Stanley*, the Supreme Court took the view that earlier cases had placed too much weight on retrospective factors and too little weight on reformative efforts.[23] Justice Muir, applying the Supreme Court test to the case before him, stated that the focus should be on whether historic convictions remain relevant, rather than whether they were so egregious that the conduct outweighs the evidence that 27 years later Mr Grant is a person of sufficiently good character to be admitted to membership.[24] The Supreme Court emphasised that the focus on the evaluation exercise must be forward looking because the decision-maker is required to make a judgment at the time of the evaluation in terms "either of the risks to the public and/or damage to the reputation of the profession if the applicant is admitted".[25] *Stanley* involved an application for admission as a barrister and solicitor despite criminal convictions for driving with excess alcohol levels over the period of 1978–2004. In applying the *Stanley* approach, Muir J observed that the distinction that exists between the practice as a lawyer and an insolvency practitioner is irrelevant in this context as both professions involve some degree of control over others' financial affairs and both professions require a high standard of honesty and trustworthiness.[26]

Conclusion

Although his Honour was critical of the process and legal test adopted by the Panel, he declined to substitute the court's decision for that of the Panel as sought by Mr Grant. He stated that "fundamentally judicial review is not concerned with the decision itself but with the decision-making process".[27] Instead he quashed the Panel's decision and chose to direct RITANZ to reconsider afresh Mr Grant's application and to determine it on the basis of such evidence as Mr Grant choses to submit and in accordance with the legal test identified by the court. In addition, Mr Grant may have to face other matters, apart from those identified in the existing decision, which have a potentially bearing on his good character. At the time of writing, RITANZ has yet to publish its decision.

Trish Keeper
Associate Professor
VICTORIA UNIVERSITY OF WELLINGTON

Footnotes

1. *Grant v Restructuring Insolvency & Turnaround Association New Zealand Inc (RITANZ)* [2020] NZHC 2876; BC202063234 [3 November 2020] (delete square bracket and insert comma after the BC number).
2. Under the Judicial Review Procedure Act 2016.
3. See *Grant v RITANZ*, above n 1, at [13].
4. (2019) 20(3) *INSLB* 45.
5. Rules of Restructuring Insolvency and Turnaround Association of New Zealand (RITANZ), 6 October 2014, Rule 3.1(a) (available from ritanz.org.nz).
6. Rules of RITANZ, above n 3, Rule 3.1(b)(i).
7. Rules of RITANZ, above n 3, Rule 8.1, although note R 8.2 provides that the Board may grant exemptions on a case by case basis.
8. See *Grant v RITANZ*, above n 1, at [4] where the court noted that RITANZ has accepted that decisions under the Rules must be in accordance with the rules of natural justice.
9. Insolvency Practitioner Regulation Act 2019 (NZ) s 57(1) contains three exemptions from membership of NZICA. In addition, to the exemption for a member of a recognised body, there are exemptions for overseas insolvency practitioners — presently only those from Australia, and a practising member of certain religious societies or orders. As to Australian

practitioners, see *New co-licensing regime for New Zealand's insolvency practitioners: the long journey to enhanced insolvency practitioner regulation* at p 47.

10. Insolvency Practitioner Regulation Act 2019 (NZ) s 5 defines an insolvency practitioner for the purposes of the Act as an administrator or a deed administrator (as those terms are defined in s 239B of the Companies Act 1993 (NZ)); an insolvent company liquidator; a receiver (as defined in s 2(1) of the Receiverships Act 1993 (NZ); and a trustee or provisional trustee appointed under subpt 2 of Pt 5 of the Insolvency Act 2006 (NZ).
11. Insolvency Practitioners Regulation Act (Recognised Bodies) Notice 2020 published in the New Zealand Gazette on 18 August 2020 as required by s 57(2) of the Insolvency Practitioners Regulation Act 2019 (NZ).
12. Insolvency Practitioners Regulation Act (Prescribed Minimum Standards, Conditions, and Requirements for Ongoing Competence, for Licensed Insolvency Practitioners) Notice 2020 published in the New Zealand Gazette on 23 March 2020.
13. Rules of NZICA, effective 11 May 2020, Appendix VI, Matters pertaining to regulation of members and non-members, for the purposes of the Insolvency Practitioners Regulation Act 2019 (Rule 7.3), cl 2.
14. *Grant v RITANZ*, above n 1, at [14](a).
15. Although this delay may seem lengthy, it should be noted that New Zealand was in levels 3 and 4 lockdown for over a month form(from) late March 2020 and most of New Zealand did not move until level 2 until mid-May 2020. Also, see above fn 6, that RITANZ accepted before the court that it was required to act in accordance with the rules of justice, which requires the provision of reasons.
16. *Grant v RITANZ*, above n 1, at [38] quoting from paragraph 3.3 of the Panel's statements of reasons.
17. *R v Paton* CA 354/94, 2 November 1994.
18. *Grant v RITANZ*, above n 1, at [14](c) and [94](a).
19. *Grant v RITANZ*, above n 1, at [94](g).
20. *Grant v RITANZ*, above n 1, at [80].
21. *Grant v RITANZ*, above n 1, at [69].
22. *Stanley v New Zealand Law Society* [2020] NZSC 83; BC202062048.
23. *Stanley v New Zealand Law Society*, above n 22, at [106].
24. *Grant v RITANZ*, above n 1, at [70].
25. See Muir J's summary of the main points of the majority judgment in *Stanley v New Zealand Law Society* [2020] NZSC 83; BC202062048 in *Grant v RITANZ*, above n 1, at [65](a)–(k).
26. *Grant v RITANZ*, above n 1, at [99].
27. *Grant v RITANZ*, above n 1, at [95].

Insolvency Law
Bulletin

The small business restructuring process — some thoughts and considerations

Lionel Meehan DLA PIPER

Introduction

This article discusses the new Pt 5.3B of the Corporations Act 2001 (Cth), which introduces a "small business restructuring process" (Process) that includes the appointment of a small business restructuring practitioner (Practitioner) to companies with liabilities of less than $1 million.

The new Pt 5.3B has been introduced into the Corporations Act by the Corporations Amendment (Corporate Insolvency Reforms) Act 2020 (Cth).

Part 5.3B leaves much detail of the Process to regulations, for which, at the time of writing, there is currently an exposure draft entitled Corporations Amendment (Corporate Insolvency Reforms) Regulations 2020 (Cth) (Regulations).

There are also proposed changes and additions to the Insolvency Practice Rules, which set out among other things rules around the remuneration of the Practitioner, to be made by the Insolvency Practice Rules (Corporations) Amendment (Corporate Insolvency Reforms) Rules 2020 (Amended Rules), for which there is an exposure draft also released.

The Process is to be termed *restructuring*, and the debtor company comes under *restructuring* when it enters the Process.

The Process commenced on 1 January 2021.

Liability cap of $1 million

The Process is limited to businesses with liabilities of $1 million or less (Liability Cap). "Liabilities" is defined broadly, to include any liabilities or obligations, including contingent liabilities — reg 5.3B.03. Initially the Regulations were issued such that contingent liabilities were to be excluded, but this was changed in the final version of the Regulations. The need to compromise contingent liabilities to give the business a fresh start, is clear.

When one considers unpaid rent (both arrears, and potentially some future rent), ATO debt, employee entitlements (these must be paid out if in arrears *before* a Restructuring Plan is proposed — see below), and bank or other lending, total aggregate liabilities are likely to reach the $1 million mark quickly.

So only the smallest of businesses seem likely to be eligible for the Process.

Restructuring that relies, as the Process does, on statutory legal processes for its implementation, is necessarily a fairly involved process. This much is evident from the significant complexity that exists in the Act and the Regulations.

Most very small businesses simply do not engage with these legal restructuring processes. Instead, in the author's experience, very small businesses proceed to restructure by agreement/negotiation. To this extent, the smallest of businesses may not use the Process even if it is available to them.

Thought could be given at a later stage to increasing the Liability Cap, to make the Process available to a broader range of businesses.

Contingent liabilities

From above, the definition of "admissible debt or claim" is now defined to include contingent debts and claims (by not excluding contingent liabilities, as was initially the case in the draft Regulations). Creditors who vote on the restructuring plan (Restructuring Plan), and are bound by the Restructuring Plan, therefore include creditors holding contingent claims — reg 5.3B.29(2)(a).

