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SHERIDANS
CHARTERED ACCOUNTANTS

Breakfast Briefing

Frequently Asked Insolvency Questions

3 March 2017

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GLOSSARY

AFSA	Australian Financial Security Authority
ASIC	Australian Securities and Investments Commission
ATO	Australian Taxation Office
Bankruptcy Act	Bankruptcy Act 1966
Corporations Act	Corporations Act 2001
Divisible property	Property that can be realised by the bankruptcy trustee for the benefit of the bankrupt estate.
DOCA	Deed of Company Arrangement
DPN	Director Penalty Notice
FEG scheme	Fair Entitlements Guarantee scheme
Non-divisible property	Property that does not form part of a bankrupt estate. Also referred to as 'exempt' or 'protected' property.
NPII	National Personal Insolvency Index
Official Trustee	The Official Trustee in Bankruptcy, a body corporate, administers bankruptcies and other personal insolvency arrangements when a private trustee or other administrator is not appointed.
PIA	Personal Insolvency Agreement
PPSA	Personal Property Securities Act 2009 (Cth)
PPSR	Personal Property Securities Register
Realisations charge	A government charge on the gross monies received into a bankrupt estate, PIA or Section 73 proposal. Currently 7%. The charge is payable in priority to any dividend to creditors.
SGC	Superannuation Guarantee Charge
SMSF	Self Managed Superannuation Fund
Statement of Affairs	Form 3 Statement of Affairs (statement of assets, liabilities, business details and personal details).
Trustee	Bankruptcy trustee

1. How long does a liquidation last?

There is no prescribed or set time within which a liquidation must be completed.

The time it takes to complete a company liquidation will vary depending on how complicated the company's affairs are. The main factors that affect the time-frame of the liquidation are the structure of the company, its dealings prior to being liquidated and whether it will be necessary to litigate.

The liquidation lasts as long as it needs to last for the liquidator to properly attend to the three main planks of the process: asset realisation, distribution to creditors and investigation.

Two important factors:

(i) Duties of a liquidator

There are a number of tasks a liquidator must perform in a liquidation, and perform properly, to adequately discharge their duties as liquidator. These tasks include (but are not limited to):

- Calling and holding meetings of creditors;
- Communicating with creditors (circulars, letters, emails, telephone calls);
- Realising the company's assets and distributing any surplus to the company's creditors;
- Collecting the company's books and records;
- Searching for any assets that may be owned by the company;
- Opening and managing a bank account for the liquidated company;
- Determining and paying the costs and expenses of the liquidation;
- Investigating the affairs of the company and reporting the findings to the company's creditors and the relevant authorities if appropriate;
- Filing statutory records and statements of account with ASIC;
- Filing a statutory report (under Section 533 of the Corporations Act) with ASIC; and
- Lodging Business Activity Statements with the ATO.

(ii) Acting in a timely manner

The liquidator should properly perform their duties in an organised and methodical fashion such that the duties are discharged in a reasonably timely manner.

1. How long does a liquidation last? (cont.)

Rough timeframes

- Unlikely to be less than 6 months.
- Earliest likely to be 9 months.
- Average likely to be 1 to 2 years.
- Liquidations that last longer than 5 years usually take this length of time because:

    (a) The liquidation is a large administration (large in terms of number of assets, value of assets, number of creditors, matters for investigation and litigation).
    (b) There is a complicating residual matter being "run off".
    (c) There is an issue taking some time to resolve, in particular, litigation.

Issues that can delay finalisation

- Ongoing litigation.
- Waiting for some event to happen or date to be reached (e.g. anniversary).
- Obtaining court directions.
- Unable to locate or determine something (investigation/tracing).

What happens if the liquidation outlives the liquidator?

The liquidation is not terminated i.e. it continues.

If there are joint liquidators, it is likely that the remaining liquidator continues the liquidation.

"If from any cause there is no liquidator acting, the Court may appoint a liquidator."
Section 502 of the Corporations Act

2. How much does a liquidation cost?

Generally it should not cost less than a certain amount and there is no upper limit (subject to creditor approval and available funds).

The actual cost (i.e. liquidator's fees accrued) is largely dependent on the same factors that determine the length of time the liquidation takes (i.e. the complexities of the liquidation).

We would contend that even the most basic, simple, "no issues" liquidation, done properly, costs in the order of $10,000 to $15,000.

In Perth, our experience is that the current 'minimum' charge is in the range of $10,000 to $20,000, with the majority of insolvency practitioners having a minimum charge of $20,000.

In considering the question "How much does a liquidation cost?" there are two primary issues:

(i) What cost does the liquidator record as their cost of the liquidation?

(ii) What cost does the liquidator actually charge?

With regard to what the liquidator records as their cost, most liquidators record their fees on a time-spent basis (we have yet to see a practitioner charge otherwise). However, recent court decisions have raised the concept of liquidators' having to consider their charge as being a percentage of asset realisations.

What cost the liquidator actually charges can depend on what asset realisations of the company are made, and the extent of any indemnities given to the liquidator for the liquidator to consent to taking the administration.

2. How much does a liquidation cost? (cont.)

Issues that affect the cost

- Assets – nature and range, number, location, realisability and market for assets.
- Creditors – number, type of claims (quantification and assessment), level of interest from creditors or others (e.g. regulators).
- Books and records – the general availability and state of the financial records.
- Investigation – the extent of and issues involved in the investigation.
- Co-operation, or otherwise, from directors.
- The extent of litigation or legal issues to be dealt with.
- Group structure and the extent of related party transactions.
- Whether there is an operating trading business at the time of the liquidator's appointment.
- Reason(s) for the insolvency.
- Fraudulent activity.
- Industry the company operated in.

Who pays the cost?

- Generally creditors.

  Subject to sufficient asset realisations, the liquidator's fees will be a cost of the liquidation. This reduces the funds that would otherwise be paid as a dividend to creditors.
- Sometimes someone else who wants the company in liquidation (e.g. petitioning creditor).
- Indemnity provider – usually the directors but can be another party (e.g. secured creditor).
- The liquidator, to the extent that they do not get paid in full and recover only a portion of their fees.

3. In a liquidation, does the ATO get paid before other creditors?

No.

The ATO's priority in respect of unremitted PAYG (and certain other taxes) was abolished in 1993 and the ATO now ranks equally with other unsecured creditors (over 23 years later some people are still unaware of this change).

