

# INSOLVENCY

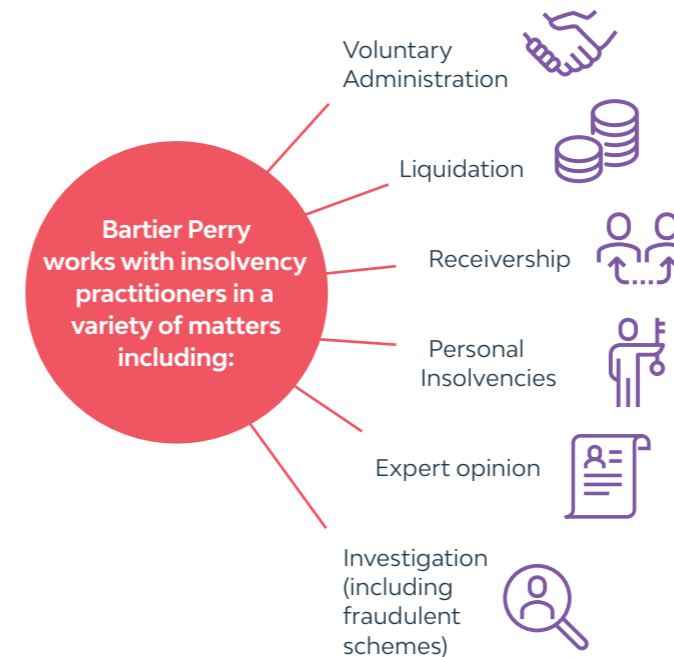


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# APPOINTMENTS

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.

## 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



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.



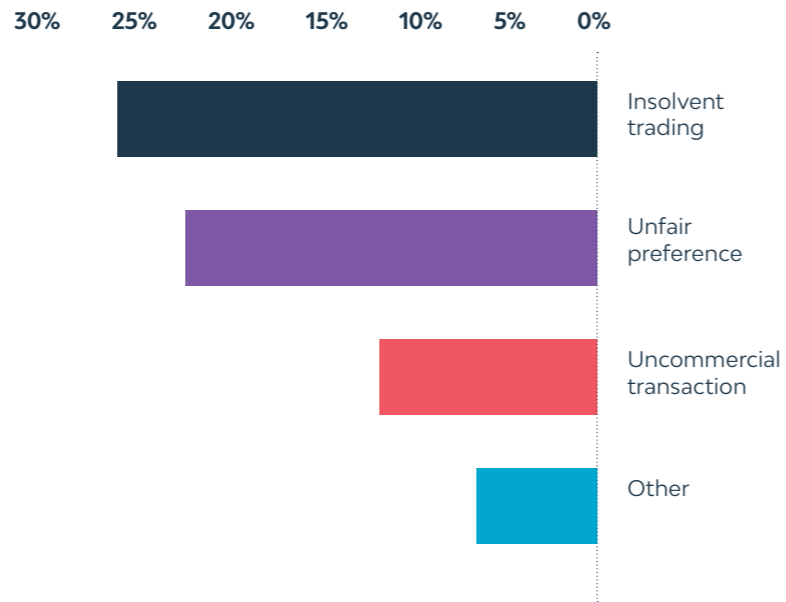
## RECOVERY PROCEEDINGS

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

Litigation funding is now an accepted way of pursuing voidable transactions and insolvent trading

A funder may fund an insolvency action regarding voidable transactions, insolvent trading or directors if the funder considers the merits of a case to be strong

It is common for funders to charge a success fee of anywhere between 20% and 50% of the recoveries made

A typical funding model will cover legal action fees, costs and will often cover an adverse costs order in the event the action is unsuccessful

The balance available after the funder's success fee will be paid into the liquidation

## SAFE HARBOUR

THE CURRENT AUSTRALIAN  
INSOLVENCY LAWS ARE WIDELY  
RECOGNISED AS BEING AMONG  
THE HARSHTEST 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)



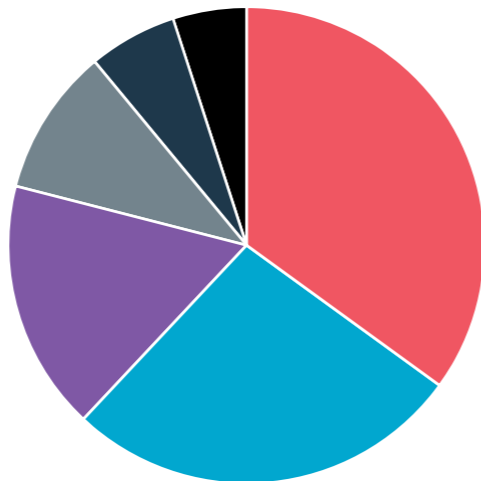
### INSOLVENT TRADING – CASE STUDY

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\*



- Other (business and personal) services
- Construction
- Accommodation and food services
- Retail trade
- Transport, postal and warehousing
- Manufacturing

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<sup>+</sup>**

**77<sup>^</sup>**  
**%**

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.