Where the value of contingent claims is unclear, one approach is that they could be valued at a nominal or other appropriate amount. Naturally, it is important to compromise both actual and contingent claims and obligations, to give the company a fresh start.

Contingent claims may materialise into significant actual claims that the Restructuring Plan did not or could not predict, and did not compromise, and which the company may not be able to meet when they arise. It is therefore important for the Restructuring Plan to be able to compromise contingent liabilities.

Insolvency

In order to enter restructuring, the debtor company must be insolvent, or likely to become insolvent (s 453B(1)(b)). This is similar to the existing voluntary administration process under Pt 5.3A.

This is reinforced by the fact that proposing a Restructuring Plan would create a presumption of insolvency for various purposes (s 455A(2)).

Once a company has become insolvent it is often too late to meaningfully assist it.

By contrast, under the recently passed (June 2020) Corporate Insolvency and Governance Act 2020 (UK) (CIGA), and the new Pt 26A of the Companies Act 2006 (UK) which provides for a modified scheme of arrangement (Pt 26A), the United Kingdom has provided for a comprehensive restructuring regime that is open to businesses of all sizes, and at least so far as Pt 26A is concerned, becomes available to businesses while they are experiencing distress but importantly *before* they become insolvent. The test of entry under Pt 26A is "*[the] company has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern*".

An entry point before the onset of insolvency may be helpful to catch problems before they become difficult to solve, and result in more successful restructuring outcomes.

Restructuring — how long does it take?

The restructuring Process is relatively short. How long it takes matters, because this in turn determines how long the moratoriums on creditor enforcement action last — moratoriums are discussed below.

An approximate timeline for the restructuring Process is as set out in the table below. This assumes that neither the directors of the debtor company nor the Practitioner end the process prematurely (both have the right to do so — see below):

Event	Timeframe / Comment
Restructuring commences — 20 business day (30 business days if extended) Proposal Period begins to run Board resolves to appoint restructuring Practitioner and s/he accepts appointment Restructuring begins and moratoriums on adverse creditor action apply Company/directors maintain control of company's business, property and affairs — debtor in possession — s 453K "Proposal Period" commences. The company and the Practitioner have 20 business days to work up a Restructuring Plan	Proposal Period Business Day 1 s 453B regs 5.3B.14 and 5.3B.17(1)
Proposal Period ends (if not extended by Restructuring Practitioner)	Proposal Period Business Day 20 regs 5.3B.14 and 5.3B.17(1)
Proposal Period extension ends	Proposal Period Business Day 30 reg 5.3B.17(2)
Employee entitlements and tax returns and statements must be paid and lodged by the end of the Proposal Period	This enlivens the ability to *propose* a Restructuring Plan — reg 5.3B.14(1)(e)
Restructuring Plan proposed — 15-business-day Acceptance Period begins to run	Acceptance Period Business Day 1

Restructuring Plan, Restructuring Proposal Statement and Practitioner's Declaration circulated to Affected Creditors Restructuring Proposal Statement must include schedule of debts and claims of Affected Creditors	reg 5.3B.14–18
Affected Creditors must make any notifications to the Practitioner within 5 business days of receiving the Restructuring Plan and materials, of any disagreement with the company's assessment of their: • admissible debts or claims • status as an excluded creditor (eg, related entity)	Acceptance Period Business Day 5 reg 5.3B.22(2)
Practitioner serves any notices on company and relevant creditor(s) within 5 business days adjudicating any disagreements about the schedule of debts and claims, and recommending whether the schedule of debts and claims must be amended (Relevant Notice)	Acceptance Period Business Day 10 reg 5.3B.22(5)
Creditors may within 5 business days of receiving the Relevant Notice, withdraw votes already cast, and vote again, if schedule of debts and claims is amended	Acceptance Period Business Day 15 reg 5.3B.23
Acceptance Period ends	Acceptance Period Business Day 15 reg 5.3B.21
Restructuring Plan is accepted if a *simple majority by value only* of Affected Creditors *who vote during the Acceptance Period*, vote in favour	Acceptance Period Business Day 15 reg 5.3B.25(1)

As can be seen, the time from resolution by the debtor company to appoint a Practitioner, through to preparing and proposing a Restructuring Plan and then circulating the plan and materials to creditors and having them vote, takes approximately 7 weeks (approximately 35 business days) without extension of the initial Proposal Period, or approximately 9 weeks (approximately 45 business days) with such extension.

So it takes around 2 months to get a Restructuring Plan up and approved. This appears to be slightly longer that an administration procedure under Pt 5.3A if the convening period for the second meeting of creditors is not extended or the second meeting adjourned, although there is not much difference.

Barleese — premature cessation of restructuring at any time for any reason

The directors of the debtor company can end the restructuring Process at any time for any reason, simply by making a declaration in writing to that effect, and providing it to the Practitioner, creditors and ASIC — reg 5.3B.02(2).

Similarly the Practitioner has the power to end the restructuring Process under s 453J of the Corporations Act if they believe on reasonable grounds that the company does not meet the eligibility criteria (for example, liabilities exceed $1 million, or employee entitlements have not been paid), or it is in the interests of creditors for the company not to undergo restructuring, or for restructuring that has commenced to end.

The restructuring also ends if an administrator, liquidator or provisional liquidator is appointed, or the court orders that the restructuring end — reg 5.3B.02(1).

Restrictions on disposals of the company's property while under restructuring

The directors of a debtor company under restructuring may not enter into a transaction or dealing that affects the company's property unless it is in the ordinary course of the company's business, or the Practitioner consents or the court provides leave — Corporations Act s 453L.

The Regulations deem that the transfer or sale of the whole or *a part* of the business, declaration of dividends, and transactions to satisfy a debt or claim, are *not* in the ordinary course of business — reg 5.3B.04(2).

The idea here is to preserve the debtor company's asset position while it undergoes restructuring, to preserve the *status quo* and with it the position of creditors, yet permit the company to trade in its ordinary course of business (which itself preserves value).

Moratorium on security and other enforcement, including "ipso facto" protection for contracts

Moratoriums on the enforcement of security and other exercise of rights, which closely track the Pt 5.3A moratoriums that apply upon voluntary administration, apply while the debtor company is under restructuring.

In addition, *ipso facto* protections have been included to prevent the termination or exercise or other rights under contracts to which the debtor company is party — Corporations Act s 454N.

The *ipso facto* provisions are essentially equivalent to the provisions that currently apply for companies that enter voluntary administration or controllership of all or substantially all assets, or a Pt 5.1 scheme of arrangement.

Secured creditors

Secured creditors are fundamentally given similar treatment to that they receive upon voluntary administration under Pt 5.3A.

In summary, secured creditors are only bound by a Restructuring Plan if they consent to it.

Secured creditors do not vote on the Restructuring Plan, and secured debt is not compromised.

What is interesting is that secured debt is ruled off at the value of the secured property — only debt in excess of collateral (secured property) value is unsecured and can vote and be compromised under the Restructuring Plan. This is discussed further below.

Secured parties holding security over all or substantially all property of the debtor company can enforce security during the "decision period". For this purpose, the definition of "decision period" in the Corporations Act is amended to include both voluntary administration, and restructuring. In relation to restructuring, the decision period will be 13 business days from commencement of the restructuring, or notification to the relevant secured party by the Practitioner of their appointment — ss 454C and 9 (decision period).

If a secured creditor does not consent, they can stand outside of a Restructuring Plan, are not bound by it, and wait for the moratorium to end (if subject to the moratorium) and then enforce their security.

The moratoriums, which are essentially the same as those which apply in Pt 5.3A administration, apply to the enforcement of security during the restructuring period, unless the Practitioner consents or secured creditors obtain court leave — s 453R.

Where there are significant secured assets, such as mortgages of real property or leasehold interests, leases of plant and equipment that exceed 2 years (PPS Leases), commercial consignments, invoice financings, or assets acquired on purchase money security interest (PMSI) finance, then each of those secured creditors can stand outside of the Restructuring Plan.

The Personal Property Securities Act 2009 (Cth) (PPSA) has significantly broadened the scope of secured creditors for these purposes. This is likely to see various secured parties able to stand outside of the Restructuring Plan, and with whom the debtor company may need to reach independent restructuring outcomes.

