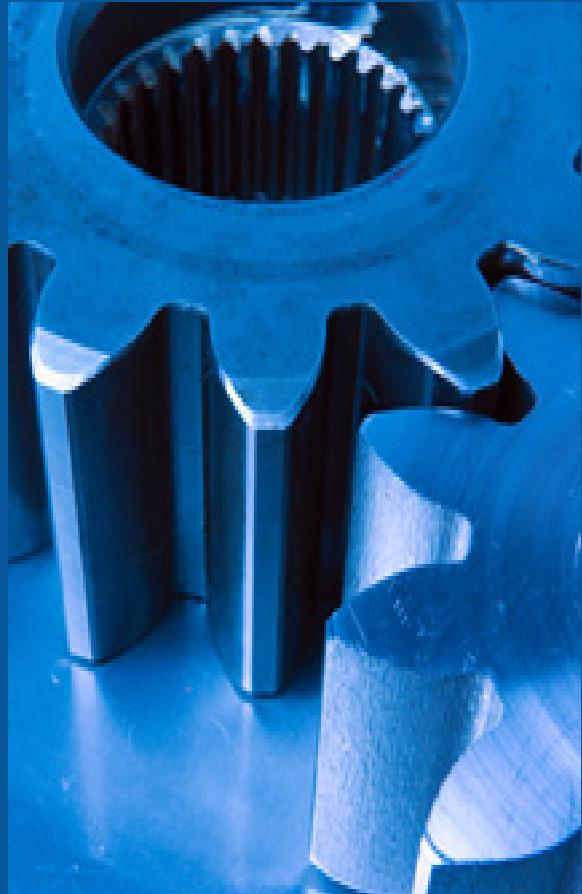


16th Annual Practical Insolvency Conference and Gala Dinner

1 and 2 May 2017
Dockside, Cockle Bay, Sydney



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CONFERENCE PROGRAMME - MONDAY, 1 MAY 2017

8.45 - 8.50 WELCOME by Rosie Traill

8.50 - 9.00 OPENING REMARKS FROM THE CHAIR

Richard Fisher AM, General Counsel, Adjunct Professor, Faculty of Law,
Office of General Counsel, University of Sydney

9.00 - 9.40 Claims against Directors (and who gets the benefit of recovery?)

We are seeing increasing levels of claims against directors. My 2016 conference covered *Smith v Starke*, *Prestige Lifting Services* and *Australian Institute of Fitness*. This year saw three new important cases:

Brentwood Village Limited (in liq) v Terrigal Grosvenor Lodge Pty Limited, Swan Services Pty Ltd (In Liquidation) and BCI Finances Pty Limited (in liq) v Binetter. *Swan* concerned a claim against an alleged de facto director for insolvent trading. It was hard fought and every conceivable issue concerning the law of de facto directors and insolvent trading claims was dealt with, including a twist on the quantification of such claims. *Brentwood* dealt with various claimed breaches of trust by a director and raises interesting questions about the level of proof and quantification of damages. BCI raised arguments of sham transactions (I'm convinced that we don't think about this aspect as often as we should) and whilst **Robert Newlinds SC** will explain those cases, it is important that we cover new ground so this year we will ask: what are the forensic advantages of attacking a transaction as (a) a sham (b) an uncommercial transaction or (c) a breach of director's duties? Do we get different outcomes in capturing circulating and non-circulating components of a charge, and if so is that a valid consideration for a liquidator or an administrator?

Robert Newlinds SC, Banco Chambers

9.40 - 10.20 When Does Section 433 Bite and When Does it Let Go?

The 2015 *Re CMI Industrial Pty Ltd (In Liq); Byrnes & Ors* decision really brought the focus onto the question "who do trading profits belong to? and are they caught by s 433?" Of course, CMI was pre-PPSR, and we need to understand the post PPSR position, and the very recent decision in *Langdon, In the matter of Forge Group 2017 FCA 170* will help us understand that. In *CMI* there was a trade on but in *Langdon* there wasn't. Does that make any difference for the purposes of s 433? Is it reasonable or sensible to assume that trading losses are treated in the same way? Are trading losses effectively a 'negative asset' and allocated to a particular pool, or are they actually a cost of realisation, and if so against which pool or pools?