## 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

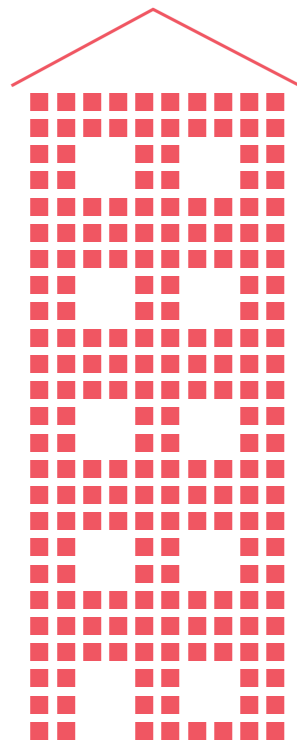
## DEALING WITH PROPERTY

### 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.

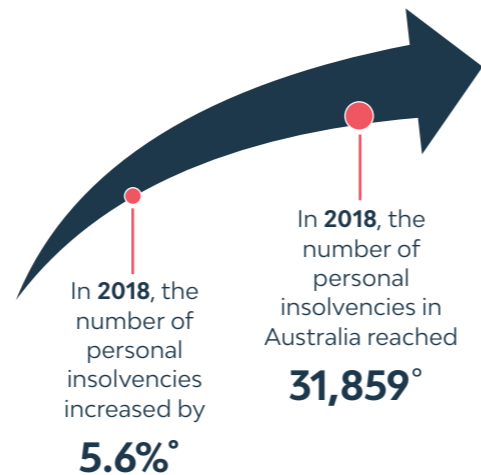
#### We assisted with:

- 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

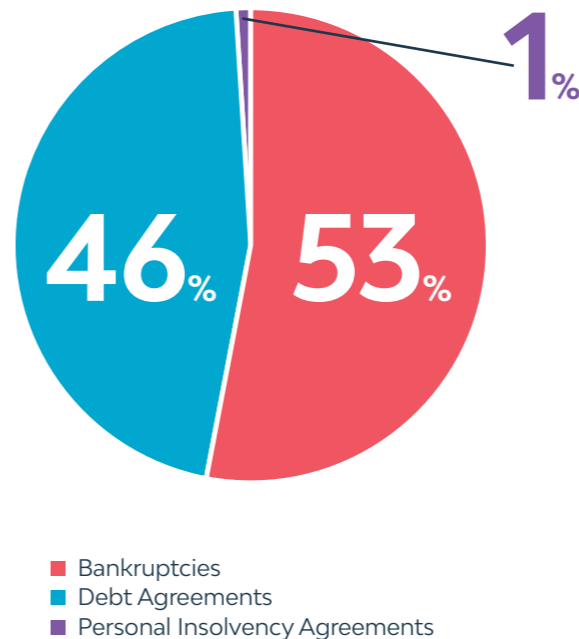
## PERSONAL INSOLVENCY



### 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

## KEY CONTACTS

For more information,  
contact one of our key  
team members:



**Gavin Stuart**  
*Partner*

**P** 02 8281 7878  
gstuart@bartier.com.au



**David Creais**  
*Partner*

**P** 02 8281 7823  
dcreais@bartier.com.au



**Adam Cutri**  
*Partner*

**P** 02 8281 7873  
acutri@bartier.com.au



**Nicholas Kallipolitis**  
*Partner*

**P** 02 8281 7939  
nkallipolitis@bartier.com.au



**Emma Boyce**  
*Senior Associate*

**P** 02 8281 7893  
eboyce@bartier.com.au



**David de Mestre**  
*Senior Associate*

**P** 02 9259 9620  
ddemestre@bartier.com.au

**BARTIER PERRY PTY LTD**

Level 25, 161 Castlereagh Street, Sydney NSW 2000

T + 61 2 8281 7800

F + 61 2 8281 7838

**bartier.com.au**

ABN 30 124 690 053

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Bartier Perry



@BartierPerryLaw



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