Related creditors

So called "related creditors", who are creditors that are related entities of the debtor company under restructuring, are treated as "excluded creditors" along with the Practitioner him or herself, and related entities of the Practitioner (Excluded Creditors).

Excluded Creditors are not permitted to vote on the Restructuring Plan — reg 5.3B.25(2)(c).

Restructuring Plan Materials

The key documents that make up the Restructuring Plan include the following (together the *Plan Materials*):

- the plan document itself (Restructuring Plan), including the so-called "restructuring plan standard terms" set out in reg 5.3B.27(1) (Standard Terms) which are discussed below;
- the debtor company's "restructuring proposal statement" (Restructuring Proposal Statement), as discussed below; and
- the Practitioner's certificate issued under reg 5.3B.16 (Practitioner's Certificate), again which is discussed below.

The Restructuring Plan

The Restructuring Plan would set out what the debtor company proposes to restore its solvency and viability. For example, in its most simplest form, the plan could encompass something like the following: contribute $50,000 to the plan fund for distribution among affected creditors; Affected Creditors prove against the $50,000 fund and receive a proportionate distribution in exchange for the extinguishment of their debt/liabilities against the company.

Naturally, the sky is the limit in terms of possibilities, although given the apparent closeness with Pt 5.3A voluntary administration, the ability to discriminate between the treatment of creditors with similar rights under a Restructuring Plan (for example, write off some creditors' claims, and retain and term out for later payment the claims of others, etc) may be guided, or at least informed, by the principles established for deeds of company arrangement under Pt 5.3A.

A Restructuring Plan must include the Standard Terms, which (from above) are set out in 5.3B.27. The Restructuring Plan is void to the extent it is inconsistent with any of the Standard Terms, which broadly are:

- all admissible debts and claims rank equally. This effectively emulates the *pari passu* principle that applies to unsecured debts and claims;
- admissible debts and claims are to be paid out proportionately (that is, on a cents in the dollar basis relative to the quantum of the debts or claims);
- creditors cannot be paid out more than the amount of their debt or claim (unlikely, but helpful clarification); and
- for secured creditors, *if the secured creditor does not* realise their security while the Restructuring Plan is in force, then they stand outside the Restructuring Plan to the extent of their secured property, and are considered to be an Affected Creditor under the Restructuring Plan only to the extent that the creditor's admissible debt or claim exceeds the value of the secured property.

This appears to be different to the treatment of secured creditors upon a DOCA under Pt 5.3A, where secured creditors can vote with their full debt amount and not forfeit their security by doing so, and equally are not bound by the DOCA unless the DOCA purports to bind them and they vote in favour of it.

This treatment of secured creditors will likely require a professional independent valuation, to establish the creditor's secured and unsecured claims.

Interestingly, enforcement costs, default interest, and receivers fees, etc, which would all normally be secured monies and so secured by security interests, would therefore all be capable of compromise under a Restructuring Plan to the extent the total secured debt exceeds the value of the secured property, except of course to the extent these claims remain contingent.

If secured creditors *do* realise their security while the Restructuring Plan is in force, then the secured creditor is taken to be a creditor under the Restructuring Plan only to the extent of any balance due to the secured creditor after deducting the "*net amount realised*" ((reg 5.3B.27(1)(e)(ii)).

What does "*net amount realised*" mean? Conventional interpretation would say this means the net return to the secured creditor after deduction of enforcement costs and expenses including say receivers' costs, legal fees and other enforcement costs. Some ambiguity may arise because enforcement costs, default interest, and receivers fees, etc, are normally secured money, and so secured debts.

Where the secured creditor enforces during the period of the Restructuring Plan, then they are taken to be an unsecured creditor for the balance of their debt (after deducting enforcement costs?) and can prove under the Restructuring Plan for this balance, and naturally the balance would be compromised as an unsecured claim under the Restructuring Plan.

These provisions on how secured debt is to be treated under a Restructuring Plan are helpful because, presumably by extension mean that a secured creditor cannot use the entirety of it secured debt to vote for, or against, a Restructuring Plan, to unduly influence the plan.

Rather, secured creditors are "ruled off" as at the time of the Restructuring Plan, to be secured to the extent of the value in their secured property only, and unsecured for the balance, and can only vote, prove under, and receive a dividend from, the Restructuring Plan to the extent of the unsecured balance.

These concepts appear to be drawn from US Bankruptcy Code Chapter 11, where similar principles apply to secured debt.

Conditions to the Restructuring Plan

A Restructuring Plan can be approved subject to conditions, which when satisfied mean that the plan comes into effect when the condition(s) are satisfied — reg 5.3B.26.

This is helpful. One can see various conditions included in Restructuring Plans, for example, conditions around reaching agreement with secured creditors who are not bound by and cannot vote upon the plan, or landlords around new lease terms.

The Restructuring Proposal Statement

The *Restructuring Proposal Statement* is to be a prescribed form, which presumably will be released closer to the time of commencement of the Process on 1 January 2021.

The Statement must include a schedule of debts and claims, which is the debtor company's view of the world in terms of what it owes to its creditors — a listing of debts owed and claims and liabilities of the company.

In proposing the Restructuring Plan, the Practitioner circulates the Statement, including as it does the schedule of debts and claims, to Affected Creditors.

Naturally, Affected Creditors have the right to disagree with the amount owed to them as listed in the Statement, which they do by issuing a notice to the Practitioner within 5 business days of receiving the Statement — see the timeline in the table above.

This is effectively the adjudication process for the proof of debts and claims. And it is lightning. Five business days passes quickly. Affected Creditors will need to be on their toes to ensure the full amount of their debt or claim is accurately recorded.

The Practitioner's Certificate

The Practitioner must issue and sign a certificate that certifies various things about the Restructuring Plan they have prepared together with the debtor company, including the following where the Practitioner has reasonable grounds to believe them, and if not identify where and why, namely whether (reg 5.3B.18(2)(a) and (b)):

- the company meets the eligibility criteria, such as having liabilities less than $1 million, and being current with employee entitlements and tax lodgements before the Restructuring Plan is proposed;
- the company is likely to be able to discharge its obligations under the Restructuring Plan, if it is approved; and
- all information required to be set out in the Statement, has been so set out.

The Practitioner commits an offence if they do not (reg 5.3B.18(4)) make reasonable enquiries into the company's business, property, affairs and financial circumstances; and take reasonable steps to verify the company's business, property, affairs and financial circumstances.

Given that small business has the propensity for less rather than more record keeping, these duties of the Practitioner may at times prove challenging.

Nevertheless, these matters are important to provide some level of independent verification and reliability to the Restructuring Plan, to protect Affected Creditors who are to vote upon it.

Voting on the Restructuring Plan — one class of unsecured creditors only vote for net (after set-off) claim amounts only, and purchased claims vote only at the purchase price (not full value)

Regulation 5.3B.25 is key and all stakeholders and lawyers alike will often refer to it.

Creditors eligible to vote on the plan can vote if they reply before the end of the "Acceptance Period".

The Acceptance Period is 15 business days (3 weeks) from the time the Practitioner gives the Plan Materials to the debtor company's Affected Creditors.

Broadly, within that Acceptance Period, should an Affected Creditor disagree with the company's assessment of the creditor's admissible debts and claims, the creditor may issue a notice to the Practitioner of the disagreement within 5 business days from receiving the Restructuring Plan — reg 5.3B.22(2)).

The Practitioner then has a further 5 business days of receiving such notices from Affected Creditors to review and adjudicate on the position, and issue a notice back to the company and the relevant Affected Creditors with the adjudication — reg 5.3B.22(5).

If the Practitioner's adjudication means the schedule of debts and claims changes, then Affected Creditors have 5 business days from receiving notice of the adjudication from the Practitioner, to withdraw their vote, and vote again (given the change to the schedule of debts and claims).

So this series of three sets of 5 business days broadly lines up and accords with, and appears designed to run within, the 15-business-day Acceptance Period.

Approval of a Restructuring Plan

Turning to the approval of a Restructuring Plan, this is by *simple majority by value* of unsecured creditors only, with (see above and reg 5.3B.25):

- secured creditor's claims deemed unsecured to the extent the claims exceed the value of the secured property; and
- mutual credits and debits between the debtor company and Affected Creditors set off, and the balance of the account (post set off) only is used for voting.

