

CONFERENCE PROGRAM - MONDAY, 19 MARCH 2018

7.45-8.35 CONFERENCE REGISTRATION AND ARRIVAL COFFEE

8.35-8.45 WELCOME

8.45-9.45 **Safe Harbour**

With the safe harbour regime having commenced in September 2017, I am excited to hear from our panel of experts on their thoughts on how the regime is being perceived by corporate Australia. Is the regime developing a rescue culture as intended? Is the regime being understood and utilised by directors? What challenges is the new regime presenting? Areas for discussion may include:

- How should safe harbour be documented
- ASX – to disclose or to not disclose
- What constitutes an ‘appropriately qualified entity’?
- Conflict considerations
- How are directors of different companies engaging with the new regime ie. SMEs vs large corporates?

Ryan Eagle, *Partner, Ferrier Hodgson*

Maria O’Brien, *Partner, Baker & McKenzie*

Geoff Green, *Group Strategic Business Services, National Australia Bank*

Barry Kogan, *Partner, McGrathNicol*

9.45-10.25 **The Channel 10 Decision - How much pre-appointment work can an administrator do without creating a conflict?**

- Does the C10 decision shift the line?
- Does it matter who instructs the accountant?
- Does it matter how the accountant is paid?
- What problems might a special purpose appointee solve?
- How does the decision impact the ARITA Code?
- What does it tell us about the position of a Safe Harbour adviser?

Chris Prestwich, *Partner, Allens*

10.25-10.45 MORNING TEA

10.45-11.25 **Ipsos Facto**

The Federal Government enacted ‘ipso facto’ law reforms last year which are anticipated to take effect mid 2018. In essence, the reforms are intended to restrict the ability of counterparties to terminate or modify the operation of a contract by reason of a company entering administration, receivership or a scheme of arrangement – so as to help facilitate a rescue of the insolvent company.

Much of the detail of the proposed reforms has been left to regulations, that are yet to be released. The reforms are likely to impact a large proportion of commercial and financial contracts in Australia, which normally allow for termination and/or enforcement in such circumstances. They may significantly impact the way administrations and receiverships are conducted and will likely raise significant issues of stakeholder management.

This panel will discuss the current status of the reform process and what we can expect to see in the market when the reforms take effect.

Mark Clifton, *Partner, Herbert Smith Freehills*

Paul Apathy, *Partner, Herbert Smith Freehills,*

Rowena White, *Senior Associate, Herbert Smith Freehills*

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- 11.25-12.05** **MACKS v VISCARIELLO Appeal Judgment - Outcomes Impacting On The Conduct And Duties of Insolvency Practitioners**
The recent South Australian Supreme Court Full Court appeal decision of *Macks v Viscariello [2017] SASCFC 172* considers several significant issues impacting on the conduct and duties of voluntary administrators, including their fiduciary duties, the duty of care and misleading or deceptive conduct. This session will discuss the broad implications of this important appeal decision and give practical guidance to practitioners on how to manage their duties when involved in complex litigation, which in this case was a litigation marathon across many years in multiple courts.
- Jason Harris, Associate Professor, UTS Faculty of Law**
Amanda Coneyworth, Director, Ferrier Hodgson and Lecturer, University of Technology
- 12.05-12.45** **What Are We Learning From The Insolvency Law Reform Act 2016 Changes In Operation?**
With the benefit of what are now several months of operation of the ILRA reforms, our presenters will highlight some of the bad, and the good, aspects of the new laws, and some sleeping issues yet to arise.
- For example, how are the courts interpreting the new law - by reference to the old sections, or afresh: *Andersen v Lennon [2017] FCCA 2452*? Are we over the transitional periods: *Walley, Re Poles & Underground [2017] FCA 486*? Are courts still giving directions on the same bases as before, despite the range of other options in s 90-15? How were the funds handling provisions managed in *Network Ten [2017] FCA 1144*? Have creditors been using their new powers, in particular FEG and the ATO? Are there vexatious or other excluded requests? Are practitioners being voted out? How are the misconduct registers being used? Are ASIC and AFSA aligned? What has changed in remuneration? Are voidable transactions being assigned to good effect?
- Jason Harris, Associate Professor, UTS Faculty of Law;**
Michael Murray, Principal, Murrays Legal – The authors of Keay’s Insolvency, 10th edition pending.
- 12.45-1.45** **LUNCH**
- 1.45-2.25** **FEG Activity Update**
FEG is a one-of-a-kind activist creditor – making enquiries, investigating, and sometimes litigating to challenge the work done by insolvency practitioners, and of course FEG is an increasingly important source of funding to assist practitioners in the efforts to recover assets. Henry Carr is uniquely placed to offer views that will be important and insightful for all practitioners.
- Henry Carr, Senior Executive Lawyer / Branch Manager, Recovery and Litigation Branch, Australian Government, Department of Jobs and Small Business**
- 2.25-3.05** **PPSR Update**
The *Personal Property Securities Act 2009* (Cth) and the Personal Property Securities Register continue to generate significant and complex legal issues for lawyers and insolvency practitioners. Nicholas Mirzai, provides a case law update and emphasises points of interest for those in the legal and insolvency profession. Amongst other cases, he will be speaking to the PPSA aspects of the *Re Amerind* appeal.
- Nicholas Mirzai, Barrister, Level 22 Chambers - Co-author of the Annotated Personal Property Securities Act and the PPS in Practice**

