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ARTICLES

Class actions in an insolvency practitioner context – *Vivienne Brand*, *Sulette Lombard* and *Jeff Fitzpatrick*

The growth of class actions and litigation funding in Australia has led to increased scrutiny of wrongdoing by company officers. To date however this scrutiny appears not to have extended to the actions of insolvency practitioners (despite considerable publicity surrounding public concern as to liquidator misconduct in particular). This article explores whether the increased prevalence of class actions in the commercial context, and judicial acceptance of litigation funding, could aid creditors in taking action against insolvency practitioners in breach of their duties. In doing so, this article reviews the general requirements for the bringing of a class action, considers issues that arise, particularly in the context of actions against malfeasant insolvency practitioners (including the way in which a class may be formulated and the impact of that formulation on notions of pari passu), and notes the likely significance of adequate insurance as a condition precedent to the bringing of a class action. The article concludes with a brief consideration of some criticisms of class actions in the Australian context, and their significance for the potential development of class actions against insolvency practitioners. 222

Pre-pack transactions in Australia – *Emanuel Poulos* and *Ayowande A McCunn*

This article discusses the practice of pre-pack transactions. This is generally understood to involve negotiating the sale of the business or assets of a distressed company prior to the formal appointment of an insolvency practitioner. The article outlines the benefits and concerns associated with pre-pack transactions, including by way of a comparative analysis of such transactions in the United Kingdom. With that background, it considers the regulatory framework in Australia, emphasising significant issues that need to be considered when completing such a transaction in Australia. The article outlines how pre-pack transactions may be conducted in Australia and suggests areas for reform that would streamline the process. 235

Applications by insolvency practitioners to the court for directions – *Peter Agardy*

Insolvency practitioners can apply to the court for directions in relation to any particular matter arising in the administration.Where the insolvency practitioner is an officer of the court, the court has inherent jurisdiction to assist its officer. The court will generally lend assistance rather than leave one of its officers floundering.*The Corporations Act 2001* (Cth) contains provisions relating to applications for directions to cover all types of administrations of companies. The *Bankruptcy Act 1966* (Cth) has similar provisions in relation to bankruptcy of natural persons. While the wording of these provisions differs, common principles are applied by the courts.The court is not obliged to give directions, but it generally tries to assist provided some general principles are adhered to. These principles are summarised.The court will not give directions about commercial decisions, which are matters for the insolvency practitioner. There needs to be a particular legal issue raisedWhile the courts have been reluctant to give directions about adversarial matters,

they are likely to be more willing to do so in the future, taking the lead from the recent High Court case of *St Petka*, in which a trustee was given directions in an adversarial matter. The lead was followed in an application brought by a liquidator in *Mento*. 257

REPORT FROM NEW ZEALAND – *Lynne Taylor*

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