Presumably a set-off mechanism would be included in the Restructuring Plan to mirror this voting mechanism; and importantly, *only those Affected Creditors that respond during the three-week Acceptance Period* get to vote.

So conceivably a Restructuring Plan could be passed with well less than 50% by value of unsecured creditors' claims, allowing for some unsecured creditors that do not respond during the Acceptance Period. A debtor company and the Practitioner might rightly consider that they could probably pass a Restructuring Plan with support from around 40% (or possibly less) by value of Affected Creditors, allowing for some who simply do not vote.

Importantly, claims cannot be purchased at discounts and then voted for full value. Put another way, purchased claims vote only at the purchase price (not full value) — reg 5.3B.25(2)(a)(ii). This is no doubt designed to prevent the scrupulous buying up of claims at a discount to vote through certain results — that will not work.

Administering the Restructuring Plan

The Practitioner plays a large role in administering the Restructuring Plan on behalf of the debtor company.

The Practitioner is to play a key role under the Restructuring Plan in terms of interfacing the debtor company's key stakeholders such as secured creditors. This can be a time-consuming process, and tensions may arise between these commitments, and the Restructuring Practitioner's permissible fees.

Separately, the Restructuring Practitioner is to administer the fund for distribution to creditors under the Restructuring Plan, being empowered to receive money from the debtor company and hold it on trust, pay money to creditors under the plan, and if requested by the directors of the debtor company realise the debtor company's property that is available to pay creditors under the plan and distribute the proceeds to creditors — reg 5.3B.37.

Accordingly, the Practitioner has power under a Restructuring Plan to dispose of the debtor company's property to give effect to the Restructuring Plan, but not where the property is subject to a security interest, or belongs to another and is used or occupied by the company — reg 5.3B.39(1).

Exceptions to this are that the Practitioner can dispose of the debtor company's property in the ordinary course of business even where it is subject to security (such as selling property that is subject to retention of title security, to facilitate a trade-on).

Alternatively the Practitioner can dispose of the company's property that is subject to security or owned by another (where the company has possession or control), either with the written consent of the secured party or owner, or with court leave — reg 5.3B.39(2).

This regime around disposal of assets, assuming (from above) the Practitioner is delegated that power by the directors of the debtor company, is very similar to that which applies under Pt 5.3A voluntary administration.

Indemnity and lien of Restructuring Practitioner

Given the significant role the Practitioner is to play, they can be exposed to obligations to third parties and the debtor company itself, and need protection.

To this end, essentially the same indemnification and lien regime as applies to an administrator under Pt 5.3A, applies to the Practitioner — see regs 5.3B.43–5.3B.45.

To summarise the position, the Practitioner will have a right of indemnity and lien over the company's assets, which will cover all property of the debtor company, and have priority to both unsecured debts and debts secured by circulating security, except where a controller is appointed:

- before the restructuring commences; or
- during the restructuring, in which case the priority of the Practitioner's indemnity and lien survive up to the point of appointment of the controller.

To the extent they secure the repayment of money borrowed by the Practitioner or interest and borrowing costs, the right of indemnity and lien of the Practitioner do not have priority over debts secured by a circulating security interest unless the secured party under the circulating security interest consents — reg 5.3B.44(5).

Payment of employee entitlements and lodgement of tax returns, and fees and other payments

The debtor company must continue to pay employee entitlements, and lodge tax returns and statements, not to commenced restructuring but (from above) before the debtor is entitled to propose a Restructuring Plan at the end of the Proposal Period — reg 5.3B.24(b) read with reg 5.3B.14(1)(e).

It would appear that substantial rather than absolute compliance is required — reg 5.3B.14(b).

This is essentially the same as the safe harbour provisions of the Corporations Act in s 588GA. That is, to qualify for safe harbour protection from insolvent trading under s 588GA, the company in question must be in substantial compliance with employee entitlement payments, and the lodgement of tax returns and statements. Similar requirements apply under the "COVID-19 safe harbour" protection in s 588GAAA.

When coupled with the other requirements to implement a Restructuring Plan, a debtor company will clearly require some level of kitty to make it through the Proposal Period for a Restructuring Plan, when considering:

- that employees and tax lodgement obligations must be kept current;
- the Practitioner will probably want cash upfront on account of his or her fees, lest s/he take the risk of going unpaid;
- the debtor company's lawyers may also want cash upfront on account of their legal fees;
- valuations are likely required (from above) of secured property, so that secured debt can be ruled off at the level of the value of the secured property, for voting and participation in the Restructuring Plan. The valuer will also likely want to be paid upfront.

The Practitioner's remuneration

The Amended Rules make provision for certain rules around the Practitioner's remuneration.

They provide that the board of the debtor company *must* make a determination (by passing a resolution) *before* the Practitioner is appointed, as to the *amount* of remuneration, and the *method* for working out the amount of remuneration, that the Practitioner will receive for work to advise upon and plan and prepare the Restructuring Plan, before it is approved.

By providing for the *both* the *amount* of remuneration and the *method of calculation*, this appears to leave scope for the remuneration leading up to the approval of a Restructuring Plan (that is, for work during the Proposal Period and the Acceptance Period), to be either an upfront and fixed dollar amount, , or charged by hourly rates — see Rule 60-1B. The Explanatory Statement does not appear to clarify either way.

Then, should a Restructuring Plan be approved, Rule 60-1C provides that the plan must specify the remuneration to be allowed to the Practitioner for work administering the plan, and that *must* be by way of a *specified percentage of payments made to creditors* in accordance with the plan. This is significant, because the *payments made to creditors* (say, $50,000) may be much lower than the total liabilities compromised by the plan (say, $800,000).

Ambiguity is created because Rule 60-1C also provides that the plan must specify a method for working out the amount of remuneration — is the specified percentage of payments made to creditors, not such a method? Are hourly rates permitted? Again, the Explanatory Statement does not offer much by way of additional explanation.

Conclusion

The Process is a sophisticated and carefully considered restructuring process for small business.

The Process is modelled upon and draws heavily from the existing and tested Pt 5.3A voluntary administration process. There is much existing case law that will be readily applicable to the Process.

Perhaps after a period of implementation, consideration could be given to expanding the process to a wider range of businesses, beyond the $1 million liability cap. The Process can likely handle much larger businesses, and may even be better suited to much larger businesses, than those with liabilities less than $1 million.

The liability cap of $1 million seems to place a brake on the wide and potentially very constructive use of the Process.

Lionel Meehan
Partner
DLA Piper

Insolvency Law
Bulletin

"Give" and "Take": Virgin Australia, the Cape Town Convention and Aircraft Protocol

David Brown *ADELAIDE LAW SCHOOL*

"If you want it, here it is, come and get it"
(Paul McCartney, "Come and Get It", written for Badfinger, 1969)

Introduction

This article is about a case arising in the Virgin Australia voluntary administration between the administrators and Wells Fargo, the lessor of aircraft engines leased to the Virgin group. The dispute was about what is meant by "give possession" under Art XI of the Aircraft Protocol to the Cape Town Convention on International Interests in Mobile Equipment (hereafter the CTC). Did it require the administrators to simply make the engines available for the lessors to take on an "as is where is" basis, which is what the administrators offered? Or did it require the administrators to redeliver the engines to Florida, as the lease agreement required, and to do so at Virgin's expense? There were clearly significant financial and resource implications falling either on the administrators (and thus the creditors of Virgin) or on the lessors, depending on the answer. Furthermore, this case is an international first under the Convention and Protocol.