However, the ATO is in a better recovery position in corporate and personal matters compared to other unsecured creditors because of the ATO's legislative power regarding, among other things, DPNs, statutory garnishees, PAYG withholding and SGC estimates, departure prohibition orders (preventing a tax debtor from leaving the country) and notices to provide information.

What is a Director Penalty Notice ("DPN")?

A method by which the ATO can impose personal liability on company directors for PAYG withholding and SGC debts without the delay or expense of taking legal action.

See Sheridans Fact Sheet on DPNs (at the back of this handout).
Available for download on our website: sheridansac.com.au/publications/

4. Can a company trade while in liquidation?

If a company is put into liquidation and still has a trading business, does the business have to be immediately closed?

Yes, the company can trade while in liquidation.
No, a business doesn't have to be immediately closed when the company is put into liquidation.

A liquidator may carry on the business of the company so far as is necessary for the beneficial disposal or winding up of that business (Section 477(1) of the Corporations Act) i.e. if the liquidator believes it would be in the best interests of all creditors to do so.

A trade-on may occur if:

(1) The business is able to be sold as a going concern, or
(2) It will result in a better return to creditors (for example, finishing off some work-in-progress).

However, a liquidator is obliged to end trading and wind up the company's affairs as quickly, but as commercially responsibly, as is practical.

If the business is profitable, the liquidator would not trade on the business indefinitely until all creditors are paid.

Initial assessment

If there is an operating business when the company goes into liquidation, the liquidator would immediately make an initial assessment:

(i) As to whether the business is profitable, and
(ii) If there is any prospect of trading on in the short term, what the cash-flow would be for the liquidator of trading on.

Generally, if the business is not profitable there will be little prospect that the business is saleable. The best the liquidator may be able to do is get the best price for the tangible assets. Occasionally an unprofitable business may be of interest to someone for strategic reasons, and that person/entity may be willing to pay more than the value of the tangible assets.

4. Can a company trade while in liquidation? (cont.)

It is not uncommon for the liquidation of small companies to be hampered by the lack of up to date and accurate books and records. This causes a specific problem for the liquidator in trying to quickly and accurately determine the profitability and cash-flows of the business. Further, it can be an impediment for the sale of a business if reliable results cannot be presented to potential purchasers.

Finally, it is noted that a liquidator may continue to trade on a business for a short period even if it is cash-flow negative because the liquidator considers that the increased value they will obtain from selling the business as operational (rather than dormant), or compared to the piecemeal sale value of the assets, is greater than the cash-flow losses in the meantime. Obviously this can be a risky strategy for the liquidator, who will need to be strongly convinced that the negative cash-flow of a trade on will be outweighed by the ultimate sale benefits.

5. Can a liquidator attack a director's personal assets?

Generally a liquidator cannot directly attack a director's personal assets.

The few occasions when a liquidator may directly attack a director's personal assets include when the liquidator claims:

- that the company has some proprietary interest in the director's assets (e.g. equitable interest).
- that the asset is actually an asset of the company, merely in the director's possession (e.g. a motor vehicle).
- that the director is holding the asset on trust for the company.

Otherwise, the liquidator can only indirectly attack the director's personal assets by making a claim against the director, which in turn may jeopardise the director's personal assets.

The ultimate sanction for a liquidator with a claim against a director would be the bankruptcy of the director. Then a bankruptcy trustee (and not the liquidator) would be in control of the bankrupt's divisible assets.

The possible claims a liquidator may make against a director include:

- insolvent trading claim
- breach of director's duties claim
- loan account or debt to the company
- payment of unpaid share capital.

6. How does liquidation, or voluntary administration, affect a personal guarantee provided by a director?

Is a director still liable under a guarantee if the company goes into external administration (e.g. liquidation or voluntary administration)?

Yes.

If the company, the principal debtor, goes into administration, receivership or liquidation, the guarantee continues to operate. The liquidation of the company does not in any way sever the guarantee, unless the guarantee expressly states that it does (which would be unusual). A guarantee is a personal arrangement between the creditor and the guarantor.

Voluntary Administration

Note that during the period of voluntary administration, a guarantee of a liability of the company cannot be enforced (except with leave of the Court) against a director, or a spouse, de facto spouse or a relative of a director (Section 440J(1) of the Corporations Act).

What if the director signed a personal guarantee as a director, but has left the company?

The guarantee continues to operate unless the director has received confirmation from the supplier that they are released from the personal guarantee, or the director has otherwise notified the creditor in a binding way that they no longer agree to be bound by the personal guarantee.

Directors should maintain a register of personal guarantees they have signed (few do).

When can the creditor enforce their guarantee?

Usually once the principal debtor is in default. If an event of default has not already occurred, the appointment of an external administrator is usually an event of default.

In the event of liquidation, the creditor is not obliged to await the outcome of the company's liquidation; they can pursue the debt immediately through enforcing the personal guarantee given by the director, regardless of any proposed distribution from the liquidation.

In a voluntary administration, the creditor cannot exercise or seek to enforce a guarantee while the company remains in voluntary administration (see above). Once the voluntary administration period has concluded, the creditor has the right to pursue any guarantees.

6. How does liquidation, or voluntary administration, affect a personal guarantee provided by a director? (cont.)

Can a personal guarantee be set aside?

Yes, although there have to be compelling circumstances and getting out of a guarantee is usually not straightforward. A guarantor should get good legal advice regarding their specific circumstances.

Instances when a guarantee might be set aside include:

- the guarantee being obtained in unconscionable circumstances.
- where an 'innocent party' was unable to make a worthwhile judgement as to what was in their best interest.
- undue influence or pressure on the guarantor.

What happens if a company enters into a DOCA?

A deed of company arrangement (DOCA) is a binding arrangement between a company and its creditors.

A DOCA does not prevent a creditor who holds a personal guarantee from a company's director or another person taking action under the personal guarantee for payment of their debt (Section 444J of the Corporations Act).

Does a DOCA release a guarantor company from a debt arising under a guarantee?

Australian Gypsum Industries Pty Ltd v Dalesun Holdings Pty Ltd [2015] WASCA 95

A party (creditor) may not be able to rely on a guarantee that has not crystallised at the time a guarantor company executes a DOCA. The DOCA may have the effect of extinguishing a claim under the guarantee, even if the claim pursuant to the guarantee arises after termination of the DOCA.

7. Why was the liquidator paid when nobody else was?

Short answer – They wouldn't do the job otherwise, and somebody needs to.

