INSOLVENCY

Bartier Perry
LAWYERS

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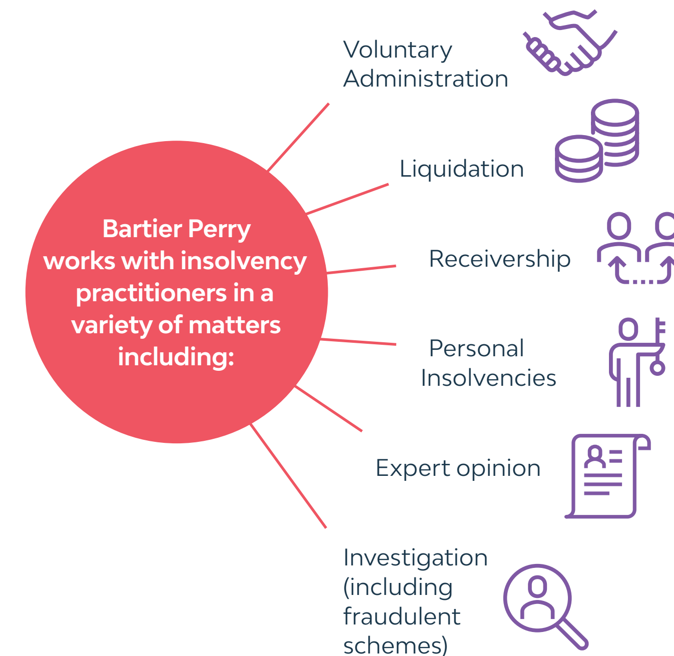
APPOINTMENTS

As a commercial law firm, Bartier Perry frequently calls on our network of insolvency practitioners to provide solutions to our clients' business needs



There are different ways in which appointments are made:

STATUTORY DEMAND
An unsatisfied statutory demand leads to a presumption of insolvency and a liquidator can be appointed upon the request of a petitioning creditor

RECEIVER AND MANAGER
To take possession of assets and realise assets for the benefit of a secured creditor

VOLUNTARY ADMINISTRATION
An appointment by directors to investigate company affairs and recommend to creditors whether a company should enter into a deed of company arrangement, go into liquidation or be returned to directors

LIQUIDATION
To distribute the assets of the company in accordance with statutory priorities voluntarily by members or creditors, or involuntarily by the court

SCHEME OF ARRANGEMENT
To assist shareholders and creditors in reaching an agreement which allows a company to restructure its capital, assets or liabilities

AGENT OF MORTGAGEE IN POSSESSION
An appointment to take possession of and realise an asset for the benefit of the financier

STATUTORY DEMANDS

TOP TIPS TO REMEMBER ABOUT STATUTORY DEMANDS:

Accurate content
Ensure the content of the demand is accurate (amounts, dates, registered office details)

Genuine dispute
Do not serve a demand where there is likely to be a genuine dispute

Service method
Personal service is preferred to post

Interest
Do not include interest calculations

Timing is critical
- 21 days to comply
- 3 months to file wind up application
- 6 months for wind up application to be decided

"Unless the debtor demonstrates that there is a genuine dispute about the claim, the inevitable result would be a prima facie conclusion of insolvency if the amount were not paid."

Scolaro's Concrete Construction Pty Ltd v Schiavello Commercial Interiors (Vic) Pty Ltd (1996) 62 FCR 319

STATUTORY DEMAND – CASE STUDY

Bartier Perry acted for a client who was owed money by a waterfront restaurant in Sydney. We issued a statutory demand that the restaurant failed to comply with. The lawyer for the defendant indicated that an application to wind up the company would be opposed on the basis that there was a genuine dispute about the debt.

Bartier Perry proceeded with the application and was successful in obtaining an order to wind up the company.

A liquidator was subsequently appointed. Bartier Perry has since acted for the liquidator in negotiating with the landlord regarding the assignment of the lease to a new tenant for substantial consideration.