One problem with leasing or taking other security over planes is that they are mobile assets, habitually moving between jurisdictions. Moreover, sometimes engines, which may be separately leased, are moved and installed in other planes. As was seen in Australia's previous major airline insolvency, Ansett Airlines, the lack of registration of security interests makes the task of establishing ownership and priority more difficult. Another problem is that when the music stops, the plane and/or engine may end up in a jurisdiction where domestic law, including its private international law and insolvency law, may frustrate or prevent self-help remedies.[1]

Since Ansett's collapse in 2001, Australia has enacted the Personal Property Securities Act 2009 (Cth) (PPSA) with its register of security interests, widely defined to include most leases. The PPSA certainly assisted with the problem that existed in Ansett, especially as it allows registration against serial numbers of certain collateral, including airframes and engines. Yet it does not deal with the extent of the problems including priority and enforcement issues, when it comes to certain internationally mobile goods, most particularly aircraft. The CTC was promulgated by UNIDROIT[2] in 2001. It currently has four protocols, but the only one which is widely acceded to and operative, and with an operating international register, is the Aircraft Protocol (the Protocol), which has to be read in conjunction with the CTC itself. Risk and confidence in the international aviation finance sector is greatly reduced by widespread adoption of the CTC and the Protocol. It is one of the most successful private international law achievements of all time.

Australia passed the legislation necessary to incorporate the CTC and Protocol into domestic law in 2013, International Interests in Mobile Equipment (Cape Town Convention) Act 2013 (Cth) ("the CTC Act") and it came into effect in 2015 after Australia's accession. The CTC provides for "international interests" including charges and leases, which can be registered on the international register, and such registration provides priority. There are some choices available to Contracting States, regarding declarations that can be made. There were strong financial incentives for the aviation sector by way of fee discounts on export credits, built into these choices. As seen in Parliament in 2013, the financial incentives were one of the main drivers for Australia's accession and the choices that were made under the CTC and Protocol.[3]

The Protocol provides an additional and powerful remedy, namely the IDERA,[4] which is an ability for the secured creditor/lessor to procure the local aircraft registration authority (eg CASA in Australia) to deregister the aircraft and permit it to be registered and exported by them. In addition, Art XI provides alternatives for dealing with insolvency-related events, and all but one Contracting State has declared its adoption of Alternative A, which declaration carries with it the financial incentives referred to above. This case note is concerned with the detailed interpretation of Alternative A in Art XI of the Protocol in the wider context of the CTC and Protocol, as it applies to Australian insolvency law, specifically Part 5.3A Corporations Act 2001 (Cth). These two provisions, the IDERA and Art XI, deal with the problem of those with registered "international interests" being frustrated in enforcement of their security by the vagaries of differing local laws depending upon where their aircraft collateral happens to be when insolvency happens.

The CTC Act (s 8) makes clear that the CTC and Protocol prevail over Australian legislation to the extent of any inconsistency. Thus it is a very powerful and rare example of an international Convention making an inroad into our substantive insolvency law, though one key question raised in this case note is how far it has done so.

Under Pt 5.3A Corporations Act 2001 (Cth), s 440B there is (subject to the possibility of court applications to lift it) a moratorium on creditor action, including that of lessors and secured creditors, during the VA period. With extensions of convening periods being frequently agreed to by courts in complex or large cases, this delay can frustrate creditors, and it is to this (and similar laws in other jurisdictions) that Alternative A of Art XI is addressed. Article XI(2) effectively puts a hard maximum length on that stay, the period declared by Australia at the time of accession, is 60 days. During this period, the debtor is also obliged by Art XI(5) to maintain and preserve the aircraft object.

Under Pt 5.3A, the administrator has personal liability for use and possession of leased property during the VA, including property subject to a PPS Lease.[5] The administrator is not personally liable where a non-use notice is served under s 443B within 5 days from taking office, or where the court gives leave to extend the initial 5-day period.[6]

In the Virgin Australia voluntary administration, which commenced on 20 April, the administrators applied for a number of such s 443B extensions in relation to property generally, alongside or in addition to extensions to the convening period for the second meeting of creditors.

In *Strawbridge, ReVirgin Australia Holdings Ltd (Admins Apptd) (No 3)*,[7] the application under s 443B specifically related to aircraft, seeking a further extension of the time to 16 June 2020. This was because the administrators, at the time of the application, were finalising negotiations to sell the airline, and it was anticipated that by 16 June it would become apparent which aircraft objects were not going to be required by the purchasers. Justice Middleton and the parties acknowledged that 19 June would mark the 60-day limit under Art XI of the Protocol, meaning that unless the administrators had cured all defects and agreed to perform all future obligations, the lessors would by that date be entitled to repossess the planes. Justice Middleton granted the extensions sought. This meant that if the administrators wished to serve non-use notices in respect of their personal liability, they would have to do so before 16 June.

Wells Fargo Trust Co, National Association (trustee) v VB Leaseco Pty Ltd (Admins Apptd), Middleton J[8]

The case, the focus of this article, concerned four aircraft engines (and associated stands, data and records)[9] leased by Wells Fargo in 2019 to Virgin Leaseco, which were then subleased to Virgin Australia.

These engines were agreed by the parties to be worth around US$40 million. On 16 June, the last day of its extension of liability under s 443B granted by Middleton J earlier, the administrators purported to give notice under s 443B in respect of these engines, and made it clear to Wells Fargo that they would have to come and get them on an "as is where is" basis. Wells Fargo maintained that under the lease agreements, the lessee was obliged to redeliver possession free of all liens as indicated in the agreement which meant that the administrators would have to arrange for the engines to be transported to a location in Florida as required by the lessor, at Virgin's expense. This dispute led to proceedings before Middleton J, judgment being given on 3 September.

The hearing before Middleton J in the Federal Court

The process of redelivering the engines also involved complex certification and records required by the leases too, so that as well as cost, there were immense practical difficulties involved were the administrators obliged to do more than make the engines available for Wells Fargo to access and arrange transportation.

Justice Middleton interpreted the CTC and Protocol, which overrode Pt 5.3A, as requiring the lessees to redeliver the engines in accordance with the stipulations laid down in the lease agreements. Largely as a consequence of this finding, he also found that the s 443B notice served on 16 June was inefficacious to comply with this obligation to give possession.

At this point, it is worth setting out Art XI of the Protocol in full.

> Article XI — Remedies on insolvency
>
> 1. This Article applies only where a Contracting State that is the primary insolvency jurisdiction has made a declaration pursuant to Article XXX(3).
>
> *Alternative A*
>
> 2. Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, shall, subject to paragraph 7, give possession of the aircraft object to the creditor no later than the earlier of:
>
> (a) the end of the waiting period; and
>
> (b) the date on which the creditor would be entitled to possession of the aircraft object if this Article did not apply.

3. For the purposes of this Article, the "waiting period" shall be the period specified in a declaration of the Contracting State which is the primary insolvency jurisdiction.
4. References in this Article to the "insolvency administrator" shall be to that person in its official, not in its personal, capacity.
5. Unless and until the creditor is given the opportunity to take possession under paragraph 2:
(a) the insolvency administrator or the debtor, as applicable, shall preserve the aircraft object and maintain it and its value in accordance with the agreement; and
(b) the creditor shall be entitled to apply for any other forms of interim relief available under the applicable law.
6. Sub-paragraph (a) of the preceding paragraph shall not preclude the use of the aircraft object under arrangements designed to preserve the aircraft object and maintain it and its value.
7. The insolvency administrator or the debtor, as applicable, may retain possession of the aircraft object where, by the time specified in paragraph 2, it has cured all defaults other than a default constituted by the opening of insolvency proceedings and has agreed to perform all future obligations under the agreement. A second waiting period shall not apply in respect of a default in the performance of such future obligations.
8. . . .
9. No exercise of remedies permitted by the Convention or this Protocol may be prevented or delayed after the date specified in paragraph 2.
10. No obligations of the debtor under the agreement may be modified without the consent of the creditor.
11. Nothing in the preceding paragraph shall be construed to affect the authority, if any, of the insolvency administrator under the applicable law to terminate the agreement.
12. . . .
13. The Convention as modified by Article IX of this Protocol shall apply to the exercise of any remedies under this Article.

Justice Middleton examined Art XI in the broader context of the CTC and the Protocol's other provisions, and in particular, he agreed with Wells Fargo that there was an obligation inherent in Art XI, by reason of Art IX(3), that exercise of any remedies under the Convention, including under Art XI, had to be exercised in a "commercially reasonable manner" which was deemed by Art IX(3) to be the case if the exercise of the remedy was in accordance with the lease agreement, except (which was not suggested here) the provision in the agreement was manifestly unreasonable.

More broadly, his Honour referred to the objective of certainty and predictability behind the CTC, and in his view, in exchange for the mutual economic benefits and financial advantages to the industry of adopting Alternative A, Art XI of the Protocol was intended to, and did, provide lessors and other secured creditors with a remedy that went beyond that available under the CTC, or under local insolvency law.