The decision in *Re Amerind Pty Ltd [2017] VSC 127* provides guidance on these issues.

Chris McLeod, who acted in the *Langdon/Forge* matter, will review the *CMI*, *Forge* and *Re Amerind* decisions and explain:

- What property will be caught by s 433 and when;
- The pre PPSR position for trading losses and trading profits
- The post PPSR position
- When does the ordinary course of business cease?
- What is the s 433 position where pre and post appointment assets are used in a trade on? and
- Where does that leave FEG?

Chris McLeod Partner and Head of Office, Norton Rose Fulbright Australia

10.20 - 11.00 A Lender's Unconscionable Conduct - Based on Consolidated Knowledge!

At a practical level the *CBA v Kojic [2016] FCAFC 186* decision is extremely challenging and presents difficulties not just for lenders, but for anyone dealing with potential conflicts of interest – regardless of Chinese walls. In *Kojic*, the same bank was banker to the vendor and purchaser and a claim of unconscionable conduct was based on the consolidated knowledge 'both sides' – even though the Court held that no individual had acted improperly. **Garry Bigmore QC** will take you through the decision and explain how to best manage potential conflicts.

Garry Bigmore QC, Lonsdale Chambers

11.00 - 11.20 MORNING TEA

CONFERENCE PROGRAMME CONT'D

11.20 - 12.10 **Panel Discussion / Open Forum Safe Harbour / Ipso Facto Reforms**

The NISA reforms - Safe Harbour & Ipso Facto - will commence on 1 January 2018.

I've assembled a panel to provide you with an overview of the changes, and talk about how they are likely to operate in practice. To make sure that we look at the changes from different perspectives, we'll have our well-known insolvency blogger **Michael Murray**, fellow blogger and banker **Geoff Green** and an insolvency practitioner and lawyer. They'll cover the changes, identify what's good and bad, and how the professions will be able to offer more options to directors faced with their company's financial difficulties.

Michael Murray, Principal, Murrays Legal

Geoff Green, Head of SBS, Melbourne, National Australia Bank Ltd

12.10 - 1.00 **Lenders' Duties on Sale**

I won't run an 'old' topic unless there have been significant developments: new legislation or important cases. After running a section 420A session for several years it fell off last years' program because not much had happened. Wow! There's been some action since then! **Chris Prestwich** will update you on the following, including possible responses to the Small Business Ombudsman, Kate Carnell's recommendations. Cases include:

- **Webster Investments Pty Ltd v Anderson and Webster Investments Pty Ltd v North Star Developments Pty Ltd** - Sale of a property by private treaty with no public advertising or advertising regime, and without prior valuation
- **Westpac Banking Corporation v Zilzie Pty Ltd & Ors** (21 October 2016) – Can a 420A claim be set off against a guarantee?
- **Golden Mile Property Investments Pty Ltd (in liq) v Cudgegong Australia Pty Ltd** (25 August 2016) - Whether a duty applied in respect of a deregistered company, and if so how it encompassed a claim for compensation as a result of compulsory acquisition
- **CME Properties (Australia) Pty Ltd v Prime Capital Securities Pty Ltd** - An attempt to secure an injunction to prevent a sale said to be in breach of 420A.
- **Arab Bank of Australia Ltd v Jeitani** - Do 420A duties extend to enforcing a GST gross up clause or taking advantage of a GST margin scheme?
- **Trilogy Funds Management Limited v Sullivan (No 2)** - Was a receiver required to pursue a development approval process to 'take all reasonable steps'?
- **Westpac Banking Corporation v Rafick Sayah** – Assessing the appropriateness of an on-line auction
- **In the matter of Metal Storm Ltd (subject to Deed of Company Arrangement)** - Is it possible to seek directions about whether a sale process complies with 420A?
- **Pola v Australia and New Zealand Banking Group Limited** - Should water rights have been specifically identified in advertisements for the sale of pastoral land?

