

**Insolvency Law Reform Act (ILRA)
Insolvency Practice Schedule (Corporations) – IPS (Corps)
& Insolvency Practice Rules (Corporations) – IPR (Corps)
TRANCHE 2 COMMENCEMENT – 1 SEPTEMBER 2017**

Note: Given the breadth of material, my focus is on the Corporations and not Bankruptcy regime.

Today the second tranche of the ILRA reforms "go live". A large proportion of the insolvency industry have spent the last 2 years attending seminars and seeking to firstly navigate through the quagmire that is the new 'patchwork quilt' regime, and secondly to digest and familiarise ourselves with the content.

We wave goodbye to dear friends - **s.447D, s.473(10), s.504(2), s.506, s.511 and s.1321** of the *Corporations Act 2001* (Corps Act).

We try to embrace the apparently superior remodels – **IPS (Corps) s.45-1, s.60-12, s.90-15**.

We glower at the new kids on the block: **IPS (Corps) Div 15 Register of Liquidators, the Div 20 Registration process** (01.03.17 operative), and ASIC's Show Cause Notice and consequences which can follow (**Div 40, s.40-40 IPS (Corps)**).

Learning "on the job."

It is a brave new world, and as an industry, together with the judiciary we will learn together in the coming months. Earlier this year in Robinson, in the matter of *Reed Constructions Australia Pty Ltd (in liq)* [2017] FCA 594, Jagot J mistakenly made orders under s.90-15 of the IPS (Corps). She was hoodwinked by s.479 no longer appearing in the Corps Act, when in fact the repeal has been deferred to 1 September 2017. Her Honour adeptly dealt with the 'mishap' by relying on the slip rule to vary the orders citing the source of the legislative power to make the final orders being s.479(3). One wonders how many more such work arounds and fixes will be sourced.

Some changes that may require your attention

As we are now at a "watch this space" juncture, below are a selection (by no means representative of all changes) of the most relevant spaces you might wish to watch most closely.

- **"External Administrator" = Court Liquidators, CVLs, Deed Administrators (excludes Receivers) (EA)**
- **s.91 – 'relation back date':** *The lacuna has been filled. The relation back date now stands as not the later date the Voluntary Administration (VA) began, but the earlier day being the date the winding up application was filed.*
- **s.588FGA amendment** – *ATO entitlement to indemnity from Director where successful unfair preference claim. Court substituted with court to allow lower courts to grant this relief.*

Registration and discipline (01.03.17 operative) – Divisions 20 and 40 IPS (Corps)

- Renewal is critical. Registered Liquidators must take care to renew their existing registrations before the anniversary date of their original registration (occurring after 1 March 2017) to then commence the 3 yearly regular renewal from that point (**Div 20, s.20.70 IPS (Corps)**).
- *In Deppeler, in the matter of Deppeler* [2017] FCA 768, O'Callaghan J was able to extend the time within which the 2 registered liquidators were able to renew their registrations under **s.20-70(3) IPS (Corps)**. However, he adjourned the hearing for consideration of the impact and any liability or other action flowing from the period between the expiration of the registrations and the renewals. His particular concern was new appointments.
- At the further hearing earlier this month, His Honour made orders that the Liquidators were 'taken to have been liquidators' under Division 20 and that the s.1560(2) (Corps Act as amended by the ILRA) prohibition on old Act registrants not accepting further appointments did not apply. His reasons reflected the liquidators being of good character, their inadvertence and not intention not to renew, and the fact that they were the first liquidators in this position post the introduction of the ILRA reforms. He did mention that ASIC could have, but did not, issue a Show Cause Notice. Query whether this is the correct decision, and if as time passes the judiciary will be less sympathetic.

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Insurance – Division 25 (01.03.17 operative)

- Be insured (professional indemnity and fidelity) and ensure your insurance is adequate. A cessation of adequate insurance prompts a requirement to lodge with ASIC a Notice of significant events (to be lodged within 5 business days of you reasonably coming to know of it – note constructive notice test).
- If the date is missed, all steps taken in existing administrations become open to challenge, but more critically taking on new appointments leaves individuals present a greater risk to personal liability.
- Do not give ASIC a reason to issue a Show Cause Notice (**s.40-40 IPS (Corps)**).

