

SPEAKERS



Rt Hon Justice Blanchard, Supreme Court

Justice Blanchard holds LLM degrees from Auckland and Harvard Universities. He was a partner in the Auckland firm of Simpson Grierson and a director of several listed companies until his appointment to the High Court in 1992. He became a judge of the Court of Appeal in 1996 and was appointed to the Supreme Court on 1 January 2004.



Scott Barker, Partner, Buddle Findlay

Scott's practice includes banking, insurance and commercial litigation as well as fraud (civil) asset recovery. He has acted on a range of commercial litigation assignments including contractual disputes, professional negligence, fair trading claims, insurance disputes, property disputes as well as various insolvency and credit recovery assignments. Scott is co-convener of the Joint Insolvency Committee of the New Zealand Law Society and New Zealand Institute of Chartered Accountants (JIC).



David Brown, Barrister and Solicitor

David is a senior lecturer in law at Victoria University of Wellington. He teaches, supervises and researches in the areas of property law, insolvency law, charities and legal education. David is also on the Law Commission's advisory committee, Insolvency Law Reform and a member of the JIC.



Steve Flynn, Special Counsel, Simpson Grierson

Steve has specialised in banking and finance, and corporate insolvency law for over 20 years. He acted for the receivers of Weddel NZ and the receivers of Terralink (the first, and to date only, receivership of a State-owned Enterprise), and is currently acting for the liquidators of the HIH Insurance New Zealand group. He has been a member of NZLS committees on Insolvency Law Reform and PPSA, and is an honorary lecturer in the Faculty of Law at Victoria University of Wellington.



Trish Keeper, Lecturer, Victoria University

Trish is a commercial law lecturer at the School of Accounting and Commercial Law, Victoria University. She lectures in company and securities law, corporate governance and labour law. Trish's principal research area is corporate law including governance and corporate insolvency issues. She has published in the Insolvency Law Journal.

SPEAKERS



Peter Macks, Senior Partner, PPB

In the past decade Peter has handled many corporate and personal insolvencies and where necessary has fought for creditors' rights through Supreme and Federal Courts - in some instances to the High Court of Australia. He has wide experience in all aspects of voluntary administrations, receiverships and liquidations and Part X arrangements and bankruptcies.



Murray Tingey, Partner, Bell Gully

Murray has particular expertise in insolvency issues and regularly acts for banks, receivers, liquidators and statutory managers. He frequently presents arguments in the High Court and Court of Appeal and, in 2004, successfully argued the first case under the Personal Properties Securities Act. Murray is a member of the JIC.

CONTENTS

1. VOLUNTARY ADMINISTRATION – AN INTRODUCTION.....	1
BACKGROUND.....	1
WHEN IS VOLUNTARY ADMINISTRATION APPROPRIATE?	2
<i>Rescue or return?</i>	2
<i>Critical factors?</i>	2
<i>Other factors</i>	3
<i>Consequences where voluntary administration is inappropriate.</i>	3
THE ALTERNATIVES TO VOLUNTARY ADMINISTRATION.....	4
<i>Introduction</i>	4
<i>Informal compromises and arrangements</i>	4
<i>Compromises and arrangements under Parts 14 and 15</i>	5
<i>Part 14</i>	5
<i>Part 15</i>	5
<i>Receivership</i>	6
<i>Liquidation</i>	7
<i>Statutory management</i>	8
KEY FEATURES OF THE VOLUNTARY ADMINISTRATION REGIME	9
<i>Administrators</i>	9
<i>Administrator's liabilities</i>	10
<i>Effect of appointment</i>	10
<i>Administrator's duties</i>	11
<i>First creditors' meeting</i>	11
<i>Watershed meeting</i>	12
<i>Conduct of meetings</i>	12
<i>Moratorium provisions</i>	13
<i>General-charge secured creditors</i>	13
<i>The deed of company arrangement</i>	13
<i>Court's powers</i>	15
<i>A universal grace period?</i>	15
2. VOLUNTARY ADMINISTRATIONS IN AUSTRALIA HAVE THEY BEEN USED OR ABUSED?	17
INTRODUCTION	17
THE SCORESHEET	19
<i>The pros</i>	19
<i>The cons</i>	19
<i>The position of directors</i>	20
WHAT DO SURVEYS AND RESEARCH PAPERS RESULTS SAY?	21
<i>Coopers & Lybrand</i>	21
<i>Australian Society of Certified Practising Accountants ("ASCPA") - Centre of Excellence for Insolvency & Reconstruction</i>	21
<i>Conclusion</i>	22
<i>Sunshine Coast University College survey</i>	22
<i>Dividend Return</i>	23
<i>Business type and size</i>	23
<i>Company size</i>	24
<i>Factors contributing to insolvency</i>	24
<i>Costs of administration</i>	25
<i>Preservation of employment</i>	25
<i>Secured creditors</i>	25
<i>Successful administration what are their characteristics?</i>	26
<i>Limitations of the analysis</i>	26
<i>Summary from analysis</i>	26
<i>The look of the average successful voluntary administration</i>	26
AUSTRALIAN SECURITIES COMMISSION ("ASC") RESEARCH PAPER 98/01	27
<i>Summary of Findings</i>	28