WINDING UP APPLICATIONS

WAYS TO BRING A WINDING UP APPLICATION:

STATUTORY DEMAND
A company can be wound up for failure to comply with a statutory demand served on a company under s459E of the *Corporations Act 2001*

JUST AND EQUITABLE
A company can be wound up on the just and equitable ground pursuant to s461 of the *Corporations Act 2001*

OPPRESSIVE CONDUCT
A company may be wound up on the ground of oppressive conduct pursuant to s233 *Corporations Act 2001*

CASE STUDY

Bartier Perry acted for an administrator to be appointed liquidator of a company in circumstances where a winding up application was on foot with the petitioning creditor pressing for the appointment of its nominated liquidator.

We successfully convinced the court that it was in the best interests of creditors to appoint the administrator as liquidator notwithstanding a petitioning creditor's right to have its liquidator appointed.

CONTESTING A STATUTORY DEMAND

Graywinter Principle

An application to set aside a statutory demand must be accompanied by an affidavit which addresses each ground of dispute. A party is not able to later supplement their evidence to address further issues.

EXAMINATIONS

Bartier Perry believes that public examinations are an important tool in gathering information which may assist with litigation, yet only

4.9%*

of external administrators indicated that they intended holding public examinations to question a company's officer or another examinable person about the affairs of the company

CASE STUDY

Bartier Perry acted for the trustee of an insolvent deceased estate and assisted the trustee with conducting public examinations of related entities that the trustee alleged were in business with the deceased. The examinations allowed the trustee to uncover valuable information and to trace estate assets.

As a result of the examinations, a settlement was reached with one of the examinees. The trustee subsequently sought further advice regarding whether there was sufficient information to commence proceedings against the examinees.

In the decision of *Saraceni v Jones* [2012] WASCA 59 it was held that the court has power under the Constitution to order public examinations where a corporation is in receivership and/or its property is in possession of a mortgagee.

As a result, parties involved in such matters have a limited prospect of avoiding summonses for public examination.

INFORMATION GATHERING

PRESUMPTION OF INSOLVENCY

If it is proved that a company has failed to keep adequate books and records or to retain them for 7 years, then the company is presumed to have been insolvent throughout the period of its failure to do so

(s 588E(4) *Corporations Act 2001*)

"Flying the company blind"

The purpose of legislation requiring a company to keep financial records was considered in the case of *Manning v Cory* [1974] WAR 60. The court held that:

"The whole policy of that section is... to prevent its officers from flying the company blind and upon its crash, and without having any information capable of sustaining the opinion, from then saying that they thought that they had more altitude."

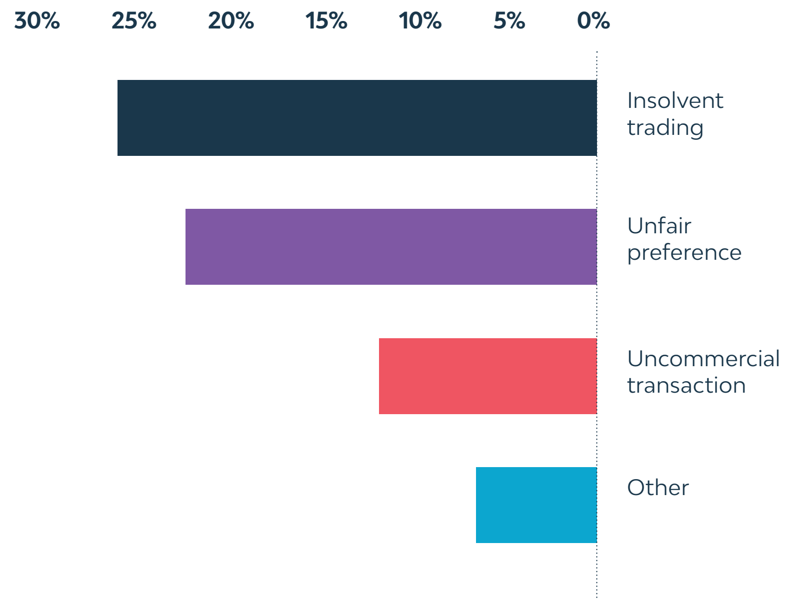
VARIOUS WAYS IN WHICH INFORMATION CAN BE GATHERED

RECOVERY PROCEEDINGS

42%*

of reports lodged with **ASIC** in **2018** disclosed that External Administrators had initiated, or had contemplated initiating recovery proceedings or compensation for the benefit of creditors