Appeal to the Full Federal Court[10]

The administrators appealed, judgment being delivered on 7 October. The Full Court allowed the appeal by Virgin (through its administrators), remitting the matter to Middleton J to decide and formulate relief in accordance with the Full Court's judgment.

The appeal in one sense can be formulated as a very narrow question of construction of Art XI of the Protocol, as the administrators argued to be the case. That is, does the requirement to "give possession" of aircraft objects under Art XI(2) require the administrators/debtor to redeliver them in accordance with provisions of the lease agreement at the expense of the administrator/debtor, or does it require them to give the creditor the opportunity to *take* possession by making them available to it.

In arguing that the requirement was merely for the administrators to give the lessor the opportunity to take possession, Virgin drew on the concept of possession in common law, and cited passages from the recent High Court decision in *Hocking v Director-General of National Archives of Australia*.[11] The appellants essentially sought to distinguish the concept of possession from the object physically possessed.

In relation to Art XI, the appellants drew on Art XI(5) which uses the phrase "given the opportunity to take possession in accordance with [Art XI(2)]" (in the context of the duty to preserve the aircraft object), and they argued that this confirmed the limited meaning of "give possession" in Art XI(2). (The respondents, as they had done below, contended that it contrasted, rather than confirmed, the meaning.)

The administrators argued, as below, that the obligation to exercise remedies in a "commercially reasonable manner" (which was deemed to be so where exercised when in accordance with the agreement), only applied if the primary judge's conclusion, effectively the view that "give possession" and "taking possession" were bundled up to be one "remedy", was correct. The appellants argument was that Art XI(2) is instead simply a "self-help remedy" where the lessor can take possession on being given the opportunity to do so, and the "commercially reasonable manner" obligation is one imposed on the *lessor* as to the manner in which they *then* exercise the *taking* of possession if they so choose.

At the heart of the administrators' argument was a confined role for Art XI. The argument of the administrators, summarised by the Full Court, was that "it is intended to override any domestic insolvency moratorium so that the creditor should be given the opportunity, should it be so minded, to take possession of its aircraft objects".[12]

The administrators argued that this narrow construction promoted predictability intended by the CTC, because an obligation to redeliver would depend on the vagaries of terms of agreements, and on all the international scenarios that it would have to apply to.

The appellants also made arguments, which had been labelled by the respondents "consequentialist", that the primary judge's construction imposed significant costs on the insolvent estate, and resource implications for administrators, to the detriment of creditors generally.

The respondents again stressed the argument that the Protocol upheld the agreement between the parties and made a broader argument that party autonomy was a basis of the CTC. In particular they said that Art XI(10) was "central" to their case- that "no obligations may be modified without the creditor's consent".

The respondents also sought to contrast the wording in Alternative B which refers to "the opportunity to take possession".

Judgment of the Full Court

The Court said that one begins with the Protocol (which is to be read with the CTC but prevails over it where there is any inconsistency).[13] It disagreed with the respondents' argument that the lease agreements were the starting point.[14]

Starting with the CTC, there was no express conferral on creditors of any right to enforce provisions in their agreement requiring redelivery on default or termination. The Convention conferred the self-help remedy of being able to take possession.[15] While the CTC does permit creditors to use remedies in the agreement between the parties, "a taking of possession contrary to the requirements of domestic law of the place where the property was located would not be permitted by the applicable law", which in this case would include Australian insolvency law. Article 30 of the CTC referred specifically to insolvency proceedings.

"Therefore, if there is an insolvency administration, then, under the Convention, the creditor must conform to the requirements of the domestic law as to the procedures by which it may enforce its rights to the property."[16]

Turning from the CTC to the Protocol, Art XI specifically provides for airline insolvency. The Full Court observed that "the self-help right to take possession and the right to enforce the terms of the agreement to the extent permitted by domestic law in Australia apply to aircraft objects".

Article XI(2) does not provide expressly that possession is to be given in accordance with the lease agreement, so for the respondents to succeed it would be necessary to read those latter words into it. But that was an unlikely construction given that four other provisions in Art XI expressly refer to the underlying agreement.

Secondly the Court preferred the view of the appellants that the wording in Art XI(5) that "unless and until the creditor is given the opportunity to take possession under paragraph 2", confirmed that Art XI(2) is not to be understood as including redelivery. The Full Court gave short shrift to the argument that the language of "giving the opportunity to take possession" in Alternative B was a contrast with Art XI(2) in Alternative A. There was nothing in the Official Commentary to the Protocol to suggest that, or any reason why it should be so.

On the relevance of the common law meaning of possession, the Court pointed out that the essential elements would also be familiar to civil lawyers. Essentially the Court emphasised the twin aspects of physical possession and intention to hold property as one's own.

The Court said that the primary judge had erred in using the Art IX(3) provision about exercise of remedies in a "commercially reasonable manner" to inform the content of the administrators' obligation to give the lessors the opportunity to take possession. Agreeing with the appellants, the Court said the *manner* in which the remedy was exercised only fell to be determined after the *content* of the remedy was determined. Since the content, in the Court's view, did not involve an obligation to effect physical redelivery, the question of commercial reasonableness of the remedy did not arise.

The Full Court, unlike the Court below, was prepared to take into account the arguments of the appellants as to the impact of the respondent's construction on all creditors, as the considerable costs of redelivery would have to be met in priority to unsecured claims. Indeed, under the lease agreement the lessee was obliged to redeliver "free of all liens" by third parties, so such a construction may even oblige the administrator to satisfy lien claimants prior to redelivery. The Court was clear that the CTC and Protocol were not intended to involve such a "reworking of generally accepted principles of insolvency law".

What then was required by Art XI(2)? It provides that notwithstanding domestic insolvency law, the administrator must do what is necessary to "pass the creditor the form of possession that the creditor could have taken in the exercise of the self-help right to take possession". To do so may require the taking of affirmative steps by the insolvency administrator beyond simply disclaiming the property. Merely submitting to the claim by the creditor may not be enough. However, the extent of those affirmative obligations is confined by what is needed to overcome any barrier to taking possession that is a consequence of the insolvent administration.[17]

It followed that the Court did not accept the respondents "central" argument on Art XI(10). The court's opinion was that on its construction of Art XI(2), there was no modification of the obligations under the lease agreement. Article XI(10) simply constrains domestic insolvency law by preventing a court from modifying the terms of the lease agreement.

The court remitted the matter to Middleton J to deal with the practicalities of how to give effect to Art XI(2) within the clear parameters of its ruling that no redelivery in accordance with the agreement was required by the administrators.

Conclusion

It is suggested that the Full Court's decision (and it is understood Wells Fargo has applied for special leave to the High Court) was correct, in that it is not only a legitimate construction of the CTC and Protocol, in particular Art XI, but also because of the Full Court's view of the limited purpose of Alternative A, which was to allow creditors, after a waiting period declared to be 60 days in Australia, to break the road block of domestic insolvency law that might otherwise stand in the way of their self-help remedy of repossession of aircraft objects. The court was also correct that Wells Fargo's argument elided the remedy's content with the separate "commercial reasonableness" standard of the subsequent manner of its exercise *by the lessor*.

The endorsement by the Full Court of the impact-based argument of the administrators, ie on the effect of the primary judge's decision for the expenses and resources in the VA and thus for Virgin's creditors, stands only to reinforce the commercial sense behind the Court's interpretation exercise.

The Courts did touch upon the common law, and even the civil law, understanding of "possession", and while one could continue the debate in a more abstract sense about the meaning of "give possession of a chattel", the starting point here is the words of the Protocol, and Art XI in particular. In this case, the court's view that Art XI(5)'s cross-reference to Art XI(2) when using the phrase "giving the opportunity to take possession" confirms, rather than contrasts with, the meaning of "give possession" in Art XI(2), was crucial, and renders any wider conceptual analysis of the meaning of possession fruitless.

There is no doubt that this decision, and any appeal to the High Court, will have repercussions beyond Australia, for all Contracting States under the CTC and Aircraft Protocol. Whatever happens, it is likely to engender international discussion and commentary for some time, as it is the first case on the point, and a rare case in the jurisprudence of the CTC and Aircraft Protocol. One hesitates to tempt fate by saying it will clarify the law when the next airline insolvency comes along, but it will certainly be influential in the shadows of aviation finance in the meantime.