Chris Prestwich, Partner, Allens

1.00 - 2.00 **LUNCH**

2.00 - 2.50 **Important PPSR Update -**

Analysis and Alerts Regarding the Most Recent Significant Cases

Paul Apathy will cover all the latest issues including:

- **Power Rental Op Co Australia, LLC v Forge Group Power Pty Ltd (in liq) (receivers and managers appointed) [2017]**
- **Langdon, in the matter of Forge Group Limited (Receivers and Managers Appointed) (in Liq) [2017]**
- **Re OneSteel Manufacturing Pty Limited [2017]**
- **In the matter of Accolade Wines Australia Limited and other companies [2016]**

Peter Apathy, Partner, Herbert Smith Freehills

CONFERENCE PROGRAMME CONT'D

- 2.50 - 3.40 Stop Press : Qld State Environmental Laws Trump Liquidation Priority Creditors : A Review of Linc Energy (in liquidation) v Chief Executive of the Department of Environment and Heritage Protection**
This decision has significant implications for insolvency practitioners as it challenges commonly held views that environmental obligations can be avoided by liquidators disclaiming relevant property and confirms that liquidation funds should first be used for environmental compliance in priority to payment of employee entitlements and liquidators' remuneration. The decision is also of more general interest as it highlights the possibility of State legislation having precedence to the Corporations Act when laws conflict (in contrast to the operation of s109 of the Constitution).
- Peter Smith, Partner, Herbert Smith Freehills**
- 3.40 - 4.00 AFTERNOON TEA**
- 4.00 - 5.20 State of the Market - Financiers Panel**
A panel of senior financiers will lead you through all the most important areas of 2017 including:
 - Impact of the restructuring advisors are having on the market. How the insolvency practitioners are reacting to the recent introduction of restructuring advisers.
 - A discussion on the lessons learnt from some of the most recent high-profile restructurings
 - Have the dynamics surrounding the decisions to sell and buy debt changed in the last twelve months?
Panel Leader: Dominic Emmett, Partner, Gilbert + Tobin Lawyers
Panelists include:
Geoff Green, Head of SBS, Melbourne, National Australia Bank Ltd
Chris Wyke, Managing Director, Moelis Australia
Chris Hill, Partner, PPB Advisory
- 5.20 - 5.30 Closing remarks from the Chair and close of day one**
- 5.30 - 7.00 Informal Drinks - Pontoon Bar, Cockle Bay Wharf**
- 7.00 - 7.30 Pre-dinner drinks**
- 7.30 - 11.30 Gala dinner proudly sponsored by Hebert Smith Freehills**



CONFERENCE PROGRAMME - TUESDAY, 2 MAY 2017

8.55 - 9.00 OPENING REMARKS FROM THE CHAIR

Richard Fisher AM, General Counsel, Adjunct Professor, Faculty of Law, Office of General Counsel, University of Sydney

9.00 - 10.00 Bankruptcy Update

This session is the "best of" my 2016 Bankruptcy Congress – Sally Nash will highlight and summarise the most significant developments in bankruptcy practice, what are the likely changes and how will you be affected?

Sally Nash, Consultant Solicitor, O'Neill Partners, Incorporating Sally Nash & Co

10.00 - 10.50 Insolvency Transactions Round-Up

Farid Assaf, literally wrote the book on Voidable Transactions (*Voidable Transactions in Company Insolvency*, Lexis Nexis). Farid will review the action-packed year that was in voidable transactions with in-depth and practical analysis of the Victorian Court of Appeal's decision in *Horne*, the New South Wales Court of Appeal's decisions in *Sydney Recycling Park*, the Full Federal Court's decision in *Great Investments* and of course Justice Edelman's controversial decision in *Hussain*.