Insolvency, by definition, means there is not enough money to pay everyone who is owed money. Usually there is a deficit of assets to liabilities.

Usually by the time external administration occurs, the company has been in financial trouble for a while. It rarely happens overnight. As a result, at the date of liquidation there is little, if anything, to pay creditors what they are owed.

At the time of their appointment, the insolvency practitioner is not owed anything. However, once they take on the job they have considerable responsibilities and work to do that is required by law, including trying to locate the company assets, obtaining information from directors, and creditors, and reporting on breaches of the law.

It is highly specialised and often complicated work, and they need to be paid for doing it.

The order in which the various parties who are owed money are paid is set out in the Corporations Act. Liquidators are given considerable priority, although not complete priority to all creditors.

If liquidators, trustees and administrators did not have some priority for payment of their fees, there would not be anyone competent, other than the government in the case of bankruptcy, willing to do work that needs to be done.

8. How can a company get out of liquidation?

A liquidation usually ends with the deregistration of the company.

However, there are two ways a company could get out of liquidation:

1. The liquidator appoints a voluntary administrator to the company, which leads to a DOCA.

2. The court orders the stay or termination of a winding up.

Voluntary administrator/DOCA

This would only be done if the liquidator believed creditors would get a better return under a proposed DOCA than under liquidation. The liquidator would have to be convinced that the DOCA proposal was worthwhile and likely to be accepted.

Stay or termination of a winding up

(i) Generally court applications are made shortly after the initial winding up order is made. An application can be made at any time but has less chance of success the longer the liquidation has been running.

(ii) Court: Federal Court, Supreme Court in each state and Family Court of Australia.

(iii) Reasons a court may make an order to end a liquidation include:

- The winding up application and other supplementary material was not served on the company in the proper way, or in a way that did not allow the company to properly defend it i.e. the process of winding up the company was deficient.

- The company is solvent and should not have been wound up.

- The liquidator appointed a voluntary administrator, the company entered into a DOCA and the liquidation is no longer necessary.

- It is just and equitable to do so for any other reason.

8. How can a company get out of liquidation? (cont.)

(iv) Factors a court will consider when deciding whether to end a liquidation include:

- Whether the applicant has made out a positive case for a stay.
- Proof of service of the notice of the application on all creditors and contributories (shareholders).
- Nature and extent of creditors and evidence as to whether or not all debts have been or will be discharged.
- The attitude of creditors, contributories and the liquidator.
- The current trading position and general solvency of the company.
- Compliance, or otherwise, of the directors with their statutory duties to the liquidator (e.g. providing a Report as to Affairs).
- The general background and circumstances leading to the winding up order being made.
- The nature of the business carried on by the company, in particular, whether that business was in any way contrary to 'commercial morality' or the 'public interest'.

9. Can a creditor make an insolvent trading claim against the company's directors?

Possibly yes.

If a liquidator does not pursue an insolvent trading claim, the creditors of a company (individually or in a group) can take an insolvent trading claim themselves.

Creditors need the liquidator's consent, or failing that, leave of the Court.

A creditor cannot commence action when a liquidator has already begun proceedings.

Importantly, creditors can take action against directors only for their own debts, whereas a liquidator can pursue an insolvent trading claim on behalf of all creditors.

Practically, it can often be quite difficult for a creditor to take their own action because of:

(i) Possible restrictions on access to the company's books and records.

(ii) Lack of experience and competence in putting together an insolvent trading claim.

(iii) The professional and legal costs of preparing and pursuing an insolvent trading claim.

It is noted that the recently passed Insolvency Law Reform Act 2016 will provide liquidators with the ability to assign other statutory causes of action, such as preference claims, which will allow more flexibility and options for insolvency practitioners and creditors to pursue any available claims.

Is it illegal for a business to fail?

No. It is part of the competitive, free enterprise market economy.
What may be illegal is to do nothing, or carry on trading, while the business is failing.

10. What effect does liquidation have on secured creditors?

Secured creditors' rights are not affected by liquidation.

The event of liquidation may, surprisingly, be the first time that the secured creditor realises that the company is in financial difficulty, at least, to the extent of insolvency. This may cause the secured creditor to review its position, and if it considers it necessary, take action (e.g. appoint a Receiver, or go into possession).

Not uncommonly, secured creditors allow liquidators to sell the assets while recognising the secured creditors' rights.

A secured creditor can prove for any shortfall in the liquidation after their security is realised. The shortfall is an unsecured claim.

Warning:

Secured creditors should be careful when submitting a proof of debt and voting in a liquidation so as not to lose their security if they get it wrong.

Regulation 5.6.24 of the Corporations Regulations 2001

In relation to a liquidation, regulation 5.6.24 of the Corporations Regulations provides:

- A secured creditor is entitled to vote only in respect of the balance, if any, due to the creditor after deducting the estimated value of the security.

- If a secured creditor votes in respect of its whole debt, the creditor must be taken to have surrendered its security unless the court is satisfied that the omission to value the security has arisen from inadvertence.

The regulation makes no distinction between a vote on a substantive issue and a vote on a non-substantive one. Even voting on procedural matters that appear innocuous and have no direct impact on the return to creditors can be caught by the regulation.[①]

Cases have held that the regulation does not apply to a vote on the voices (or by a show of hands) but it does apply where a poll is taken.

Before lodging a proof of debt or voting in a liquidation, a secured creditor should consider:

(i) Why they want to lodge a proof of debt or vote at the meeting of creditors, and
(ii) Whether their position as a secured creditor will be improved by lodging the proof of debt or by voting.

① *Cosmopolitan Constructions Pty Ltd (in liquidation) [2013] NSWSC 780*

10. What effect does liquidation have on secured creditors? (cont.)

Voluntary administration

Regulation 5.6.24 of the Corporations Regulations does not apply to:

(a) A meeting of creditors convened under Part 5.3A of the Corporations Act (i.e. meetings held while the company is in voluntary administration), or

(b) A meeting held under a deed of company arrangement.

11. When do I have to worry about a statutory demand or a winding up application?

Immediately.

Many company directors do not understand the significance of statutory demands or winding up applications.

Sometimes directors allay their concerns by presuming:

(i)	Statutory demands	"I can pay this out before it gets to court."
(ii)	Winding up applications	"I can settle this matter at the eleventh hour before the matter proceeds to a hearing."
		"I can appoint a voluntary administrator and prevent the court from appointing a liquidator."

While the above measures may delay the eventual process, it still leaves the company at risk of being liquidated.