EXTERNAL ADMINISTRATORS' REPORTS – EXPECTED TYPE OF RECOVERY PROCEEDINGS (2017-2018)*



FUNDING

IS LITIGATION FUNDING IN INSOLVENCY APPROPRIATE? MATTERS TO TAKE INTO ACCOUNT:

- the prospects of success
- the amount of costs likely to be incurred in the conduct of the liquidator's case and the extent to which the litigation funder is to contribute to them
- the extent to which the funder is to contribute to the costs of the defendant if the liquidator's action is not successful
- the availability of insurance to cover adverse cost orders
- the extent to which the liquidator has considered other funding options
- the return to creditors after taking into account the funder's success fee
- the wishes of the creditors

SAFE HARBOUR

THE CURRENT AUSTRALIAN INSOLVENCY LAWS ARE WIDELY RECOGNISED AS BEING AMONG THE HARSHEST IN THE WORLD

The stated aim of the Safe Harbour is to:

Strike a better balance between protection of creditors and encouraging honest, diligent and competent directors to innovate and take reasonable risks

Explanatory Memorandum 1.12

It is **essential** that a director seeking protection of the Safe Harbour obtain advice from an **appropriately qualified advisor**. The appointment of an advisor should reflect:

Nature, size, complexity and financial position of the business to be restructured

Advisor's independence, professional qualifications, membership of appropriate professional bodies

Advisor's experience

Bartier Perry has deep experience and a wide network to assist insolvency practitioners and directors in relation to Safe Harbour protection

INSOLVENT TRADING

ALLEGATIONS OF INSOLVENT TRADING

69%* of External Administrator reports in **2018** alleged a civil breach of insolvent trading (up **6.3%** from the previous year)

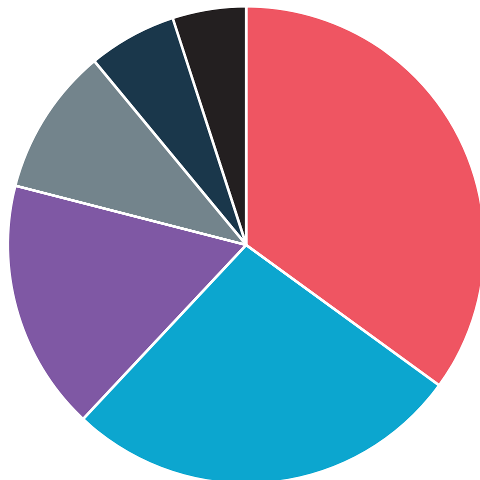
INSOLVENT TRADING – CASE STUDY

Bartier Perry acted for a liquidator in insolvent trading proceedings under section 588G of the *Corporations Act 2001* (Cth) (Act) in the Supreme Court of NSW. The insolvent trading claim was opposed by the company's directors on the basis that the company was not insolvent at the time it incurred the relevant debts.

The directors failed or refused to produce the books and records of the company or provide a RATA (now known as a ROCAP). We advised the liquidator to issue a request for the company's financials under s530B(4) of the Act on the company's former accountants who then produced unsigned financial statements for a limited period indicating a loss for most years.

We were able to successfully rely on the presumption of insolvency by reason of the company's failure to retain proper books and records for the prescribed period and we were successful in proving, in the alternative, that the company was in fact insolvent at the relevant time. The Court made orders in our client's favour for compensation under section 588M(2) of the Act against the directors personally, together with interest and costs.

