



Law Council  
OF AUSTRALIA

*Business Law Section*

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The Senate  
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Canberra ACT 2600  
**Via email: [financeminister@finance.gov.au](mailto:financeminister@finance.gov.au)**

26 March 2014

Dear Assistant Treasurer,

**Submission in relation to the case of *Vickers, in the matter of Challenge Australia Dairy Pty Ltd (Admin Apptd) (Rec & Mgrs Apptd)* [2011] FCA 10 and s 433 Corporations Act 2001 (Cth)**

**Introduction**

- 1 This Submission is made by the Insolvency & Reconstruction Law Committee of the Business Law Section of the Law Council of Australia (“the **Committee**”) and with the support of the Section’s Corporations Committee.

**Summary**

- 2 The combined operation of ss 558(1) and 433 of the *Corporations Act 2001* (Cth) (“the Act”) is to give a priority status to the payment of leave and other entitlements in circumstances of a company’s winding up. The decision in *Vickers* stands for the principle that this priority does not extend to the employees of a company in receivership. Subsequently, this has been followed in *White v Norman; Re Forest Enterprises Australia Ltd (recs & mgrs apptd) (in administration)* [2012] FCA 33 (2012) 199 FCR 488; and *Re Great Southern Ltd (recs & mgrs apptd) (in liq); Ex parte Thackray* [2012] WASC 59 (2012) 260 FLR 362.
- 3 The Committee is of the view that this position is undesirable as a matter of policy, in the sense that the potential for detriment to employees (through non-payment of entitlements in subsequent winding-up) outweighs contrary considerations.
- 4 The Committee therefore recommends that the deeming provision in s 558(1) be broadened to include receiverships.

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## **The Facts in Vickers**

- 5 The case of *Vickers, in the matter of Challenge Australia Dairy Pty Ltd (Admin Apptd) (Rec and Mgrs Apptd)* [2011] FCA 10 (2011) 190 FCR 569 was decided by Barker J in the Federal Court of Australia on 13 January 2011.
- 6 The applicants were appointed as receivers and managers of a dairy company (Challenge Australian Dairy: 'the company') immediately after the second defendants, the administrators, were appointed on 28 October 2010. CAD carried on dairy facilities at Boyanup and Capel, WA.
- 7 The receivers were appointed pursuant to a debenture dated 1 November 2006 granting the National Australia Bank ('NAB') a fixed and floating charge over the undertaking of the company and all its assets, both present and future.
- 8 On 4 November 2010, the receivers put the Capel dairy on care and maintenance which resulted in the steady decline of employees through retrenchment, resignation, or relocation to the Boyanup dairy. On 2 December 2010, the receivers were advised that the company's principal supplier would no longer be able to supply milk, which resulted in further retrenchments.
- 9 Employees that were retrenched were paid a retrenchment payment in accordance with section 433 of the Corporations Act 2001 (Cth) ('the Act'), but were not paid entitlements in respect of any annual leave or long service leave that had not become 'due' on the date of the receivers' appointment. Nor were the employees paid superannuation or annual leave or long service leave entitlements falling 'due' after the date of the receivers' appointment.
- 10 The receivers applied to the Court for a determination as to whether the entitlements of employees not paid were in fact required to be paid pursuant to section 433 of the *Corporations Act 2001* (Cth) ('the Act') in priority to the NAB's debt, and whether receivers are personally liable pursuant to section 419 of the Act to make those payments (in which case, the receivers would seek indemnification from company).
- 11 If the receivers were obliged to pay the particular entitlements (amounting to about \$660,000), they would need to realise more assets before they could satisfy the NAB's debt and retire.

## **The Legislation**

- 12 Section 433 of the Act deals with payment of certain debts out of property the subject of a floating charge in priority to claims under the charge.
- 13 Section 433(3)(c) provides that the receiver or other person taking possession or assuming control of property of the company must pay in priority to any claim for principal or interest in respect of the debenture any debt or amount that in a winding up is payable in priority to other unsecured debts pursuant to sections 566(1)(e), (g), or (h) or 560.
- 14 Section 433(9) provides that the 'relevant date' in this context is the date of the appointment of the receiver or possession being taken or control being assumed as the case may be.