Statutory demands

A company has only 21 days from service to respond to a statutory demand. Other than paying the demand, the response can be either:

(1) To claim that the statutory demand is defective in some way, or

(2) To have the statutory demand set aside because of the existence of a genuine dispute.

There is no provision to extend the 21 day deadline.

Significantly, if the statutory demand is not paid nor an application made to set aside the statutory demand, the company is deemed to be insolvent.

As a consequence, a creditor relying on non-compliance with the rules in relation to a statutory demand can proceed to issue a winding up application.

11. When do I have to worry about a statutory demand or a winding up application? (cont.)

Winding up application

The consequences of a winding up application being made against the company are:

(1) If not dealt with, the company will, in all likelihood, proceed into liquidation.

(2) The fact that the winding up application is public information. The petitioning creditor is required to file the appropriate notice with ASIC (Form 519 - Notification of court action relating to winding up). The winding up application is advertised on ASIC's Insolvency Notices website.

(3) Even if the debt is settled with the petitioning creditor, any other creditor of the company can file a Notice of Appearance and make an application to substitute their claim against the company in the winding up application, based on the non-compliance with the statutory demand. This process can technically continue until all potential creditors have been paid.

Ignoring a statutory demand and/or winding up application can, at the very least, cause significant inconvenience, not to mention potentially substantial legal costs.

Finally, if the director's cunning plan is to appoint a voluntary administrator at the last minute, the following should be noted:

- Although Section 440A(2) of the Corporations Act requires a court to adjourn a winding up application where an administrator has been appointed,

- The court is only to allow this if it is satisfied that it is in the interests of the company's creditors for the company to continue under administration rather than be wound up.

- And, there have been instances where the court has not been satisfied that it was in the interests of creditors for the administration to continue.

In summary, it cannot be guaranteed that the court will adjourn a winding up application simply because of the appointment of an administrator.

12. Will you make sure the directors go to jail?

No.

Even if the directors are guilty of a criminal offence, liquidators do not have the power to pursue criminal matters (and you go to jail only for criminal matters).

Liquidators are duty bound to report criminal matters to the Australian Federal Police, ASIC and AFSA, but only these organisations, in conjunction with the Department of Public Prosecutions, can pursue and prosecute someone for a criminal offence.

13. What is the difference between liquidation and bankruptcy?

Companies are liquidated and individuals bankrupted.

Two separate pieces of legislation are involved:

- Liquidations are governed by the Corporations Act.
- Bankruptcies by the Bankruptcy Act.

At the finalisation of a liquidation, the company is deregistered, i.e. it ceases to exist, while a bankrupt survives bankruptcy.

While a bankrupt loses their assets at the date of bankruptcy, one of the principal aims of the bankruptcy process is to provide a mechanism for the financial rehabilitation of bankrupts. The aim of liquidation is not the financial rehabilitation of the company.

14. What options are available for a company experiencing financial difficulty?

The directors should obtain proper accounting and legal advice as early as possible, as this increases the likelihood of the company's surviving.

Often a company cannot be saved because professional advice was sought too late.

An insolvency practitioner can conduct a solvency review of the company and outline the available options.

Options may include:

- Refinancing
- restructuring (e.g. sale of company assets, reduction in staff, outsourcing of existing and future contracts for work, entering into a compromise or payment arrangement with creditors)
- changing the company's activities
- appointing an external administrator
    - voluntary administration
    - liquidation

See Sheridans Fact Sheet – Indicators of Insolvency (at the back of this handout).
Available for download on our website: sheridansac.com.au/publications/

15. How long is someone bankrupt?

Bankruptcy generally lasts for a period of three years

- Can be extended in certain circumstances to five or eight years (when the trustee lodges an objection to discharge).
- Start date for the bankruptcy "clock" is the date the debtor's Statement of Affairs is accepted by AFSA.
- Discharge from bankruptcy occurs three years and one day after the start date.
- Discharge is automatic unless the trustee has lodged an objection to discharge (the debtor does not have to apply for discharge).
- The administration of the bankruptcy may continue after the debtor is discharged from bankruptcy.
- The debtor's name will appear on the NPII forever as a discharged bankrupt and on credit reporting agencies' records for 2 years from the date of discharge, or up to 5 years from the date the debtor became bankrupt, whichever is later.

Objections to discharge

Generally trustees lodge objections to discharge in order to prompt a bankrupt to comply with certain obligations. Grounds for the lodgement of an objection to discharge may include failure by the bankrupt to:

- provide information to the trustee
- disclose all income to the trustee
- pay assessed income contributions
- explain how money was spent, or
- reveal all assets and creditors.

Proposed change

A part of the Government's suite of intended insolvency law reforms is the proposal to shorten the bankruptcy period to one year. The Government's reasoning is that this period strikes a better balance between encouraging entrepreneurship and protecting creditors.

Interestingly, it is intended that trustees could still extend the period of bankruptcy for a period of up to eight years, and that the obligation of bankrupts to make excess income contributions remains for three years.

Therefore, the reduced period is intended to affect restrictions relating to overseas travel, holding an office under the Corporations Act, employment within certain professions and access to personal finance.

16. Can a bankrupt travel overseas?

Yes, if they have their trustee's written permission and a legitimate reason to travel.

Warning: It is an offence to travel, or make preparations to travel, without the trustee's written consent. If the bankrupt commits this offence the trustee may extend the period of bankruptcy. On conviction, the bankrupt may face imprisonment (maximum three years).

Conditions placed on overseas travel

The trustee may impose conditions when giving permission, such as:

- the period of travel
- the date the bankrupt is required to return to Australia
- that any income contributions the bankrupt has been assessed to pay are paid before they go.

Passport(s)

Bankrupts must hand their passport(s) to their trustee if directed to do so. Generally most registered trustees hold a bankrupt's passport for the period of bankruptcy; however, the Official Trustee does not.

Requesting permission to travel from the trustee

- the bankrupt should contact the trustee as soon as they are aware that they may need to leave Australia.
- the bankrupt should write to the trustee detailing all relevant information regarding the proposed trip.
- Sheridans and the Official Trustee have a specific form to be completed by the bankrupt.
- the trustee must be given adequate time and information to consider the request (although we occasionally accelerate the process on compassionate grounds).

Refusal of permission

The trustee may refuse to give permission for a number of reasons, including:

- the bankrupt has not carried out all of their obligations under the Bankruptcy Act e.g. to file their Statement of Affairs.
- the bankrupt is required to assist the trustee in the administration of the bankruptcy.
- the trustee's investigations have not been completed.