<i>Other Issues</i>	30
<i>Recommendations in favour of Deeds with little chance of success</i>	31
<i>Use of the process as an automatic route to liquidation</i>	31
<i>Existing winding up application</i>	31
<i>Trading after the Deed of company arrangement</i>	31
COURT INVOLVEMENT	32
<i>Shaping the evolution through judicial discretion</i>	32
<i>Leave of the court under Part 5.3A</i>	32
<i>Part 5.3A, division 13 – The general powers of the court (The Plenary Powers)</i>	33
PRACTICAL INVOLVEMENT.....	34
<i>Lessors, claims for rent and deeds of arrangement.: Molit decisions</i>	34
<i>Lessors – Claims for rent and deeds of company arrangement</i>	36
<i>In Molit No.2</i>	37
<i>Discrimination and deeds of company arrangement</i>	37
<i>The Benchmark</i>	39
<i>Criticism of Molit No 2.</i>	39
<i>The Emanuel Group</i>	40
<i>Directors' failures to be fully frank with administrators can have horrendous, wide-ranging and long-term consequences.</i>	41
OTHER INTERESTING ISSUES.....	41
<i>Dangers for unwary administrators</i>	41
<i>The administrator as chairman</i>	43
<i>Self interest voting</i>	44
<i>Regulation 5.6.33 - what does it mean?</i>	44
<i>What actually transpired?</i>	45
<i>Priority - liquidation or administration</i>	45
THE FUTURE.....	46
<i>CASAC Report</i>	46
<i>Report on voluntary administrations</i>	46
<i>First Meeting</i>	46
<i>Directors</i>	46
<i>Second Meeting</i>	47
<i>The Court</i>	47
<i>Deeds of Company Arrangement</i>	47
<i>Other Matters</i>	47
LAW REFORMS AND THE IMPACT ON AUSTRALIA'S INSOLVENCY LAWS	48
<i>Improvements to the regulation of insolvency practitioners ("IP's")</i>	48
<i>Proposals with respect to remuneration</i>	49
<i>Pooling arrangements for insolvent companies</i>	49
<i>Protection of superannuation guarantee</i>	49
<i>Cost reduction measures</i>	50
<i>The protection of employee entitlements</i>	50
IMPACT OF THE SONS OF GWALIA HIGH COURT RULING.....	50
<i>Bankers' perspective</i>	51
<i>Opportunities for unscrupulous directors</i>	52
<i>Unsecured creditors</i>	52
<i>Private equity</i>	52
<i>Legislative change</i>	52
CONCLUSION.....	52
3. VOLUNTARY ADMINISTRATION- KEY CASE LAW	55
INTRODUCTION	55
THE NEW ZEALAND VERSION OF VOLUNTARY ADMINISTRATION	56
THE ROLE OF THE COURT.....	57
SECTION 239ADO	58
<i>AUSTRALASIAN MEMORY PTY LTD. V BRIEN</i>	60
INITIATION OF A VA.....	62
<i>Incentive for directors to initiate</i>	62
<i>Threshold test for appointment</i>	62
WHO HAS STANDING TO APPOINT AN ADMINISTRATOR?.....	63
<i>Court's role in relation to appointment</i>	63

