

Special purpose liquidators

The recent appointment on 18 May 2016 by the Federal Court of a special purpose liquidator to investigate certain transactions and activities of Clive Palmer's company Queensland Nickel Pty Ltd is a reminder of the existence and potential usefulness of special purpose liquidators.

What is a special purpose liquidator?

A special purpose liquidator ("SPL") is a liquidator who is appointed by the Court to carry out a specific function in the liquidation of a company in circumstances where it is desirable that the function is not performed by the acting liquidator, usually where a situation of conflict arises with the acting liquidator.

A SPL is simply a liquidator appointed for the purposes of the *Corporations Act 2001 (Cth)* with a specified scope of responsibility.

Power to appoint

The Court's power to appoint a SPL stems from Section 511 of the *Corporations Act* provided that it will be 'just and beneficial' to do so.

An application may be made by the liquidator, a contributory (shareholder) or a creditor.

It has been held that the Court may appoint a SPL where:

- the acting liquidator has a conflict or may not be seen to be independent as to some particular and discrete matter; or
- the liquidator may feel some embarrassment because of commercial connections (*Spedley Securities Ltd (In Liquidation) (1991) 9 ACLC 700*).

The Court has its own unfettered discretion and the circumstances in which it can appoint are not limited to the above.

Generally when determining if such an appointment will be in the interest of the general body of creditors, the Court will consider matters such as the clarity of the task(s) to be assigned to the SPL, whether the appointment of a SPL will be beneficial to the administration of the winding up and if the likely additional cost is justified.

Examples of appointments

- **One.Tel Limited (In Liquidation) (2013).**
A SPL was appointed to investigate both potential litigation against the company directors and the decision of the directors not to proceed with a rights issue.
- **Re HIH Insurance Ltd & Ors (2006)**
The existing liquidators sought a SPL to deal with possible cross-claims against related FAI companies in proceedings initiated by the prospective plaintiff HIH companies.
- **Lo v Nielsen & Moller (Autoglass) (NSW) Pty Ltd (2008)**
A creditor sought the appointment of a SPL to investigate certain matters including insolvent trading, the granting of security and transfer of debts to associated parties and the sale of property to those associated parties. The creditor was willing to fund the investigation.
- **Ambient Advertising Pty Ltd (In Liquidation) (2015)**
The largest unrelated creditor sought orders for the appointment of a SPL, with ancillary orders as to a funding agreement. The creditor wanted the SPL to investigate transactions between the company and related entities.
- **Queensland Nickel Pty Ltd (In Liquidation) (2016)**
The Commonwealth of Australia applied to the Court for a SPL to investigate transactions between Queensland Nickel and related entities and also the activities of the various directors and officers to those entities. The total claims of employees are expected to be more than \$73 million of which \$69 million will be paid under the Commonwealth's Fair Entitlements Guarantee (FEG).

The appointment of a SPL is a useful tool to bear in mind during the liquidation of a company if a particular transaction is not being investigated because of a conflict of interest affecting the liquidator. One principal benefit of this approach is that a funder of a claim to be investigated and pursued by the SPL knows that its funds will be applied to the particular purpose and not taken up in the general administration of the liquidation.

To satisfy the Court that the appointment of a SPL would be in the best interest of creditors in the winding up of the company, creditors wishing to make an application for the appointment of a SPL should ensure they provide the Court with sufficient evidence as to the terms of appointment of the proposed SPL, the limits and scope of the SPL's powers and the proposed SPL's qualifications.

Final Note: SPLs are generally not appointed to investigate the conduct of the existing liquidator. This is more properly a function of the Court (see J. Brereton's remarks in *Honest Remark Pty Ltd v All State Exploration NI & Ors (2006)* regarding an application for a special purpose administrator).



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