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3.05-3.25 **AFTERNOON TEA**

3.25-4.10 **ASIC PRESENTATION: The Role of the Regulator and Government**

Recent and mooted changes including the Insolvency Law Reform Act 2016, Government's industry funding model for ASIC and safe harbour/ipso facto reforms, makes this a timely opportunity for us to hear from the newly appointed Senior Executive Leader, Insolvency Practitioners, Thea Eszenyi who will cover the important issues and focus for the year ahead from the Regulator including the role of the Regulator and Government.

Thea Eszenyi, *Senior Executive Leader, Insolvency Practitioners Team, ASIC*

4.10-5.30 **State of the Market - Financiers Panel.
Where Are The New Opportunities For Work?**

It's true that bank appointments of IAs and receivers are low. Part of this reflects that there are a number of non-bank lenders in this market, and so some of those appointments are made by non-banks. It also reflects a new preparedness to allow borrower-side advisers to have a first opportunity. I've assembled a panel of bank and non-bank lenders who will talk about the state of the market, opportunities for work, and the impact of regulatory and other factors.

Moderator : Quentin Olde, *Senior Managing Director, FTI Consulting*

Jon Munnings, *Acting General Manager, Group SBS, NAB*

Tim Stewart, *Managing Director, Gordon Brothers*

5.30 **CLOSE OF DAY ONE**

6.30-7.00 **PRE-DINNER DRINKS**

7.00-11.00 **DINNER**

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8.00-8.30 ARRIVAL COFFEE

8.30-9.30 **Personal Insolvency –**

Law Reform Focus and Implications for Corporate Practitioners

As I write this program there is some very significant reform in the wings, with legislation to implement so-called 'one-year bankruptcy' and reform Part IX debt agreements currently before the Senate

Legal and Constitutional Affairs Legislation Committee. I've asked Sally Nash to provide an overview to help you understand the changes and what they will mean for insolvency practice, including anything new.

Other areas include:

STOP PRESS: Lessons for Trustees in a judgment delivered 19th February, 2018, *Compton v Ramsay Health Care Australia No 2, [2018], re Part X*

- Trustees Duties – *Young v Thompson (formerly trustee of the property of Young) [2017] FCAFC 140*
- Exoneration: *Lane Trustee in the matter of Lee v Deputy Commissioner of Taxation* re the Trustee's right of indemnity
- 60 Day Time Limits – *Ferella V Official Trustee, FCA 18*
- Family Law & Bankruptcy – *Needham and Trustee of the Bankrupt Estate of Needham [2017] Fam CAFC 94*
- Quistclose Trust - *Rambaldi v Commissioner of Taxation [2017] FCA 57* to seek a preference claim

Sally Nash, *Consultant Solicitor*, O'Neill Partners Commercial Lawyers

9.30-10.25 **Insolvent Transactions Round-Up, including -**

Assigning the Rights to Sue and Funding Voidable Transactions Proceedings

I have an Insolvent Transactions round up every year. It's not because I can't think of new topics! Preferences may not be the 'sexiest' restructuring topics, but for a lot of you they help pay the bills, especially when things are quieter. So as long as the Court keep producing judgments that are important for practitioners, I will keep delivering 'the same topic' Those of you who come every year will know that it is not really the same topic of course....each presentation provides an overview of the most important cases in the preceding twelve months, and so every paper is different. This year we also will be considering issues of assigning the rights to sue and funding voidable transactions proceedings. Stephen Mullette will take you through the most recent important cases including:

- *Shot One Pty Limited (in Liq) v. Day [2017] VSC 741*
- *Lucas, in the Matter of Filestock Pty Ltd [2017] FCA 1425*
- *Marsden (liquidator) v CVS Lane PV Pty Limited Re: Pentridge Village, Marsden v CVS Lane PV Pty Limited [2018] FCA 102*
- *EH 2015 Pty Ltd (In Liq) v Caratti (No 3) [2017] WASC 210*
- *Lewis Securities Ltd (in Liq) v Carter (2017) 120 ACSR 327*
- *David Clarke Air Conditioning Pty Ltd as trustee for the David Clarke Air Conditioning Trust v Quann (No 3) [2017] WASC 91*

Stephen Mullette, *Principal*, Matthews Folbigg Lawyers

10.25-10.45 **MORNING TEA**

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10.45-11.40 Remuneration Issues

At the time we hoped that **Sakr Nominees** (last year's Stop Press topic) had given us clarity, but there have been such a large number of cases that this topic gets a run in 2018 too.

Thomas Russell will be presenting this year's remuneration update, featuring a summary of where we are and how we got here, a review of recent court decisions, the latest on "proportionality", a quick recap of the law relating to payment of remuneration from trust money, and practical tips on preparation and presentation for insolvency practitioners seeking approval of fees by the court. This session is a must-see for practitioners who think it is important to get paid for the work they do – don't miss this opportunity to bring yourself up to date with latest developments. Some of the cases may include the below recent decisions: In the matter of **Hunter Valley Dental Surgery Pty Ltd [2017] NSWSC 1144 s 473(3)(b)(ii)**

- In the matter of **ACN 159 605 188 Pty Ltd [2017] NSWSC 1642**
- In the matter of **Anglican Development Fund Diocese of Bathurst Board (Receivers and Managers Appointed) [2017] NSWSC 967**
- **Re Gunns Plantations Ltd (No 3) [2017] VSC 777**
- **Re Atwell & Co Pty Ltd (in liq) [2017] VSC 683 [2017] VSC 500**
- **Re Mackie Group Pty Ltd (in liq) (in its capacity as Trustee of the Jupelina Unit Trust) 2017]**
- **VSC 477 (1 September 2017)**
- **Re Aohai Pty Ltd [2017] VSC 414 (21 July 2017) [2017] VSC 414**
- **Park & Muller (liquidators of LM Investment Management Ltd) v Whyte No 2 [2017] QSC 229**

Thomas Russell, *Partner*, Piper Alderman Lawyers

11.40-12.15 STOP PRESS: THE LATEST IMPORTANT CASES ROUNDUP:

The Amerind Appeal – Trading trusts, Statutory Regime of Priority, Employee Entitlements, Set-offs Update, Hamersley & QCA Decision re Environmental Laws Linc Energy Update

How do recent cases including **Commonwealth v Byrnes and Hewitt [2018] VSCA 41 (Amerind) and Hamersley Iron Pty Ltd v Forge Group Power Pty Ltd (in liq) (receivers and managers appointed) [2017] WASC 152 (Hamersley)** affect you?

On **28 February 2018** a five member bench of the Victorian Court of Appeal handed down judgment in **Amerind**. The Court has added to the longstanding debate over whether the allocation and distribution of trust assets in the insolvency of a corporate trustee follows the statutory regime in the Corporations Act or the general law regime at trust law. We now have different law applying depending on your jurisdiction.

On **21 March 2018**, the Western Australian Court of Appeal will consider the appeal from the decision of His Honour, Tottle J in **Hamersley**. What is the impact of **Hamersley** and what may change?

On **9th March 2018**, The Queensland Court of Appeal delivered the judgment relating to environmental laws in **Linc Energy**. What did the Court say? What does this mean for practitioners and other States?

Natasha Toholka, *Partner*, Norton Rose Fulbright

12.15-1.00 Sham Contracts

Sham Contracts are one of my pet topics. No need to prove insolvency, no 6 months/two years/ four years limitations, no three year use it or lose it last minute emergency applications to extend time. Using **Camden Nurseries Pty Ltd v Aussie Growers (Aust) Pty Ltd [2017] NSWSC 1770 (15 December 2017)** as a template Glen Cussen will discuss the forensic advantages of attacking a transaction as a sham, and explain how to go about it.