- 15 Section 566(1)(e) gives priority to 'wages, superannuation contributions, and superannuation guarantee charge payable by the company in respect of services rendered before the relevant date'. Paragraph (g) of that subsection gives priority to all amounts due on or before the relevant date because of an industrial instrument to employees of the company and in respect of leave of absence.
- 16 In light of these sections, the receivers contended that only entitlements that were due and payable as at the relevant date (of appointment) should be accorded statutory priority.
- 17 The receivers further contended, following *Love v The Image Centre Pty Ltd* (1991) 33 AILR 406 ('*Love*') and *Whitton v ACN 003 266 886 Pty Ltd* (1996) 42 NSWLR 123 ('*Whitton*') that leave of absence payments become due either when leave of absence is in fact taken, or when employees become entitled to a sum of money as payment in lieu.
- 18 Section 558(1) provides that where a contract of employment with a company 'being wound up' was subsisting immediately before the relevant date, the employee under the contract is entitled to payment under section 556 as if his or her services had been terminated by the company on the relevant date.

### **Conflicting Authority & Decision in Vickers**

- 19 The receivers in this case sought a determination in part due to seemingly conflicting authority. De Jersey CJ held in *Re Office-Co Furniture Pty Ltd* [1999] QSC 63; [2000] 2 Qd R 49 ('*Office-Co*'), that the earlier decisions of *Love* and *Whitton* were distinguishable on the basis that neither had adverted to the significance of section 558. The Chief Justice held (at 2 Qd R 49 at 53) that section 558 applied in relation to receivership in the context of section 556, and therefore operated to deem entitlements payable for the purposes of section 433.
- 20 On the other hand, while Finkelstein J agreed in *McEvoy v Incat Tasmania Pty Ltd* [2003] FCA 810; (2003) 130 FCR 503 ('*McEvoy*') that *Love* and *Whitton* were properly distinguished in *Office-Co*, he nonetheless declined to follow *Office-Co* on the basis of the effect of receivership on the contractual relationship, and the apparent differences between receivership and liquidation. Finkelstein J noted that the appointment of a receiver by the court generally terminates the contract of employment, whereas this does not follow from a privately appointed receiver who is the company's agent. His Honour observed that the external/voluntary dichotomy also exists in windings up.
- 21 The ultimate question in *McEvoy* was whether the phrase 'any debt or amount that in a winding up is payable in priority to other unsecured debts' refers only to those 'debts and claims' mentioned in section 556(1), or whether it refers to the 'debts and claims' as expanded when necessary by the deeming provision in section 558(1). Finkelstein J ultimately held that the answer to this question is to be derived from legislative history, which persuaded him that the only purpose for section 558(1) was to ensure that employees would not in a winding-up lose priority for annual and long service leave which was still accruing but had not yet fallen due.
- 22 His Honour could discern no intention to confer the same benefits on employees of a company in receivership, whose employment may survive the receivership, and

therefore were less likely to suffer in the same way as an employee whose company was unable to pay its debts in full.

- 23 Barker J followed this in *Vickers*, holding that Parliament did not ‘apply its legislative mind to the circumstances of receivership.’ Accordingly, it was held that section 433 of the Act did not oblige the receivers to pay unaccrued annual or long service leave entitlements to employees who remained employees after the appointment of receivers.
- 24 Similarly, section 433 was held not to oblige the plaintiffs to make payments under section 556(1)(e) of the Act in respect of superannuation contributions and guarantee charges which became due and payable during the appointment as receivers.
- 25 Accordingly, it was held that the receivers were not personally liable under section 419 to pay those sums to employees in respect of whom the entitlements accrue but do not become due and payable, or indeed to in respect of whom entitlements become due and payable during the course of the receivership.
- 26 In short, the reasoning of Barker J in *Vickers* and Finkelstein J in *McEvoy* was that the deeming provision, section 558(1), was intended to apply only to employees in a winding up, for these reasons:
- a. Employees of a company being wound up may have had their contracts terminated by reason of entrance into liquidation; and
  - b. Liquidation usually spells the death of the company and therefore results, in most cases, in the dismissal of all remaining employees of the company; and
  - c. These statements are not always applicable to receiverships.
- 27 Finkelstein J in *McEvoy* considered from [8] to [16] the effect and intent of legislative amendment to the relevant sections. He concluded at [26] (with emphasis added) that:
- ...the intent of Parliament was to ensure that employees would not in a winding up lose priority for annual and long service leave which was still accruing but had not yet fallen due at the commencement of the winding up. In the absence of amending legislation (and the introduction of the deeming provision), the employees whose employment was about to come to an end as a result of the winding up would be disadvantaged when compared with employees whose rights had accrued as they would miss out on benefits which they were intended to be given. *I can discern no intention that the same benefit should be given to employees of a company in receivership, whose employment may survive the receivership. It could not be said that they would suffer in the same way as an employee whose company was unable to pay its debts in full.*