EFFECT OF ADMINISTRATION	65
“Fully” Secured Creditors.....	65
Secured Creditors.....	66
UNSECURED CREDITORS	66
Employees	67
THE COURT’S DISCRETION ON ENFORCEMENT BY SECURED CREDITORS	68
<i>Approach of the court.</i>	68
“ADEQUATE PROTECTION”.....	70
DEFINITION OF “CHARGE”.....	71
THE ROLE OF ADMINISTRATORS	72
DUTY TO INVESTIGATE	72
<i>The independence of administrators</i>	73
REMUNERATION AND EXPENSES.....	75
REMOVAL OF THE ADMINISTRATOR.....	76
<i>Creditors Meetings</i>	76
DEEDS OF COMPANY ARRANGEMENT	77
CONCLUSION	80
4. CHANGES TO LAW OF COMPANY LIQUIDATIONS.....	81
SECTION 1: PROCEDURAL ISSUES	81
<i>Appointment of liquidators (s 241)</i>	81
<i>Restrictions on appointment by shareholders and on who can be appointed</i>	81
<i>Section 241AA – restriction on appointment of liquidator by shareholders or board after application filed for court appointment</i>	82
<i>Creditors’ right of review of shareholder appointment</i>	83
<i>Duty to summons meeting of creditors (s 243)</i>	84
<i>Power of court where outcome of voting at meeting of creditors is determined by related entity (s 245A)</i>	84
<i>Termination of liquidation (s 250)</i>	86
<i>Other duties of liquidators (s 255)</i>	86
<i>Qualifications of liquidators (s 280)</i>	86
<i>“Professional services” exclusion (s 280(1)(ca))</i>	86
<i>“Continuing business relationship” exclusion (s 280(1)(cb))</i>	88
<i>Meaning of continuing business relationship?</i>	88
<i>Applications to the court under s 280(1)</i>	90
<i>Enforcement of liquidator’s duties (ss 285, 286)</i>	92
SECTION 2: RIGHTS IN REALTION TO LITIGATION.....	93
<i>Assignment of liquidator’s rights to sue under the Act</i>	93
<i>Creation of new priority for creditors who fund preservation / recovery – Seventh Schedule – clause 1(l)(e)</i>	94
<i>Liquidator’s power to disclaim onerous property (s 269)</i>	96
<i>Pooling of assets of related companies (s 271A)</i>	96
CONCLUSION	96
5. VOIDABLE TRANSACTIONS AND CHARGES: CHANGES UNDER THE COMPANIES AMENDMENT ACT 2006.....	99
PURPOSE OF VOIDABLE PREFERENCE REGIME.....	99
EXISTING VOIDABLE PREFERENCE REGIME – WHAT WAS THE PROBLEM?	100
REMOVAL OF “ORDINARY COURSE OF BUSINESS” TEST	101
NEW “CONTINUING BUSINESS RELATIONSHIP (RUNNING ACCOUNT)” PRINCIPLE	101
AUSTRALIAN CASE LAW REGARDING CHANGES UNDER THE CAA.....	102
HARMONISATION OF RELEVANT TIME PERIODS	104
PROCEDURAL CHANGES FOR SETTING ASIDE VOIDABLE PREFERENCES	104
AMENDMENTS TO THE CREDITOR’S STATUTORY DEFENCE	104
PERSONAL INSOLVENCY REGIME	106
CONCLUSION	106
6. PREFERENTIAL CREDITORS	107
NEW SCHEDULE 7	107
PRIORITY LEVELS	108
FIRST LEVEL DEBTS: ADMINISTRATION COSTS	108

SECOND LEVEL DEBTS: EMPLOYEES	109
THIRD AND FOURTH LEVEL DEBTS.....	112
FIFTH LEVEL DEBTS: CROWN	112
OTHER CHANGES	112
<i>Subrogation rights for payments to preferential creditors.....</i>	112
<i>Secured Creditors and Personal Property Securities Act 1999 (PPSA)</i>	113
<i>Liquidations.....</i>	113
<i>Insolvency.....</i>	114
<i>Other forms of corporate insolvency.....</i>	114
7. PHOENIX COMPANIES	117
WHAT ARE THEY?	117
BACKGROUND TO NEW ZEALAND PROVISIONS	117
THE NEW OFFENCE (S 386A)	119
ROLE OF INTENTION?	119
THE FIVE ELEMENTS OF S 386A.....	121
<i>The defendant was a director of the old (failed) company and is either a director or manages the new (phoenix) company.....</i>	121
<i>The time limits specified in the section are satisfied.....</i>	122
<i>That the old company was placed in insolvent liquidation</i>	122
<i>The name of the new company, if not identical, is sufficiently similar as to suggest an association with the pre-liquidation name of the old company.....</i>	123
CIVIL LIABILITY UNDER S 386C	124
EXCEPTIONS.....	125
EXCEPTION ONE: S 386D (SUCCESSOR COMPANY)	125
EXCEPTION TWO: S 386E: (TEMPORARY LEAVE OF THE COURT).....	126
EXCEPTION THREE: S 386F (EXISTING NON-DORMANT PHOENIX COMPANY)	127
LEAVE OF THE COURT	128
SECTION 380(3)-NEW OFFENCE	129
CONCLUSION.....	130