Show Cause Notice – 20 business days to reply (01.03.17 operative)

- If you receive a Show Cause Notice, seek legal advice immediately. Not only can you be barred from assuming further appointments, or have registration be suspended, but the Committee can impose a condition prohibiting all other liquidators from allowing you to carry out any of the functions or duties on their behalf – as employee, agent, consultant or otherwise for 10 years. This is effectively a ban from working in the industry (**s.40-55(g) IPS (Corps)**).

Remuneration – Division 60 IPS (Corps) (01.09.17)

- The entitlement to be remunerated only for "necessary work properly performed" (as referenced in the ARITA Code) remains (**s.60-5**).
- Ordinarily a Remuneration Determination is required, obtained by creditor's resolution, COI resolution or Court order (Inspector General in Bankruptcy) (**s.60-10**). The exception is a right to reasonable remuneration for necessary work properly performed capped at the statutory maximum of \$5,000.
- Any of ASIC, a person "with a financial interest in the external administration", or an officer of the company, can apply to the Court to review a Remuneration Determination (**s.60-11**). Usefully, the matters the Court must have regard to essentially replicate the former s.504(2) and s.473(10).
- An application for remuneration review may include a claim for relief under Division 90 pursuant to which the Court "may make such order as it thinks fit in relation to the external administration of a company". **s.90-15(3)(f) IPS (Corps)** expressly references repayment of remuneration as a sample order.
- **FIX:** Most readers will be pleased to that the wording of s.60-20 IPS (Corps) has been amended to avoid a construction whereby a liquidator's own colleagues working on the file were "related entities" prohibited from obtaining a profit and advantage from the administration. That would have required separate resolutions to be passed by creditors approving staff members working on the file. The error has been fixed allowing a single resolution approving the liquidator's remuneration to be sufficient.

Resolutions without meetings – 75-130 IPR (Corps), s.75-40 IPS (Corps)

- **s.75-130 IPR Corps** - A resolution can be mailed to creditors and will be deemed passed if:
 1. 15 business days' notice has been given;
 2. approved by majority in number and value of those creditors who have replied;
 3. no more than 25% objected to proposal without a meeting.
- **ISSUE:** A potential problem has been identified with the wording "a resolution is taken to have been passed" in **s.75-130** because the section omits the words "at a meeting" found in former s.64ZBA Bankruptcy Act. The concern is that this only allows some and not all proposals to be passed using this method, leaving a gap. Await revision.

Meetings and timing for notices – Division 75 IPS (Corps)

- Except for VAs (1st & 2nd meeting largely retains existing regime), no compulsory meetings for any External Administrations.
- Focus on notice to creditors of their rights. Together with notice of appointment, EAs to send DIRRI, remuneration approval and notice of rights (to request documents, reports and information, request meetings, give directions, appoint a reviewing liquidator, and remove & replace the incumbent EA).
- CVL: Notice of appointment & notice of rights within 10 business days.
- Court Liquidation: Notice of appointment & notice of rights within 20 business days.

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- VA: No right to call a meeting.
- All other External Administrations (excluding VA and provisional liquidation) - a meeting can be directed by **(s.75-15 IPS (Corps))**:
 1. creditor's resolution;
 2. COI direction;
 3. more than 25% of creditors in number and value request; or
 4. between 10% & 25% of creditors in number and value, if they provide security for costs of the meeting.
- NOTE: EA can call meeting at any time.
- Direction must be reasonable **(s.75-15(2) IPS (Corps))**. Defined by reference to a description of what is unreasonable - **75-250(2) IPR (Corps)**:
 - a. complying with the direction would substantially prejudice the interests of one or more creditors or a third party and that prejudice outweighs the benefits of complying with the direction; or
 - b. there is not sufficient available property to comply with the direction; or
 - c. a meeting of the creditors dealing with the same matters covered by the direction has already been held, or would be held within 15 business days after the direction is made; or
 - d. the direction for the meeting is vexatious (deemed vexatious if it is given within 20 business days after a similar direction was given.)

Meeting procedure – Division 70 IPS (Corps) and 75 IPR – Subdivision C

- Presiding EA must invite resolutions and amendments to resolution and allow time for debate **(75-70 IPR)**.
- A remuneration resolution amount can only be amended down and not up at the meeting.
- Must arrange facilities to enable participation by electronic means **(75-75 IPR)**.
- Meeting can be adjourned by resolution or at presiding EA's discretion (for no more than 15 days) **(74-140 IPR)**.
- Proofs of debt must be dealt with and Minutes kept clearly evidencing how. Can mark a proof objected to, but allow a vote reserving the objection (cf. bankruptcy – must adjourn until objection dealt with) **(75-88 IPR)**.
- Creditor has 10 days from decision to appeal rejection to Court.