16. Can a bankrupt travel overseas? (cont.)

Dissatisfaction with the trustee's decision

- the bankrupt should attempt to resolve their concerns with their trustee.
- the bankrupt may apply to the Federal Court or the Federal Circuit Court for review (the bankrupt should get legal advice before doing this).

PACE notices

Trustees can lodge Passenger Analysis Clearance and Evaluation ("PACE") notices with the Department of Immigration to ensure a bankrupt cannot leave the country.

17. Can an individual trade as a sole trader while bankrupt?

Yes.

The Bankruptcy Act does not restrict a bankrupt from being employed and earning an income during bankruptcy, either as an employee or through self-employment.

Bankruptcy is not about punishing people – it is about providing financial rehabilitation.

However, an undischarged bankrupt is prohibited from acting as a director of a company (unless approval is obtained from the court) and is usually disqualified from being a trustee.

But a bankrupt can continue to trade as a sole trader, or in partnership as an individual, while bankrupt.

- the income the bankrupt earns from the business as a sole trader or partner will be assessed by the trustee to determine if the bankrupt is liable to pay income contributions.

- the bankrupt must disclose to the trustee the plant and equipment, stock and other assets owned by the business at the date of bankruptcy. The bankrupt may be required to 'pay' for the assets they wish to continue to use in the business.

- the bankrupt must be careful to disclose that they are bankrupt if obtaining any form of credit more than the indexed amount (currently $5,546).

- all people/organisations the bankrupt does business with must be notified of the bankruptcy unless the bankrupt's full name is contained in the business name.

- many professional associations and licensing authorities have their own conditions around bankruptcy of their members. This is not regulated by the Bankruptcy Act and is at the discretion of each relevant body. The bankrupt should confirm directly with each organisation that they are a member of as to whether bankruptcy will affect their membership and their ability to practise a particular trade.

17. Can an individual trade as a sole trader while bankrupt? (cont.)

Sometimes bankrupts set out to earn just under the income contribution threshold amount while bankrupt.

We would encourage bankrupts to go out and earn as much as they can if they are able to: bankrupts can be 'glad' they are going to pay something in bankruptcy (providing a much appreciated dividend to creditors) and the bankrupt will get back on their feet at a faster rate (for example, saving for an overdue holiday, improving their quality of life).

Bankrupts should not forget that they get to retain half of any amount earned over the threshold amount.

Employees

- The Bankruptcy Act does not require bankrupts to disclose their bankruptcy when applying for employment.

- However, some employers may ask the question or choose to search the NPII.

- Usually an employer will not be notified of the bankrupt's bankruptcy unless:

    - the employer is listed as a creditor in the bankruptcy.
    - following the failure of the bankrupt to pay income contributions, the trustee issues a garnishee notice to the employer.
    - the employer conducts a search of the NPII.

- See notes earlier regarding professional associations and licensing authorities.

18. What happens if a bankrupt dies?

The administration of the bankrupt estate continues i.e. the bankruptcy continues, so far as it is capable of being continued, as if the bankrupt were alive.

It is a common misconception that when a person dies, their debts are automatically discharged. This is not so, unless specific provision has been made for them to be discharged (e.g. by an insurance policy).

The deceased bankrupt still owes debts to their creditors until discharged from bankruptcy. The debts are not passed on to the bankrupt's survivors or heirs, unless the bankrupt's debts were joint or the survivors were guarantors. Generally someone cannot become liable for someone else's debt by virtue of death, or marriage.

- The trustee will obviously not be making any future income assessments.
- The trustee will contact the executor of the bankrupt's deceased estate.
- There is no discharge from bankruptcy.

19. Can a deceased person declare bankruptcy?

It is unusual, but it is possible for a deceased person (or more accurately the estate of a deceased person) to declare bankruptcy.

Part XI of the Bankruptcy Act

This section of the Bankruptcy Act contains provisions enabling the insolvent estates of deceased persons to be administered in bankruptcy. It provides for both the administration of deceased estates for persons who were insolvent at the date of death and those deceased estates that subsequently become insolvent because of debts incurred by the executor of the deceased estate.

State and Territory Laws – an alternative

Insolvent deceased estates can also be administered under State and Territory Laws, and do not have to be administered under the Bankruptcy Act.

Each State and Territory has legislation for the orderly administration of deceased estates whether solvent or insolvent.

There are similarities between the Bankruptcy Act and the various State and Territory laws for the administration of deceased estates as each provides for the ordered and rateable distribution to creditors.

Benefit of using Part XI

The trustee has recourse to the "antecedent transaction" provisions of the Bankruptcy Act because they apply to Part XI administrations.

Application for Part XI order

An application for an order that the deceased estate be administered under Part XI of the Bankruptcy Act (commonly referred to as an "administration order"):

- Application is made to the Federal Circuit Court or the Federal Court.
- Application can be made by the legal personal representative of a deceased debtor (e.g. executor or administrator), or a creditor (owed at least $5,000).
- The person making the application can choose a preferred registered trustee.

20. Can a bankrupt keep an inheritance?

Short answer – No.

Proceeds from a deceased estate where the person dies before or during the debtor's bankruptcy fall into the bankrupt estate.

Divisible property is defined broadly in the Bankruptcy Act and it includes not only property owned by the bankrupt at the time of bankruptcy, but also property acquired by the bankrupt after bankruptcy up until the time of discharge. This is referred to as "after-acquired" property.

The most common form of after-acquired property is inheritance.

If a bankrupt knows that they are a beneficiary of someone's Will, and that person is still alive but may die during the period of the bankrupt's bankruptcy, the bankrupt may choose to disclose the fact of their bankruptcy to the person. That person is then at liberty to change their Will (although that person should seek independent legal advice prior to making any changes).

One useful solution to this issue would be to have a standard clause in every Will that specifically refers to a bankruptcy event and creates a testamentary trust in the event of the bankruptcy of any beneficiary.

There are some exceptions to the position that a bankrupt cannot keep an inheritance:

(a) The deceased's superannuation – if the bankrupt is a named beneficiary of the deceased's policy, the superannuation may be paid to the bankrupt's superannuation fund and will not become divisible property of the bankrupt estate.

(b) Proceeds from a life insurance policy for a deceased spouse – if the bankrupt is the named beneficiary and receives the proceeds after the date of bankruptcy then the funds will not become divisible property of the bankrupt estate.