Farid Assaf, Barrister, Banco Chambers

10.50 - 11.10 MORNING TEA

11.10 - 12.10 Regulating Corporate External Administration - An ASIC Perspective

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 ASIC about its activities and plans for the year ahead. Hear about the challenges in the insolvency space from an ASIC perspective and what might be done to deal with those challenges.

Adrian Brown, Senior Executive Leader, Insolvency Practitioners, ASIC

12.10 - 1.00 Our New Insolvency Laws Under the ILRA - What You Really Need to Know

The Insolvency Law Reform Act 2016 has already given ASIC and AFSA significant new powers, as well as new authority to ARITA and other bodies over their members' conduct. They will each be assessing your compliance with the implementation of the new laws, with ASIC able to demand details of your firm's practice and procedure in conducting administrations. The new laws include those on reporting, voting, rights of creditors, regulators' attendance at meetings, remuneration, staffing and more. Lawyers will need to advise on these new powers and obligations, and on avenues to guide practitioners through the increased range of challenges available to creditors and regulators.

Michael Murray will outline the changes and alert you to areas of difficulty or potential challenge.

Michael Murray, Principal, Murrays Legal

1.00 - 1.50 LUNCH

1.50 - 2.40 Stop Press: Court Approval of Liquidator Remuneration

The *Sakr Nominees* judgment handed down **9th March 2017**, is one of those happy if rare liquidations where creditors are paid 100 cents in the dollar – but that meant that there were no creditors to approve the liquidators' remuneration, and an application to Court was necessary. Unhappy with a decision which applied the AAA *Financial Intelligence* line of precedents, the liquidator appealed (helped by a commendably public spirited willingness on the part of Colin Biggers & Paisley to act pro bono), with both ARITA and ASIC joining the proceedings as friends of the Court. Michael Rozdal will review the decision and outline what it means for practitioners as well as guide you through issues in the new reforms and how this might reconcile with the ILRA.

Michael Rozdal, Consulting Principal, Keypoint Law

PPSA INTENSIVE WORKSHOP
WEDNESDAY, 3 MAY 2017 FROM 9AM - 2PM
PPSA IN DEPTH : INTENSIVE PPSA FOR LENDERS AND
INSOLVENCY PRACTITIONERS
Interactive Sessions and Case Studies

PRESENTERS :

Tony Coburn, Consultant

Patrick Lowden, Partner

Mark Clifton, Partner

Rowena White, Senior Associate

James Myint, Senior Associate

It has been over five years since the Personal Property Securities Act 2009 (Cth) came into effect, fundamentally altering the operation of personal property securities in Australia.

Since that time, there have been some horror stories where an incorrect keystroke has cost millions, and several surprises. Just this year alone we have seen very significant outcomes in cases such as **Forge**, **OneSteel**, **Re Langdon** and **Amerind**.

For that reason I have arranged for experts from **Herbert Smith Freehills** to run an intensive workshop targeted towards experienced insolvency practitioners, lenders, and other industry participants to provide a practical update on the more advanced and practical issues surrounding the PPSA.

Highlights include:

PPSA issues arising in insolvency: an examination of the practical implications of the PPSA upon insolvency, including analysis of the PPSA's interaction with the key provisions of the Corporations Act 2001 (Cth), and common issues that arise (and how to resolve them) upon insolvency, explored via a case study that will explore the following issues amongst others:

- when is a defect in a PPS registration seriously misleading?
- exercise of the Court's power to extend the time to register?
- Circulating assets – what are they and who has priority
- Allocation of costs and expenses between circulating and non-circulating asset recoveries
- which security interests have priority over a prior registered all-paap?

Practical problems with registration and how to address them: recent cases reveal that there are still pitfalls in registering financing statements on the PPS Register. We will go through technical registration issues, common registration queries received from the industry, and how to mitigate faulty registration risk.

Case studies on the PPSA: workshop leaders will provide detailed case studies based on their real life restructuring and insolvency experience, and will guide attendees in identifying and resolving common PPSA issues that may arise.