Process to remove and replace EA at meeting – s.90.35 IPS (Corps) & 75-265 IPR

- By resolution with 5 business days' notice.
- Notice of meeting must include proposed new EA's DIRRI and signed Consent, to be tabled at the meeting and lodged with ASIC.
- Outgoing EA may apply to Court.

Rights of creditors to request information to Creditors – Division 70, s.70-40 IPS (Corps) & 70-10 IPR (Corps)

- Creditors may by resolution, or an individual creditor may request information, a report or production of a document.
- The EA must comply unless what is sought is not relevant; or it would result in a breach of the EA's duties in the administration; or it is otherwise not reasonable to comply. Defined by reference to a list of what are unreasonable requests - **70-10 IPR (Corps)**:
- It is not reasonable if:
 - a. complying with the request would substantially prejudice the interests of one or more creditors or a third party and that prejudice outweighs the benefits of complying with the request; or
 - b. on the ground of legal professional privilege; or
 - c. disclosure of the information, report or document would found an action by a person for breach of confidence; or

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- d. there is not sufficient available property to comply with the request; or
- e. the information, report or document has already been provided; or
- f. the information, report or document is required to be provided under the Corporations legislation within 20 business days of the request being made; or
- g. the request is vexatious (which includes if the same request is made within 20 business days)

In all other cases, the request is reasonable and must be complied with. Also note that payment of costs by other creditors or the requesting creditor cures (d) – (f) inclusive.

- If not reasonable, the EA must notify in writing that it is unreasonable and set out the reasons why (**70-5 IPR**).
- Must comply with reasonable requests within 5 business days, or later by agreement with the requesting party (**70-1(2)(a) IPR**), or if certain further time is required by written notice extending the period for compliance (**70-1(2)(b) IPR**).

Division 90 – Review of External Administration vs. Division 45 - Court Oversight

- Division 45 follows Division 40 regarding disciplinary action and provides that the Court may make such orders as it thinks fit in relation to a registered liquidator (**s.45-1 IPS**).
- Power may be exercised:
 - a. on Court's own initiative, during proceedings before the Court; or
 - b. on application by the registered liquidator, or ASIC.
- **s.45-1(4)** sets out various matters the Court may consider.
- **s.45-1(5)** states that the section does not limit the Court's powers under any other provision of the Act, or under any other law.
- By contrast, Division 90 deals with review of the administration, both by the Court and by reviewing liquidator (new concept introduced by the ILRA).
- Under Division 90, the Court may inquire on its own initiative, or on the application of "a person with a financial interest in the external administration", an officer of the company, the COI, or ASIC (**s.90-5 & s.90-10**).
- **s.90.15(3) & (4)** lists many sample orders and the matters that may be taken into account.
- **s.90.15(6)** separately lists orders to make good damage sustained arising from a breach of duty.
- **s.90-23** deals with the appointment of a reviewing liquidator by ASIC or the Court.
- **s.90-24** deals with the appointment of a reviewing liquidator by the creditors, to carry out a review into either or both of the remuneration sought by the EA, or a cost or expense incurred by the EA.

Time will tell how Div. 45 and Div. 90 are applied, separately or together, and if the Court adopts different approaches to their use. Neither section on its face appears of the same character of any 1 of the repealed sections they substitute.

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FINAL TAKE AWAYS

A new day has dawned for insolvency in Australia. In light of these changes we suggest the MUST DOs as follows:

1. Understand the registration and renewal process. Ensure systems are in place to diarise and cross check.
2. Be prudent and follow the processes – be mindful of the publicly accessible Liquidator's Register which also records bankruptcy matters and includes EUs.
3. Know and ensure compliance with new timings, including for notice of appointments / notice of rights to creditors and ASIC lodgments.
4. Understand how the postal resolutions without meetings work and what is required for approval. Do not be caught out.
5. Be aware of the significantly expanded creditor rights to information and know when there is a proper basis to deem a request unreasonable.
6. Finally and trite as this may sound – Brief competent lawyers who you know will have spent the time getting across what is a complex new regime!

This briefing was prepared by Chantal Reigo, a Partner in McKean Park's Commercial Litigation & Insolvency team. Should you wish to discuss any matter arising from the contents, Chantal can be contacted on (03) 8621-2820 or by email on chantal.reigo@mckeanpark.com.au.

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