Importantly, if the following assets of the deceased are realised and paid into the deceased estate, and then the bankrupt receives funds as a beneficiary from the deceased estate, the funds received by the bankrupt are after-acquired property i.e. divisible property:

- superannuation
- compensation for a personal injury

20. Can a bankrupt keep an inheritance? (cont.)

A query can sometimes arise in the above situation as superannuation and compensation for a personal injury if property of the bankrupt would usually be considered an exempt asset.

21. Is superannuation sacred in bankruptcy?

Generally yes, but not always.

The Bankruptcy Act says that the definition of divisible property does not extend to the interest of a bankrupt in a regulated superannuation fund i.e. superannuation is non-divisible or protected property.

However,

1. If superannuation is not held in a regulated fund, an approved deposit fund or an exempt public sector superannuation scheme, it is not protected property and is therefore divisible.

2. Property and funds in a regulated fund, approved deposit fund or exempt public sector superannuation scheme may be divisible if the property and/or funds were transferred to the fund in order to defeat creditors.

   A bankruptcy trustee has powers to claw back and realise property that was transferred to a superannuation fund in order to stop that property from becoming part of the bankrupt estate i.e. the property was transferred to the fund in an "out-of-character" transaction with the intent to defeat creditors.

   The transfer to the fund must have occurred after 28 July 2006, when the relevant legislation came into force.

3. Any money withdrawn from the superannuation fund prior to bankruptcy loses its protection and can be claimed by a trustee. For example, a debtor withdraws $10,000 from their superannuation fund and then becomes bankrupt with $8,000 of the funds remaining in their bank account. The $8,000 cash will vest in the bankruptcy trustee.

Other points of note:

- Superannuation payments received after bankruptcy are protected. In certain circumstances, debtors can get early access to their superannuation (e.g. severe financial hardship).

- Assets purchased with superannuation funds withdrawn after the date of bankruptcy, and before discharge, are protected assets.

- A bankrupt cannot be a trustee or a responsible officer of an SMSF. A bankrupt has a grace period of six months from the date of bankruptcy to resign from the role, to allow enough time for the appropriate arrangements to be made without disadvantaging other members.

21. Is superannuation sacred in bankruptcy? (cont.)

- A bankrupt can have an unlimited amount in superannuation funds that is protected. Historically, a bankrupt's superannuation interest was protected but only up to a certain limit. That limit used to be the pension reasonable benefit limit (RBL). But from 1 July 2007 the RBL regime was abolished, with no replacement, such that there is now no limit on superannuation protection. Of course, at the same time, the Government introduced various contribution caps.

- The ATO can garnishee a superannuation fund to pay outstanding taxes. A garnishee notice in respect of any tax-related liabilities may be served on a superannuation fund but it will not be effective until the tax debtor's (member's) benefits are payable under the rules of the fund (e.g. the tax debtor retires or dies). Generally a notice served on a superannuation fund will request payment as a lump sum unless the pension/annuity payable can guarantee repayment in a satisfactory period of time.

  The ATO needs to issue the garnishee notice before the debtor is declared bankrupt as the ATO does not issue such notices after someone is declared bankrupt.

  If the ATO has issued a garnishee notice before the debtor is declared bankrupt, then the notice still applies, but only to amounts that were due prior to the date of bankruptcy.

22. What assets can a bankrupt keep?

A bankrupt can keep non-divisible or exempt property.

A bankrupt cannot keep divisible property that the bankrupt owns at the start of bankruptcy and after-acquired property during the period of bankruptcy.

An asset is defined as anything of value that the bankrupt owns.

The assets a bankrupt can keep include:

- most ordinary household and personal items.
- tools used to earn an income up to an indexed amount (currently $3,750).
- vehicles (e.g. cars and motorbikes) where the total value of the vehicles less the sum owing under finance is no more than the indexed amount (currently $7,700).
- most balances in regulated superannuation funds and payments from regulated superannuation funds received on or after the date of bankruptcy (superannuation payments received before bankruptcy are not protected).
- life insurance policies for the bankrupt or their spouse if the proceeds from these policies are received after bankruptcy.
- compensation for a personal injury (e.g. car accident or workers' compensation), whether received before or after the date of bankruptcy, and any assets bought wholly or substantially with such compensation.
- assets held by the bankrupt in trust for another person (e.g. a child's bank account).
- if creditors agree, awards of a sporting, cultural, military or academic nature made to the bankrupt, such as medals or trophies, and claimed as having sentimental value.

A bankrupt's divisible property "vests" in the trustee upon bankruptcy. This means that the trustee has the power and authority to deal with the assets i.e. take physical possession and control of the assets, which includes the right to sell them. The bankrupt no longer has a claim to the assets or the right to deal with them. The bankrupt is not permitted to deal with the property even if it is still registered in their name.

Assets owned with someone else

The bankrupt's share of the asset vests in the trustee, and the trustee can sell this share.

22. What assets can a bankrupt keep? (cont.)

Assets the bankrupt used to own

The trustee has powers to investigate assets previously owned by the bankrupt prior to bankruptcy. If assets have been given away or sold for less than their value prior to bankruptcy, the trustee may recover the assets or the difference between the market value of the asset and the amount received for it.

Legal claims against someone else

The trustee will assess the viability of the legal claim(s) and whether they should be continued. If a claim relates to a personal injury or death of a spouse or family member, the bankrupt may be entitled to pursue the claim even after becoming bankrupt.

Assets not dealt with before bankruptcy ends

A bankrupt's discharge from bankruptcy does not result in the return of undealt-with assets to the bankrupt. The trustee can continue to deal with the assets. Some assets may take a number of years to sell. However, if the bankruptcy ends with annulment, the remaining assets will be returned to the bankrupt.

Overseas assets

It is not just the bankrupt's Australian assets that vest in the trustee, but all assets, including those held or located overseas. Of course, there can be practical and legal difficulties in recovering and realising overseas assets.

23. What is revesting of property in bankruptcy?

At the commencement of bankruptcy, the property of the bankrupt vests in the trustee.

Revesting is the transfer of any property that had previously vested in the trustee back to the bankrupt after they have become discharged from bankruptcy.

Provisions dealing with the revesting of property were added to the Bankruptcy Act in 2003.

Prior to this legislative change, the only relevant provision was Section 127 of the Bankruptcy Act which provides the trustee with 20 years from the date of bankruptcy to realise the property. After that 20 year period the trustee cannot realise the property and it revests in the former bankrupt.

