

17th Annual Practical Insolvency Conference and Gala Dinner

19 and 20 March 2018
Dockside, Cockle Bay, Sydney

Meeting your ILRA annual CPE requirements*: Are you and your team audit-ready?

CPE/CPD/CLE total: 15 hours

TOPICS:

STOP PRESS: Re Amerind Appeal Judgment
Safe Harbour
Ipsa Facto
The Channel 10 Decision - How much pre-appointment work can an administrator do without creating a conflict?
Macks v Viscariello Appeal Judgment - Outcomes Impacting On The Conduct And Duties of Insolvency Practitioners
What Have We Learnt From ILRA In Operation?
Administrators Incurring Credit
PPSR Update
ASIC PRESENTATION: The Role of the Regulator and Government
State of the Market - Financiers Panel. Where Are The New Opportunities For Work?
Personal Insolvency – Law Reform Focus and Implications for Corporate Practitioners
Insolvent Transactions Round-Up & Assigning the Rights to Sue and Funding Proceedings
Remuneration Issues
Winding up Strata Title Corporations
Important Tax Issues and Recent Developments
FEG Activity Update
Invalid/Ineffective/Void Appointments
Sham Contracts
Winding Up Schemes
Linc Energy Update re Environmental Laws
Set-Off Update – Hammersley/Forge Case

Paul Apathy, *Partner*,



Australian Institute of
CREDIT MANAGEMENT

Herbert Smith Freehills

Endorsed by:

SPEAKERS

Scott Aspinall, *Barrister*, Ground Floor Wentworth
Farid Assaf, *Barrister*, Banco Chambers
John Breene, *Partner*, Breene & Breene Solicitors
Ross Burns, *Director*, Significant Debt Management Service Delivery (Debt), ATO
Henry Carr, *Senior Executive Lawyer/ Branch Manager*, Recovery and Litigation Branch, Australian Government, Department of Jobs and Small Business
Simon Cathro, *Partner*, Worrells
Mark Clifton, *Partner*, Herbert Smith Freehills
Amanda Coneyworth, *Director*, Ferrier Hodgson and *Lecturer*, Insolvency Law, University of Technology
Glen Cussen, *Partner*, Kemp Strang
Ryan Eagle, *Partner*, Ferrier Hodgson
Thea Eszenyi, *Senior Executive Leader*, Insolvency Practitioners, ASIC
Geoff Green, *Group SBS*, NAB
Jason Harris, *Associate Professor*, UTS Faculty of Law
Ingrid King, *Barrister*, Tenth Floor St James Hall
Stephen Mullette, *Principal*, Mathews Folbigg Lawyers
Chris Prestwich, *Partner*, Allens
Nicholas Mirzai, *Barrister*, Level 22 Chambers
Michael Murray, *Principal*, Murrays Legal
Jon Munnings, *Acting General Manager*, Group SBS, NAB
Sally Nash, *Consultant Solicitor*, O'Neill Partners Commercial Lawyers
Maria O'Brien, *Partner*, Baker & McKenzie
Thomas Russell, *Partner*, Piper Alderman Lawyers
Natasha Toholka, *Partner*, Norton Rose Fulbright
Rowena White, *Senior Associate*, Herbert Smith Freehills

SYDNEY INSOLVENCY NEWS

Real Journalism, Real People and Real-time Commentary on Sydney's Insolvency Scene

PROGRAM OUTLINE
17th Annual Practical Insolvency Conference and Dinner
19 – 20 March 2018 Dockside, Cockle Bay, Sydney

8.00am - Conference registration

8.35am - Welcome

8.45am - 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

9.45am - 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

10.25am - 10.45am - Morning tea

10.45am - Ipso 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, Freehills

Paul Apathy, Partner, Herbert Smith Freehills,

Rowena White, Senior Associate, Freehills

11.25am - 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

12.05pm - 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.

12.45pm - 1.45pm - Lunch

1.45pm - 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

2.25pm - 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*

3.05pm - 3.25pm - Afternoon Tea

3.25pm - 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, ASIC

4.10pm - 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. Part of this 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 market, opportunities for work, and the impact of regulatory and other factors.

Jon Munnings, Acting General Manager, Group SBS, NAB

5.30pm - Close of Day One

6.30 for 7pm Gala Dinner

PROGRAM OUTLINE - DAY TWO

8.30am - 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 our 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 – **Farella 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

9.30am - 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:

Marsden (liquidator) v CVS Lane PV Pty Limited Re: Pentridge Village, Marsden v CVS Lane PV Pty Limited [2018] FCA 102

Stephen Mullette, *Principal, Matthews Folbigg Lawyers* (session wording tbc)

10.25am - 10.45am - Morning tea

10.45am - 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*

11.40am - STOP PRESS: THE LATEST IMPORTANT CASES ROUNDUP: The Amerind Appeal – Trading trusts, Statutory Regime of Priority, Employee Entitlements, Set-offs Update, Hammersley & 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

12.15pm - 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

1.00pm - 1.50pm Lunch

1.50pm - 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, 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 pm - 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 – further complicated by offshore owners who may not be able/prepared to meet levies. Using a very recent case - In the matter of ***Dungowan Manly Pty Limited (in liquidation) [2017] NSWSC 1771 (15 December 2017) [2017] NSWSC 1771*** our panel will take us through the challenges involved and the challenges involved in winding up a strata title corporation.