Top 6 industries with the highest number of reports lodged with ASIC*



Where evidence existed of an alleged civil breach, **79%** of External Administrator reports estimated that the debt incurred when the company was insolvent was less than

$1 million*

Top 3 reasonable grounds to suspect insolvent trading*

Financial statements disclosing a history of serious shortage of working capital and unprofitable trading

Non-payment of statutory debts

Difficulties paying debts as and when they fall due

ILLEGAL PHOENIX ACTIVITY

Illegal phoenix activity is estimated to cost Australia annually between

$3 - $5 Billion+

77%^ of law firms reported seeing phoenixing in more than **10%** of jobs they worked on

OVERVIEW OF PROPOSED REFORMS

The *Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2018* introduces civil and criminal offences for directors, pre-insolvency advisors and individuals who facilitate illegal phoenix activity.

Offences will be supported by an extension of the existing liquidator asset clawback powers to cover illegal phoenix transactions.

A recent ASIC decision to ban a director of three failed companies for the maximum period of 5 years signals a renewed effort by ASIC that those who engage in illegal phoenix activity can expect to be dealt with harshly.

ASIC will also be granted specific powers to recover property that has been transferred under an illegal phoenix transaction for the benefit of creditors.

Bartier Perry LAWYERS

PREFERENCE PAYMENTS

22%*

of reports lodged with **ASIC** indicated that external administrators had initiated or contemplated initiating proceedings to recover unfair preferences

"If the sole purpose of the payment is to discharge an existing debt, the effect of the payment is to give the creditor a preference over other creditors unless the debtor is able to pay all of his or her debts as they fall due...

To have the effect of giving the creditor a preference, priority or advantage over other creditors, the payment must ultimately result in a decrease in the net value of the assets that are available to meet the competing demands of other creditors."

Airservices Australia v Ferrier (1996) 185 CLR 483

COMMON INDICIA OF PREFERENCE PAYMENTS

01	02	03	04	05
Payments to creditors outside normal trading terms	Payments to creditors in rounded sum which cannot be reconciled to invoices	Arrangement with creditors to pay in cash on delivery terms	Payments made after supply has stopped	Payments made following the legal recovery action

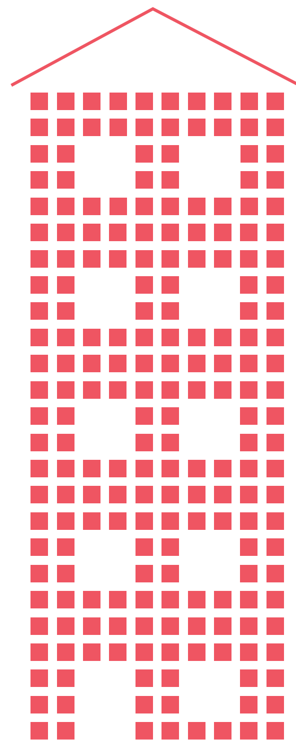
DEALING WITH PROPERTY

Trust assets

Where an external administrator is appointed as corporate trustee, they may not be able to access trust assets for the benefit of creditors, or for their costs.

"In circumstances where a company that is the trustee of a trust goes into liquidation, and thereupon ceases to be the trustee of the trust, does the liquidator's power of sale of the property of the company in s 477(2)(c) of the Corporations Act 2001 (Cth) extend to trust assets that remain registered in the company's name? The answer is uncertain on the present state of the authorities."

Aced Kang Investments Pty Limited [2017] FCA 476



s66G Applications

Bartier Perry regularly appoints insolvency practitioners as trustees for the sale of real property

In exercising a power of sale in respect of property, controllers or receivers and managers must take all reasonable care to sell property of a company for not less than market value, or if there is no market value, for the best price that is reasonably obtainable pursuant to a 420A of the *Corporations Act 2001*.

Where there are no funds in the liquidation, the court may be prepared to exercise discretion (to increase return to creditors) by allowing the liquidator to also act as trustee for the sale.

For example, the liquidator of a company that co-owns property with a third party will generally seek to be trustee for the sale of the property.