The 2003 revesting provisions (Section 129AA of the Bankruptcy Act) allow for certain property to revest in the bankrupt at a date earlier than 20 years from the date of bankruptcy.

All bankrupt estates are subject to the revesting provisions, even if the bankrupt was discharged before the introduction of the 2003 provisions.

What property is covered by the revesting provisions?

(i) Property (other than cash) disclosed in the bankrupt's Statement of Affairs.

(ii) After-acquired property (other than cash) that the bankrupt discloses in writing to the trustee within 14 days after the bankrupt becomes aware that the property devolved on, or was acquired by, the bankrupt.

What property is not covered by the revesting provisions?

(i) Cash.

(ii) Property not disclosed in the bankrupt's Statement of Affairs.

(iii) After-acquired property of the bankrupt notification of which was not given to the trustee within 14 days of the bankrupt's knowledge of its acquisition.

This property is not subject to Section 129AA of the Bankruptcy Act, and therefore Section 127 is relevant i.e. the trustee has 20 years to realise this property and only after 20 years does it revest in the former bankrupt.

23. Revesting of property in bankruptcy (cont.)

When does the property revest ("revesting time")?

(a) Property disclosed on Statement of Affairs – six years after discharge. For bankrupts discharged before 5 May 2003, the revesting date was 5 May 2009, unless the revesting date was extended.

(b) After-acquired property – six years after either the date of discharge or the date of notification, whichever is later. The earliest date that after-acquired property revested to any bankrupt was 5 May 2009.

Objection to discharge lodged by trustee

The lodgement of an objection to discharge by the trustee has the effect of delaying the revesting provisions.

For a bankruptcy extended by five years, the revesting will not occur until 14 years after the start of bankruptcy.

Trustee can delay the revesting of property

The trustee can delay the revesting of property by issuing an extension notice to the bankrupt extending the revesting period by up to three years at a time. The notice must be given to the bankrupt prior to the six-year expiry. There is no limit on how many extensions a trustee can make. Therefore, in theory, the trustee can keep extending the period indefinitely.

24. What is an annulment of bankruptcy?

Annulment is effectively the cancellation of bankruptcy.

It is a common misconception that once a person is bankrupt there is nothing more they can do about their financial position until they have been discharged. This is not true as annulment may be an option.

There are three ways a bankruptcy may be annulled:

(1) The bankrupt pays their debts in full, including interest, the realisations charge and the trustee's fees and expenses.

(2) The bankrupt's creditors accept a composition or arrangement, which is an offer of something less than payment in full.

(3) The bankrupt successfully applies to the Court for an order annulling the bankruptcy.

Consequences of annulment

- Assets not needed by the trustee to pay creditors, the realisations charge and the trustee's fees and expenses will be returned to the bankrupt.

- Secured creditors still have their rights under the security given, which may include the power to seize and sell if there is default.

- The bankrupt is still liable for the payment of debts that are not provable in bankruptcy.

- The bankrupt's name will appear on the NPII forever, with the record showing that the bankruptcy was annulled, and on a credit report available from a credit reporting agency for 2 years from the date of annulment, or 5 years from the date the person became bankrupt, whichever is later.

Composition or arrangement (Section 73 Proposal)

In our experience, the option bankrupts most commonly consider to get out of bankruptcy before the statutory three year period expires is a Section 73 proposal.

Compositions (the payment of money over some period of time) and Schemes of Arrangement (any other form of legal arrangement) can be used at any time during the bankruptcy period, and have occasionally been used by bankrupts after discharge.

24. What is an annulment of bankruptcy? (cont.)

Creditors decide whether to accept the proposal or not (special resolution). Generally creditors will entertain a proposal if they are going to receive a higher dividend than they would do through the continuation of the bankruptcy.

The aim is a win for both creditors and the bankrupt: creditors get a better return and the bankrupt is released from bankruptcy.

25. What are income contributions?

In 1992 provisions were introduced into the Bankruptcy Act making bankrupts with high incomes liable to pay contributions to their trustee for the period of their bankruptcy.

Put simply **– a bankrupt must pay to the trustee one-half (50%) of their after-tax income that is over and above a certain threshold.**

This contribution is a debt due to the trustee that survives discharge, and the bankrupt may be re-bankrupted if the contribution is not paid.

As you can imagine, there are various 'rules' regarding the calculation of a bankrupt's compulsory income contribution liability.

Income

'Income' under the provisions of the Bankruptcy Act is not the same as 'income' under the taxation Acts.

It includes wages, pensions and distributions but also includes:

- Loans from associated parties.
- Benefits* as defined under the Fringe Benefits Tax Assessment Act (there does not have to be an employee-employer relationship).
- Income or consideration received by another party as a result of work done by the bankrupt.
- Refunds of tax for post-bankruptcy periods.

* Examples of benefits include:

- An overseas trip paid for by someone else.
- The use of someone else's motor vehicle for little or no cost.
- Living rent free in a friend's residence.

Deductions from income

- Child support payments
- Maintenance payments made under Family Law orders
- Tax payments
- Business expenses (allowable tax deductions)

25. What are income contributions? (cont.)

Threshold

Income thresholds (after tax and deductions)

Number of dependants	Income Threshold* $
No dependants	54,736.50
1	64,589.07
2	69,515.36
3	72,252.18
4	73,346.91
5+	74,441.64

** Current amount – thresholds are indexed and updated every six months.*

Dependants

A dependant is someone who is living with the bankrupt and who is financially dependent on the bankrupt.

A dependant cannot earn more than a certain amount (currently $3,514) and still be classed as a dependant for the purpose of determining the threshold.

Hardship variations

There are specific hardship provisions in the Bankruptcy Act which are limited to exceptional circumstances that would impose an excessive financial burden.

The list of what constitutes "hardship" for the purposes of the Bankruptcy Act is specific, and a trustee does not have discretion to grant hardship for expenses that are not listed in the Bankruptcy Act.

The exceptional circumstances are:

- ongoing medical expenses
- costs of child day care essential for work
- particularly high rent when there are no alternatives available
- substantial expenses of travelling to and from work
- loss of financial contribution, usually by a spouse, to the costs of maintaining a household.

26. What options are available for an individual experiencing financial difficulty?

Speak to someone.

Preferably a professional advisor: accountant, lawyer, financial counsellor, community legal centre or registered trustee.

Every person's situation is unique and different.