Glen Cussen, *Partner*, Kemp Strang

1.00-1.50 LUNCH

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1.50-2.30 Important Tax Issues and Recent Developments

The Tax Office's burgeoning activity in the securities area might mean that more cases are resolved through secured arrangements resulting in fewer bankruptcies and liquidations. However, the other side of the coin is that the Tax Office is set to become the new kid on the block who joins the banks as a major appointee of receivers. Ross Burns, will address:

- The ATO's new technological capabilities and how this affects Trustees
- The relatively-new ability to take mortgage security in respect of tax debts – how, when and where will the ATO use this power and how will this play out in terms of statutory priorities
- The very recent ***Keris Pty Ltd (Trustee) v Deputy Commissioner of Taxation [2017] FCAFC 164 (13 October 2017)*** decision and its implication about the tax office's powers to issue a Security Bond Demand.
- Transparency of Tax Debts measure, which essentially is the new law being introduced to allow for the ATO to provide information on taxpayers with ABNs to Credit Reporting Bureaus, Ross will outline details of this legislation.

Ross Burns, Director, Significant Debt Management Service Delivery (Debt), ATO

2.30-3.15 Winding Up Strata Title Corporations

One of my banking contacts has picked Strata Title insolvency as one of the hotspots for 2018 and 2019, as Strata title corporations are hit by the need to address problems of cladding/removal/replacement and other buildings defects. Those corporations will need to look at whether they should and can raise special levies. And it seems that some of the parties that will be asking to pay those special levies will be offshore, with limited capacity to find or dispatch funds in Australia.

Using a very recent case in the matter of ***Dungowan Manly Pty Limited (in liquidation) [2017] NSWSC 1771*** as a reference point our panel will use their experience, as the team involved on the case, to help us better understand the challenges involved winding up a strata title corporation and in particular the issue involved in raising a special levy:

- Complications and risks of converting company title buildings to strata title.
- The impact of a dispute between shareholders (i.e. owners) of a company title building
- The impact of a voluntary administration on such an entity.
- What powers exist by a Liquidator or Administrator in raising special levies. Can such levies include the recovery of liquidator's fees and administrator's fees.
- What risks should those persons that are part of a company title property be concerned with respect to the ability of such an entity in raising special levies.

Farid Assaf, Barrister, Banco Chambers
John Breene, Partner, Breene & Breene Solicitors
Simon Cathro, Partner, Worrells Solvency & Forensic Accountants

3.15-3.30 AFTERNOON TEA

3.30-4.10 Administrators Incurring Credit

When administrators need to borrow money (most of the time!) there are at least two issues to address: whether or not to seek a variation to personal liability, and how the administrator can actually grant effective security to protect any personal liability they do have. Our speaker will review:

- ***Park, in the matter of Surfstitch Group Ltd (Administrators Appointed) [2017] FCA 1244***
File number: NSD 1842 of 2017 October 2017
- ***Korda, in the matter of Ten Network Holdings Ltd (Administrators Appointed) (Receivers and Managers Appointed) [2017] FCA 1144***
- ***Woods, in the matter of Paladin Energy Ltd (Administrators Appointed) [2017] FCA 836***
File number: WAD 328 of 2017
- ***Crawford, in the matter of North Queensland Heavy Haulage Services Pty Ltd (Administrators Appointed) [2017] FCA 723***

Scott Aspinall, Barrister, Ground Floor Wentworth Chambers

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4.10-4.50 **Invalid/Ineffective/Void Appointments**

It's not clear just how much work an administrator should do to confirm the validity of their prospective appointments – but there's a great deal of pain in sorting it all out. There have been several cases in the last twelve months which suggest that the law is evolving and practitioners are still encountering practical difficulties. Ingrid King will review:

- ***Kreab Gavin Anderson (Australia) Ltd, in the matter of Kreab Gavin Anderson (Australia) Ltd [2017] FCA 300***
- ***In the matter of Sydney Project Group Pty Ltd (Administrators Appointed) (Receivers and Managers Appointed) and S.E.T. Services Pty Ltd (Administrators Appointed) (Receivers and Managers Appointed) [2017] NSWSC 881 (30 June 2017)***

Ingrid King, Barrister, Tenth Floor St James Hall Chambers

4.50-5.30 **Winding Up Schemes**

Last year the C10 case taught us (amongst other things) that there was another form of appointment the nameless 'special purpose appointee' – of course that is not the only form of nameless appointment type, you might also be appointed to wind up a Managed Investment Scheme, which are quite different to any other form – very little legislation – almost everything is controlled via Court orders.

Our speaker will take you through the ins and out of section 601 appointments.

Danielle Funston, Partner, K&L Gates

5.30 **WRAP UP AND CONFERENCE CLOSE**