- 28 It was this approach that was preferred in *Vickers* at the expense of the possibly more practical approach of de Jersey CJ in *Office-Co*.
- 29 Since, the reasoning of Barker J in *Vickers* and of Finkelstein J in *McEvoy* has been preferred to that of de Jersey CJ in *Office-Co* in two cases: *White v Norman; Re Forest Enterprises Australia Ltd (recs & mgrs apptd) (in administration)* [2012] FCA 33 at [99] per Besanko J; and *Re Great Southern Ltd (recs & mgrs apptd) (in liq); Ex parte Thackray* [2012] WASC 59 at [12] per Master Sanderson.
- 30 The plaintiff in *White* was an officer but not a director of the company Forest Enterprises Australia Ltd. Principally, the question was whether remuneration benefits were prohibited by Div 2 of Pt 2D.2 of the *Corporations Act 2001* (Cth). The question also arose, however (at [87]):

*Are any amounts payable to Mr White by FEA amounts in respect of leave of absence which were not due on or before the "relevant date" in respect of FEA and are therefore not entitled to any priority under s 433 and 556 of the Act, and if so, what amounts?*

- 31 The plaintiff White argued that s 433(3)(c) should be interpreted as incorporating the deeming provision in s 558(1); the defendants contended to the contrary. This squarely gave rise to exactly the issue that was before Barker J in *Vickers*.
- 32 Besanko J ultimately followed the same course as Barker J: his Honour referred to the judgment of de Jersey CJ in *Office-Co*, before adopting the construction of Finkelstein J in *McEvoy* for the reasons given by his Honour in that case. The reasons given by Finkelstein J in that case were, again, that receivership is distinguishable from winding-up, and that the legislative history disclosed that Parliament's focus was on winding-up. A submission that Finkelstein J had misunderstood the legislative history was (at [96]) not accepted.
- 33 In *Thackray*, Master Sanderson also followed Finkelstein J in concluding that sections 433 and 561 are complementary (at [29]). In that case, administrators were appointed, then receivers, and then the administration transitioned to a winding-up. The liquidators argued that, by reason that the winding-up was taken to have commenced as at the date of the appointment of administrators per s 513B, s 561 was applicable and s 433 was not. The plaintiffs submitted to the contrary. Master Sanderson accepted (at [28]) the submissions of the plaintiffs:

*On balance, I am satisfied that both sections operate. In my view, s 433 operates as at the date of the appointment of the receiver and there is no warrant in the section for suggesting it would cease to act.*

*Equally, the terms of s 562 [sic: 561] are clear. Once a resolution is taken by the creditors to wind up the company, then s 561 applies. Any receiver who is appointed after an administrator will need to be mindful of the prospect of the company being wound up and s 561 applying.*

34 In relation particularly to the *Vickers* issue, Master Sanderson said as follows at [12]:

*What is important is employees whose employment is brought to an end following the commencement of a receivership, do not, by s 433 obtain any priority for accrued leave entitlement.*

35 The Master set out the effect of his finding at [25] and [26]. Receivers appointed in circumstances where administrators have already been appointed must pay out the debts and claims within s 433 (not including the annual leave and long service entitlements in keeping with *Vickers* and *McEvoy*). They must also hold sufficient floating charge assets on trust (pending resolution of the s 561 free asset question) to meet the additional payments that would be required under s 556(1) based on the s 558 deeming provision, for the event that the administration transitions to a winding-up.

### **Competing Policies**

36 Why would Parliament intend to confer a particular advantage or benefit through the section 558(1) deeming provision on employees of a company that is to be liquidated, but not on employees of a company that is in receivership?

37 On this question, Finkelstein J said in *McEvoy* as follows at [24] -[25]:

*[t]here is something to be said in favour of a construction that results in the equality of treatment of employees in a winding up and in a receivership. ... Yet there are many respects in which a receivership is unlike a liquidation. ... Receiverships...do not affect the existence of the company. Second it is often in the interests of the charge that the company continue in business. To that end, staff are kept on and are often unaffected by the receivership. In those cases, a construction which places employees of a company in receivership on the same footing as employees of a company which has been wound up will operate in a discriminatory fashion, as the former employees will both keep their jobs and be paid out as if they had lost them.*

38 While it is true that receivership does not *always* 'spell the death' of the company, it very frequently does (as de Jersey CJ in *Office-Co* and Barker J in *Vickers* noted). In these circumstances, employees do not have the benefit of the priority conferred and deemed by section 558(1) notwithstanding that they are, in practice, in the same position as employees of a company that is liquidated.