A debtor must be realistic about their current and expected future situation, and look at all options before making a final decision.

Options

A. Informal

(i) Proper budgeting and control of financial resources.

(ii) Negotiate with creditors, to arrange manageable payment terms or acceptance of a smaller payment to settle a debt.

B. Formal

(i) Interim (21-day) relief

The suspension of creditor enforcement by presenting a declaration of intention (DOI) to present a debtor's petition. This provides the debtor with temporary relief for up to 21 days to seek help and to consider the options. A DOI is not recorded on the NPII.

(ii) Bankruptcy

(iii) Personal insolvency agreements (PIAs)

(iv) Debt agreements

Unsecured debts, assets and after-tax income must be under certain limits to propose a debt agreement (currently $109,473 for debts and assets, $82,104.75 for after tax income).

27. Winding up corporate trustees and trusts

Insolvencies involving corporate trustees are not new.

The tax advantages of trusts in Australia have led them to proliferate. According to the Australian Bureau of Statistics[①] there are 478,951 businesses trading under a corporate trustee structure in Australia.

Historically, insolvency practitioners paid little, if any, attention to the distinction between a company and a trustee company and would generally sell the assets of the trustee company (under the right of indemnity) and deal with the proceeds as if it were a normal company.

However, the development of trusts law has not kept pace with insolvency law and the Corporations Act, primarily because the relevant areas of trust law involve the common law or state based legislation that has not been updated regarding insolvency for a long time. For example, the entire priorities section of the Corporations Act has no equivalent in trusts law.

In recent years, decisions from various cases have been touching on the distinctions between winding up a trustee company and an ordinary "normal" company. The general trend has been towards increased court supervision and legal expense. While the trend has made the task for insolvency practitioners of winding up trustee companies progressively difficult and fraught, it had been nevertheless manageable.

However, if the recent decision of Justice Brereton in *Independent Contractor*[②] is to be followed, it now appears that there would effectively be a very different insolvency regime that applies when dealing with trusts.

Issues

The following is a very brief summary of the principal issues:

1. Ability to sell assets

There are opposing court views on a liquidator's ability to sell trust assets without a court application (*Kitay*[③] and *Re Stansfield*[④]).

① *8165.0 Counts of Australian Businesses, including Entries and Exits, June 2011 to June 2015 Australian Bureau of Statistics 26/2/2016.*
② *In the matter of Independent Contractor Services (Aust) Pty Limited ACN 119 186 971 (In Liq) (No 2) [2016] NSWSC 106*
③ *Kitay, in the matter of South West Kitchens (WA) Pty Ltd [2014] FCA 670.*
④ *Re Stansfield DIY Wealth Pty Ltd (in liq) [2014] NSWSC 1484.*

27. Winding up corporate trustees and trusts (cont.)

2. Insolvency Practitioner's remuneration

- The practitioner dealing with trust assets can claim only for the work involved in dealing with the trust. If there are no other assets available from the company, then other work in the winding up that cannot be categorised as administering the trust cannot be recovered from the trust. With a normal company, the practitioner would be entitled to charge for all work done, subject to creditor approval and sufficient assets.

- Fee approval is to be made by the court and not creditors.

- The courts are increasingly using a percentage of asset realisations as a basis for charging, which in a substantial number of administrations (particularly, smaller administrations) results in the amount approved by the court being less than the costs accrued and that which would have previously been approved by creditors.

- Substantial legal costs of the practitioner's application for approval of costs.

Independent Contractor

Liquidator's total costs	$115,146
Fees the Liquidator sought approval for in dealing with trust assets	$49,510
Fees approved by the court	$30,000
Liquidator's recovery of total costs	26%
Liquidator's fees written off	$85,146
Liquidator's legal costs of the application	$72,179

i.e. The legal costs incurred were not far off the fees the Liquidator had to write off.

27. Winding up corporate trustees and trusts (cont.)

3. Section 556 priorities of the Corporations Act

For the first time in *Independent Contractor* it was held that the Corporations Act S.556 priorities do not apply i.e. all creditors share in any distribution from the trust on a pari passu (equal) basis:

- The petitioning creditor is apparently not entitled to be reimbursed for their reasonable costs of obtaining a winding up order.

- Employees will not receive any priority for their entitlements (a significant issue for the FEG scheme).

4. Secured creditors

Secured creditors' position appears to be enhanced in the insolvency of a trustee company:

(i) Employee entitlements may not have to be paid ahead of the secured creditor from any circulating assets (S.561 of the Corporations Act).

(ii) A receiver would not need to go to court to have their remuneration approved.

Effect of the new developments

In summary, the outcome for the insolvency practitioner and creditors, if *Independent Contractor* is followed, is often likely to be completely different in the winding up of a business in a trust structure than if it were simply a company under the Corporations Act. It is only the trust structure that causes the significantly different outcome.

For the liquidation of a trust company:

- the process is less efficient
- the practitioner must make more court appearances
- dividends to creditors are distributed quite differently than when governed by the Corporations Act
- insolvency practitioners are remunerated far less, despite the extra costs and expenses incurred.

28. Migrated security interests

The two-year transitional period under the PPSA ended on 31 January 2014.

This transitional period gave parties a two-year grace period to register interests created prior to the commencement of the PPSA that are considered security interests under the PPSA but which were not registrable under prior law, termed "transitional security interests".

Transitional security interests also include security interests that were automatically migrated from pre-PPSA registers (e.g. the ASIC Register of Company Charges or the Vehicle Securities Register) onto the PPSR.

This automatic migration of security interests was not seamless. Certain registrations were migrated with data that did not conform with the data required by the PPSA (although the data was adequate for the previous legislation).

In anticipation of such defects, the registrar of the PPSR made a determination to ensure that these registrations remained effective temporarily despite a defect *(Personal Property Securities (Migrated Security Interest and Effective Registration) Determination 2011)*.

This temporary period of effectiveness allows secured parties time to amend migrated registrations so that the data contained in the registrations conforms with the PPSA's requirements. If a registration was valid on a previous register and it was migrated across to the PPSR, any defects under the PPSA caused by the migration did not render the migrated registration ineffective.

Importantly, this protection no longer applies after 31 January 2017.

On the migration of the security interests, all migrated registrations were given an end date of either their "registration end time" in their previous registration, or 31 January 2017, whichever is earlier.

In summary, any old forgotten security interests that were subject to the migration and have unrectified defects will cease to be effective after 31 January 2017.

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