David Brown
Associate Professor
Adelaide Law School

Footnotes

1. See Sir R Goode, "Security Interests in Mobile Equipment: Lawmaking Lessons from the Cape Town Convention" (2014) 35 *ALR 59* at 59, cited in *VB Leaseco Pty Ltd (Admins Apptd) v Wells Fargo Trust Co, National Association (trustee)* (2020) 384 ALR 378; [2020] FCAFC 168; BC202009745 at [29].
2. International Institute for the Unification of Private Law.
3. Second Reading of the CTC Act, 29 May 2013 (Anthony Albanese, Minister).
4. Irrevocable Deregistration and Export Authority, Art IX(1).
5. Corporations Act 2001 (Cth) s 443A(1)(c).
6. Corporations Act 2001 (Cth) s 443B(8).
7. [2020] FCA 726; BC202004553.
8. [2020] FCA 1269; BC202008419.
9. Article I(2)(c) of the Protocol defines "aircraft engines" as including "all modules and other installed, incorporated or attached accessories, parts and equipment and all data, manuals and records relating thereto".
10. (2020) 384 ALR 378; [2020] FCAFC 168; BC202009745.
11. (2020) 379 ALR 395; [2020] HCA 19; BC202004673.
12. (2020) 384 ALR 378; [2020] FCAFC 168; BC202009745 at [66](6).
13. Article 6 of the CTC, see Full Court at [88].
14. Citing *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 255; 142 ALR 331; [1997] HCA 4; BC9700274 per McHugh J.
15. Articles 8(1)(a) and 10(a) of the CTC, see Full Court at [86].
16. At [87].
17. At [106].

Don't go Chasing Waterfalls — unfortunately, s 588GAAA was just not safe

Stephen Mullette *MATTHEWS FOLBIGG LAWYERS*

"'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean — neither more nor less.'

'The question is,' said Alice, 'whether you can make words mean so many different things.'

'The question is,' said Humpty Dumpty, 'which is to be master — that's all.'"

(Lewis Carroll, *Through the Looking Glass*)

There is a suggestion that reading s 588GAAA of the Corporations Act 2001 (Cth) as though it required an appointment of an external administrator by 31 December 2020 is "plainly wrong". Well, slap my forehead and call me stupid. If this is plainly wrong, I do not want to be right!

The suggestion is that this is some unusual or foreign interpretation of the words of the section, and that this at odds with the purpose of the provision. While I wish both were true, and although I think it is tolerably clear we are dealing with unfortunately poor drafting, I don't think that either conclusion is plain at all. Nor do I see why directors should take the risk, hoping that the courts will fix the problem with the plain wording of the section. There was still a waterfall at the end of this safe harbour, and the government should have passed legislation to clarify the position for the sake of all concerned. Given that did not happen, we must now wait and see.

This is a further explanation of my thoughts expressed in my article in the Bulletin in 2020.

A question of risk

I do not profess to be a doyen of statutory construction. Or even very smart. But I like to think I understand a bit about risk. The real problem for directors is that **they** bear the risk if the "plainly wrong" interpretation is not, well, plainly wrong.

And to the extent it is suggested advisors may be at risk for advising on a "plainly wrong" interpretation, the risk equation is similar. I would rather not be sued at all, of course. But if I had to choose, I would rather be sued by a director/shareholder, who appointed an administrator to an insolvent company too early (an oxymoron), and avoided personal liability for insolvent trading. On the other hand, I can see a much more direct legal claim from a director who became personally liable for insolvent trading which could have been avoided, if only advice had been provided that the administrator needed to be appointed before a particular date.

The real question at the time was why was anyone taking a risk that the Government could have clarified with the flick of a legislative pen?

A question of words

Section 588GAAA excuses a director from liability for insolvent trading in respect of certain debts. The only debts which are carved out are those which satisfy all three essential criteria:

- incurred in the ordinary course of business (s 588GAAA(1)(a)); and
- incurred during the statutory period (which expired on 31 December 2020) (s 588GAAA(1)(b)); and
- incurred "before any appointment during that period of an administrator, or liquidator, of the company" (s 588GAAA(1)(c)).

The "alternative" interpretation argues that it is "plainly wrong" for the words "any appointment during that period of an [external administrator]" to be understood to mean that "any external administrator, must have been appointed, during that period". This only needs to be read out loud to realise that it is neither plainly wrong, nor is it against the ordinary meaning of the words used. And anything less than absolute clarity in this regard, means we are back in the area of "risk" discussed above.

"any"

It is true that the word used in s 588GAAA(1)(c) is "any" appointment, not "the" appointment. Much is made of this in the "alternative" interpretation. Maybe there is no appointment? Doesn't "any" mean that "maybe" there is no an appointment? Aha!

Of course this is (hypothetically) correct! There may be no appointment. Maybe there was. They are definitely the only two (hypothetical) possibilities. Like "any" pregnancy, there is no in-between.

However in the context of the use of this section to defend an insolvent trading claim involving a liquidator, this is the only one of at least three possible interpretations of the word "any" which is **not available**. The three that I can think of are:

1. "Any" means "maybe" — as the "alternative" interpretation seems to argue;
2. "Any'" means "the" — that is, the appointment which actually occurred.
3. "Any" means "if" — that is, a condition of the operation of the third requirement is that there has been any appointment.

"Any" means "maybe"

With respect to those who argue "any" means "maybe there won't be an appointment", what this appears to forget is that the section only operates in the context of an insolvent trading claim. We are not suspended in ignorance knowing whether or not a liquidator will be appointed. With one exception, this has already occurred. Otherwise there would be no insolvent trading claim and this section is irrelevant. As we sit here now, looking ahead, we can say — "maybe a liquidator will be appointed. Maybe one won't". However, by the time the insolvent trading claim is brought, we will definitely know. We are not talking about Schrödinger's cat, both alive and dead at the same time. The box is opened, and the cat is dead.

Section 588GAAA is a defence, or carve out, to this insolvent trading claim, being brought by an actual liquidator (or creditor with the liquidator's consent under s 588R, or assignee from the liquidator under s 100-5 of the Insolvency Practice Schedule). Without "any" appointment there is no insolvent trading claim and no need for a safe harbour (COVID or otherwise), and the section is entirely irrelevant. We'll come back to the one exception later.

So if there is **no** appointment, no one has anything to worry about, the cat is alive, and the safe harbour has no storm upon which to operate. But, if someone is being sued for insolvent trading, then (subject to the exception below) there **has** been an appointment, and so it is not an 'assumption' that an appointment has occurred, it is a fact, and a pre-requisite to s 588GAAA having any operation at all.

"Any" means "the"

And so if there is **an** appointment at the time the insolvent trading claim is being brought, then what do the words of s 588GAAA(1)(c) require? They require that **the** appointment must have occurred "during that period". You cannot say, at that time, that the word still means "maybe".

Look at it another way. Let's move from the speculative "any" appointment, to "the" forthcoming "actual" appointment which will occur on 1 January 2021 of a liquidator who sues for insolvent trading in relation to a debt incurred on 29 December 2020 to purchase stock of $1,000. The director satisfies the first two criteria — by proving the debt was incurred in the ordinary course of business, and incurred during the statutory period. Noting it is the director who bears the onus under s 588GAAA(2) — how is the requirement in s 588GAAA(1)(c) satisfied? I would respectfully submit that the only way it can be satisfied is if it is established that the appointment which actually occurred, did so "during that period". An appointment on 1 January 2021 can not satisfy that requirement without some egg-shaped linguistic gymnastics. The (and therefore "any") appointment must have occurred during the period. That is the plain, ordinary meaning of the words of the section.

"Any" means "if"

What about the exception? There is, of course, a possibility that an insolvent trading claim can be brought without "any" appointment of a liquidator. ASIC can apply for declarations under 1317E that the director has breached s 588G. Pecuniary penalty orders could be ordered (s 1317G) or disqualification of the director (s 206C). Essentially this will be an insolvent trading claim brought by ASIC. This does not require 'any' appointment of an external administrator to have occurred.