What are the issues/protocols for Developers being liable to fix high rise apartments? Who pays for rectification: manufacturer, supplier, builder, certifier, architect, council? Will proportionate liability laws assist or frustrate recovery

What are the guidelines around relevant BCA standards? Are they adequate? What are the issues practitioners need to be aware of.

(session details tbc)

Farid Assaf, *Barrister*, Banco Chambers

John Breene, *Partner*, Breene & Breene Solicitors

Simon Cathro, *Partner*, Worrells Solvency & Forensic Accountants

3.15pm - 3.30pm - Afternoon Tea

3.30pm - 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

4.10pm – 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

4.50pm - 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 under s 601NF. And 601NF appointments 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 NF appointments, referencing:

- **Powell, in the matter of Arafura Pearls Holdings Limited (in liq) [2017] FCA 1159**
- **Pyrenees Vineyard Management Ltd v Frajman [2008] VSC 552**
- **Re Environinvest Ltd [2009] VSC 33**

Danielle Funston, *Partner*, K&L Gates

5.30pm - Wrap up and conference close

Meeting your ILRA annual CPE requirements*

CPE/CPD/CLE approx total: 15 hours

Did you know that under ILRA practice rule 20-5 you need least 40 hours of CPE every year? You can count self-study towards that total but you need at least 10 hours "capable of being objectively verified by a competent source" - in other words: external study. Solicitors & Barristers must earn 10 CPD units every legal CPD year (1 April – 31 March annually). *Check with your professional body or get in touch for further details

FOR FURTHER DETAILS ON THE PROGRAM, REGISTERING, PRESENTING, FEEDBACK OR SPONSORING PLEASE
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INVITATION FROM ROSIE TRAILL

My 17th Annual Practical Insolvency Conference & Gala Dinner is proving to be one of my most exciting to date. The event covers all the recent developments and current judicial decisions, law reform and practice strategies to assist you to achieve even more successful outcomes. I am so thrilled to announce that over the course of the event there will be a large number of highly-experienced practitioners from the Legal, Accounting, Banking and Finance, Non-Bank Financiers, Debtor Finance organisations and Government sectors in attendance. I am keeping my focus on all the areas where opportunities may exist and where I can make a difference by way of personal introductions.



This year there is much new ground to cover! I have invited some of the highest calibre speakers to do the hard work for you, many of whom have an intimate first-hand knowledge of their subject matter. When things are quieter in the market, it's more important than ever that you run your files as effectively as possible and to recover assets as quickly and efficiently as possible. It's also important to get out and about and market your practice and services.

As I only produce one major event a year and specialise in commercial insolvency, I have the luxury of spending many months researching topics and speakers carefully. Selection is based on the feedback from my expert advisory panel consisting of past speakers, former delegates and personal contacts with whom I have developed relationships over the many years since my first Insolvency Conference staged in 1996.

Sometimes I get conflicting ideas on what ought to be included so it is very tough for me to balance out the program and maintain freshness in an annual event. I try to strike up a happy medium between giving exposure to new speakers and securing those you have asked for again. The preparation that goes into the presentation and discussions will benefit you in your daily practice immediately and provide you with an excellent resource to add to your library for you and your team. The speakers all work extremely hard as I have requested they develop new papers based directly on your needs. It is not always their preference, but when I ask you to spend two days out of your busy practices, I am very aware that the time you spend away needs to be as valuable to you as if you were back on the job. I never want to hear anyone say "I've heard all this before".

I also want to provide you with outstanding value not just with the cost, but also measured in terms of who you meet. I encourage you to make the most of the networking opportunities especially at the conference dinner and invite you to approach me personally if you would like personal introductions to be made with any of your fellow attendees or speakers.

As always, I encourage you to get in touch with any feedback and any particular areas of concern you would like any of the presenters to cover at the conference.

Thank you so much for your support and encouragement, I hope you find this event as stimulating as it is practical. I look forward to welcoming you there.

Warmest regards

R. Traill

Rosie Traill
Managing Director
Traill & Associates

HOW TO FIND DOCKSIDE

Situated on the Balcony Level at Cockle Bay Wharf on the city side of Darling Harbour, Dockside is between the Sydney Aquarium and former Imax Theatre site.

Via Foot: Walk down Market Street past the Darling Park monorail station on your right. Go down the escalators onto the Pyrmont Pedestrian Bridge level and turn left.

Via Train: Alight at Town Hall Station, and follow the directions as above

Taxi Drop Off : Ask to be dropped off at Cockle Bay Wharf under the blue canvas awning. The driver needs to take Wheat Road by keeping left going past the former Imax Theatre site. Take the escalators up one level to Dockside.

Via Car: Darling Park car park is located at 201 Sussex Street. We recommend this car park for evening events.