Advanced PPSA concepts: analysis of the key provisions of the PPSA that are frequently queried or misunderstood by insolvency practitioners and lenders. This will involve a detailed step by step analysis of these provisions, their practical ramifications and tips and strategies for dealing with them, in a systematic framework.

IF YOU WOULD LIKE TO ATTEND, PLEASE CONTACT THE CONFERENCE REGISTRATION DESK.

**HOSTED AT THE OFFICES OF HERBERT SMITH FREEHILLS SYDNEY,
LEVEL 34 ANZ TOWER 161 CASTLEREAGH STREET SYDNEY NSW 2000 AUSTRALIA**

ABOUT YOUR WORKSHOP LEADERS

TONY COBURN, Consultant, Herbert Smith Freehills

Tony is head of Herbert Smith Freehills' Banking Regulatory Team based in Sydney, and is widely recognised as one of Australia's leading and 'go to' PPSA experts. Tony is a full-time Consultant with Herbert Smith Freehills. Tony also advises generally on supply of goods and services to consumers within Australia. Advising Australia's largest banks as well as many other clients engaged in the financial services sector, Tony brings to the table a skill set including the preparation and design of transaction structures, commercial agreements and compliance processes. A co-author of the Lexis Nexis publication, **Personal Property Security in Australia**, and a contributor to the Lexis Nexis publication, **Australian Credit Law**, Tony is considered one of Australia's leading banking and finance lawyers.

PATRICK LOWDEN, Partner, Herbert Smith Freehills

Patrick is a senior financing lawyer, advising banks, investment banks and corporates on a range of complex banking and finance transactions, including capital markets, structured finance, corporate and acquisition financing and restructuring transactions. His deals include award-winning structured and innovative capital markets transactions in the regulatory capital and corporate hybrid spaces, as well as major acquisition and restructuring transactions. Patrick lectures on domestic and international capital markets for the University of Sydney Master of Laws programme and sits on a number of industry and professional committees. Along with Tony, he is a co-author of Personal Property Security in Australia.

MARK CLIFTON, Partner, Herbert Smith Freehills

Mark is one of Australia's most experienced insolvency practitioners, and his involvement on prominent insolvency administrations and restructures – including **Ansett, Babcock & Brown, One.Tel, United Medical Protection, ERG, Elders, Gunns, Godfreys, I-Med, Retail Adventures** and **Nexus Energy** – has made him a highly sought-after practitioner. Mark has extensive experience advising stakeholders in corporate distress situations, including administrators, liquidators and receivers, secured and unsecured lenders and other creditors, mezzanine financiers and bondholders, vendors and purchasers of distressed assets, and boards and shareholders of distressed entities. Mark's clients include Australian and international banks, major Australian insolvency firms, major Australian ASX-listed corporations, private equity firms and distressed debt funds.

ROWENA WHITE, Senior Associate, Herbert Smith Freehills

Rowena is an experienced restructuring and insolvency specialist, advising lenders, borrowers, shareholders, directors, insolvency practitioners and other stakeholders on contentious restructuring and formal insolvency processes including administrations, deeds of company arrangement, receiverships, liquidations and creditors' schemes of arrangement. Prior to joining Herbert Smith Freehills in 2014, Rowena spent five years in New York and London working in the restructuring and insolvency group of a major international law firm, and has significant experience in cross-border and multijurisdictional restructuring transactions. Rowena holds a Master of Laws from Harvard Law School, and a Bachelor of Laws (Honours) and Bachelor of Commerce from the University of Adelaide.

JAMES MYINT, Senior Associate, Herbert Smith Freehills

James has significant experience advising on some of Australia's most significant structured financing and restructuring transactions, including most recently, the award winning warehouse securitisation funding of GE's disposal of its entire \$8.2bn credit card business to a consortium led by KKR, Värde Partners and Deutsche Bank AG (the first of its kind in Australia). His practice is extensive and includes advising investment banks, funds and corporates on leasing transactions and receivables sales which often involve complex PPSA issues. James has a Bachelor of Commerce (with Distinction) and a Bachelor of Laws (First Class Honours). He is admitted to practice in New South Wales.