What does this tell us about the operation of the third requirement for safe harbour under s 588GAAA(1)(c)? A director may be able to reach safe harbour under s 588GAAA without satisfying the third requirement, because there has not been "any" appointment.

This interpretation would also explain why the word "any" was used instead of "the", because it is possible that there may be no appointment. So ... the "plainly wrong" interpretation will not be relevant to an insolvent trading claim by ASIC, because there will be no liquidator or administrator.

However if there **IS** an appointment *a fortiori* the "plainly wrong" interpretation must be, in my respectful view, plainly right. If "any" liquidator is involved, then the ordinary and plain meaning of the words is that "any" appointment must have occurred "during that period" — ie before 31 December 2020.

"during that period"

The principal difficulty with the wording of s 588GAAA(1)(c) is caused by the inclusion, not of the word "any", but the phrase "during that period". The timing issue which is said to be "plainly wrong" only arises because of those words. Remove those words, and there is no (well, perhaps less?) controversy between the "alternative" and the "plainly wrong" views. The third requirement for safe harbour would become simply that the debt must have been incurred "before any appointment of an administrator, or liquidator, of the company".

But if I may, here are two points for consideration:

1. What do those words therefore mean, given that they **are** included?
2. Why is there a reference to the appointment of an administrator at all?

As to the first point, well, the plain and obvious meaning, as discussed above, is that the words say what they mean and mean what they say (to paraphrase Alice and the March Hare). They require any appointment to have occurred "during the period" before 31 December 2020. Otherwise, what work is there for the words to do? This does not seem to be explained by the "alternative" interpretation.

And as to the second point, why is it possible that a director seeking safe harbour might wish to prove the appointment of an administrator? Is not it because the appointment of an administrator is an appropriate action to take when faced with an insolvent company, and after debts have been incurred, but before the limited safe harbour period has expired? That is, if an **administrator** is appointed **during the period**, but the company is only placed into **liquidation** (leading to the liquidator's insolvent trading claim) **after**, the director would still be able to satisfy the third requirement, and avail himself or herself of the s 588GAAA defence. Is not that consistent with the "plainly wrong" interpretation of s 588GAAA(1)(c), that the administrator must have been appointed before 31 December 2020?

I do not like it any more than you do, but is not that the plain and ordinary meaning of the words?

A question of purpose

Much more could be said about the "purpose" argument for the "alternative" view which suggests that requiring an appointment before 31 December 2020 would be inconsistent with Parliament's discernible purpose in enacting the provision. Two observations might suffice for present purposes:

Firstly, I think we can agree that this is not what the insolvency industry (who know about insolvent trading) *thought* was the intended purpose of the provision — why would the Government have cut off the operation of the defence at 31 December 2020 (or such other date as may be prescribed) if an external administrator had not been appointed by then? It doesn't make sense — it is stupid. This is not how insolvent trading works — debts are incurred first, and the liquidator appointed many months or even years later. The "plainly wrong" interpretation forces directors to consider appointing before 1 January 2020. Agreed. It is dumb. However that is not the same thing as saying that it is inconsistent with Parliament's purpose.

And in fact, unfortunately, the "plainly wrong" view is indeed consistent with that legislative purpose, at least in part. There are two main points put against this:

Firstly, it is said that if the "plainly wrong'" view is correct, directors will not know whether the defence is available at the time the debt is incurred. Agreed. However there is nothing unusual in corporate insolvency, including director's personal liability, for a defence to be conditional upon directors taking an action by a deadline. Director Penalty Notices, anyone? The director is at all times personally liable for a penalty equivalent to a company's unpaid withholding tax amounts until they are paid. Liability accrues with each unpaid withholding amount, and yet the director can avoid personal liability entirely, by appointing an external administrator right up until the time the DPN expires (provided lodgements have been kept up to date, of course). In the same way a director does not know at the time a debt is incurred whether she will have a defence under s 588GAAA, but she does have complete control over whether the defence is available, right up until the end of 31 December 2020. There is nothing inconsistent with Parliamentary purpose in this regard.

Secondly, it is unfortunately possible, like it or not, to discern a purpose for the "plainly wrong" provision. It is a flawed purpose, perhaps a stupid purpose, (because the Government does not understand how insolvent trading claims work). But it is a purpose nonetheless, clearly discernible from the legislation and the explanatory memorandum. That purpose is set out in the explanatory memorandum to the *Coronavirus Economic Response Package Omnibus Bill 2020* at 12.16 — namely that the provision is to be "a new **temporary, six month period** in which a new safe harbour . . . applies" (emphasis added).

Parliament's purpose was to provide a limited, temporary protection, that would expire upon "any appointment of an administrator or liquidator of the company **during the temporary safe harbour application period**" (Explanatory Memorandum at 12.17, emphasis added). The whole point and purpose of the legislation was that it would give protection only for a temporary period. The problem, however, was that the Government applied this temporal limitation to both the debts being incurred and also the appointment being made.

Why did it do this? I have no idea — but it is still clear enough. And for what it is worth, the following should be noted:

1. Let's not forget this legislation was drafted in extraordinary haste, with minimal consultation, in the middle of a pandemic, amidst sweeping legislative reforms. With whom did the Government sit down and explore the possible implications of limiting access to a statutory defence if it was made to expire should no appointment be made by 31 October 2020?
2. The Government wanted relief that was "temporary". There is already an existing safe harbour provision (which has its own quirks and faults of course). But this was intended to be an additional, temporary protection:

   > We know this will be temporary. That's why all our actions are geared towards building a bridge, keeping more people in work, enhancing the safety net for those that aren't and keeping businesses alive so they can get to the other side and stand up their workforce as quickly as possible. (Frydenberg & Morrison, Joint Press Release 22 March 2020 "Supporting Australian workers and businesses")

   The "other side" of the "bridge" for the government was the end of the 6 month statutory period, which was 1 January 2021. If a business has gotten to "the other side" by arriving at 1 January 2021 without having to appoint an external administrator, then I suspect the government (mistakenly?) believed that the "temporary" safe harbour was no longer required.

Of course the provision is not as effective as a properly drafted and well crafted safe harbour for directors against all debts incurred during the ordinary course of business, and which were incurred between 25 March 2020 and 31 December 2020, even if the company is placed into liquidation in 2021 or beyond. But this does not mean that the provision is not clear, on its face. Nor does it make it inconsistent with a (flawed) legislative purpose.

The fact that when trying to dig directors out of a hole, the government has only provided a fork or a shovel (that I say vanished on 31 December 2020), does not mean that we are not stuck with the tools provided, at least until the Government realises its mistake and gives directors the correct equipment. That may now be too late.

The other clue as to legislative purpose might be in the fact that the Government does appear to have picked up the existing 2017 Safe Harbour provisions in s 588GA(1)(b)(iv). As has been pointed out, s 588GAAA(1)(c) appears to have lifted up from the operation of the existing Safe Harbour in s 588GA(1)(b)(iv) — which provides insolvent trading safe harbour protection against debts incurred before an appointment — ie at any time. However the government in its ineffable wisdom then added the words "during that period" after the reference to "any appointment" making it tolerably clear that it intended (unwisely, agreed) to limit the protection to debts incurred where the administrator was appointed during a "temporary" period.

I mentioned I am no doyen of statutory interpretation, but I do not believe that it is a principle of statutory construction that a section would have been more helpful and given better protection if the Government had drafted it better.

A question of time

Unfortunately I am not convinced that judges will necessarily wish to play the role of Humpty Dumpty, and make the words "during that period" mean "during that period or at any time" in accordance with a perceived intention of parliament, which appears to have simply mucked this provision up.

More importantly, it was not me advising directors that they should take that risk. Of course they were welcome to — and it is encouraging that there are some willing to go out on that limb and argue for the alternative view. The more the merrier. I like to deal in certainties and am more than happy to live with the consequences of pointing out flawed legislation and advising directors of risks (on the one hand) and certainties, on the other. Directors can make up their own mind. After all, isn't that what we lawyers are paid to do?

In the meantime, Government is legislating faster than Lewis Carroll — so how about if something sensible were to come out of this most recent legislative landslide, and the Government were to slip in a minor amendment to s 588GAAA to fix the problem for us all, if retrospectivity were permitted, which it may not be?

Stephen Mullette
Matthews Folbigg Lawyers

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