BARTIER PERRY CAN ASSIST WITH:

- Seeking directions from the Court before dealing with property
- Preparing contract for the sale of land (including s66G applications)
- Lodging caveats and lapsing notices
- Assignment of personal property
- Assignment of causes of action
- Sale of assets and businesses
- Disclaiming leases

CASE STUDY

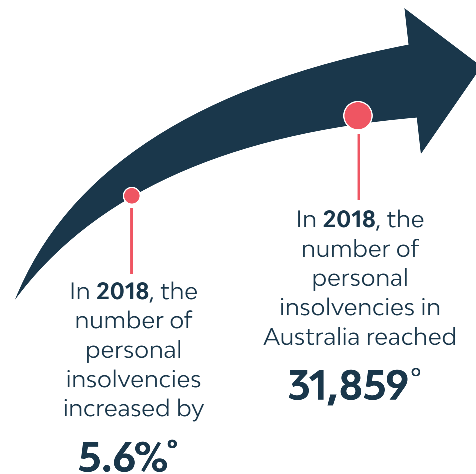
Bartier Perry was engaged to assist with the sale of a property and the winding up of a company that operated a time share scheme with more than **500** registered owners on title.

We assisted with:

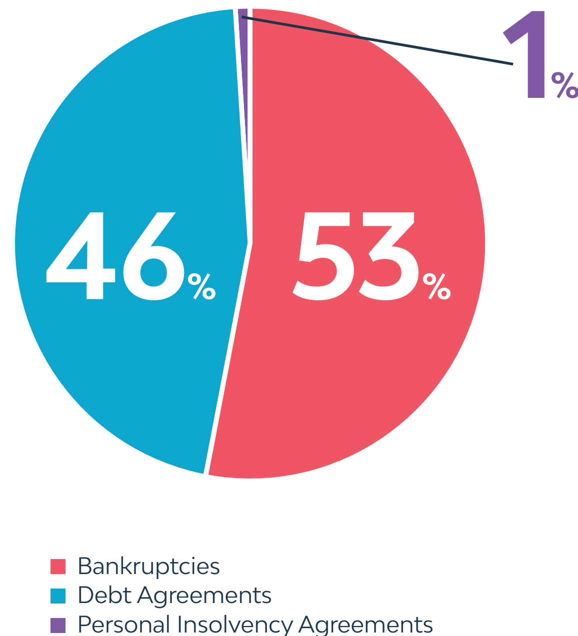
- appointment of trustees to sell the property
- ancillary orders as part of the s66G application including:
  - orders for substituted service on the registered owners
  - orders regarding the consolidation of certificates of title in relation to over 1,200 sub-folio interests
- advice on potential issues regarding surrender of lease in relation to the tenant occupying the property

PERSONAL INSOLVENCY

INCREASE IN PERSONAL INSOLVENCIES



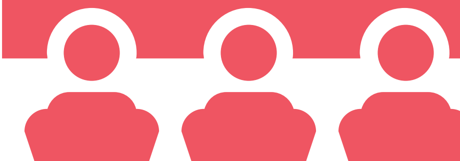
BREAKDOWN OF PERSONAL INSOLVENCIES BY TYPE°



The court will assist Trustees to facilitate the resolution of contentious matters as they arise in the course of the administration of a bankrupt's estate.

BARTIER PERRY TIP:

It may be quicker and more cost effective for a Trustee to take advantage of the wide discretion provided to the court as soon as a contentious matter arises.



INSOLVENCY PRACTITIONERS AS EXPERTS

SOME OF THE MATTERS BARTIER PERRY USES INSOLVENCY PRACTITIONERS FOR:

Solvency and valuation reports

Expert opinion evidence and analysis of company financial statements

General commercial matters such as investigation into fraudulent schemes

References:

* ASIC Insolvency Statistics: External Administrators' Reports (July 2017 to June 2018)
+ Pricewaterhouse Coopers Consulting (Australia), Economic Impacts of Potential Illegal Phoenix Activity, June 2018
^ Australian Restructuring Insolvency & Turnaround Association Journal vol 30 #1 2018
° AFSA 2018 Annual Statistics

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