39 In favour of maintaining the distinction, policy considerations are as follows:

- a. If employees of a company in receivership have the relevant entitlements paid out in priority to the payment of the debenture-holder, this can potentially be deleterious to the enterprise as a whole. More assets will be required to be liquidated by the receivers in order to satisfy both the entitlements and then, subsequently, the interest of the security-holder. There is an increased risk that the company will fail.

- b. Moreover, if indeed the employees are retained and the company continues in existence following receivership, then as Finkelstein J notes at [25], ‘former employees will both keep their jobs and be paid out as if they had lost them’.

40 Against maintaining the distinction, policy considerations are as follows:

- a. If employees of a company in receivership do not have relevant entitlements paid in priority, and it turns out that receivership is terminal for the company, then those employees may be disadvantaged by the inability to rely on the deeming provision of section 558(1) in conditions that are not materially, in a practical sense, different from employees of a company that has been wound up.
- b. The risk of not allowing employees of a company in receivership priority payment of their entitlements is that the company thereafter is wound up in circumstances where the receivership is sufficiently costly that those entitlements cannot fully be paid in the winding-up.
- c. A secondary consideration is that removing the distinction would alleviate to some degree the practical difficulty for receivers that arose in *Thackray*. In that case, receivers had to pay (per s 433) those s 556(1) entitlements that were “due” and hold others’ 556(1) entitlements that were not “due” on trust by reason of a pre-existing administration. Application of the s 558(1) deeming provision to the case of a receivership would render uniform the payments required by ss 433 and 561, therefore obviating the need to hold any monies on trust.

### **The Committee’s Suggested Reform**

- 41 The Committee is of the view that the risk of non-payment of employee entitlement in winding up following receivership outweighs the risk that the requirement for the receivers to realise a greater sum of money in receivership (to meet both entitlements and the secured creditor’s payout amount) will lead to that company’s insolvency in circumstances where, absent payment of employee entitlements in the receivership, the company might have survived.
- 42 The Committee does not view the consideration that employees would—if the company survived—retain their jobs but have their leave entitlements paid out as though they had not retained their jobs as weighing significantly against amendment. Though this may result in a circumstance where an employee receives money rather than leave in circumstances where the employee would have preferred (or indeed have been entitled to) leave, this consideration is, in the Committee’s view, outweighed by the risk that the employee will receive neither money nor leave in a winding-up following receivership.
- 43 Ultimately, the Committee considers that the increased risk of non-payment of employee entitlements in a winding-up following a receivership is the most important consideration.
- 44 Accordingly, the Committee recommends amendment of the current legislative position that employees of companies in receivership are distinguished from

employees of companies that are being wound up. This recognises that receiverships are frequently harbingers of impending insolvency and winding up, and that to dichotomise receiverships and windings up is in many cases to draw something of a false distinction. As this false distinction has the potential to operate greatly to the detriment of employees in situations where the receivership effectively exhausts the subject company's assets, leaving insufficient assets to meet entitlements in subsequent liquidation, there is little justification, in the Committee's view, for maintaining the distinction.

- 45 This recommendation is made in the absence of detailed empirical evidence. If the evidence were to demonstrate that a significant percentage of companies that go into receivership are subsequently wound up, that would provide empirical support for what is in any event—in the Committee's view—the preferable policy position. *A fortiori* if in these circumstances it has been the case that employee entitlements have on occasion gone unpaid.
- 46 Though this cannot necessarily be quantified, some examination of the question as to whether, and to what extent, paying employee entitlements in receiverships would increase the extent to which those companies are subsequently wound up, would also be useful.

#### Contact details

- 47 If you have any questions regarding this submission, in the first instance please contact the Committee Chair, Michael Lhuede, by phone on 03-8665 5506 or via email: [mlhuede@piperalderman.com.au](mailto:mlhuede@piperalderman.com.au)

Yours faithfully,

A handwritten signature in black ink, appearing to read 'John Keeves', with a long horizontal stroke extending to the right.

John Keeves  
**Chairman, Business Law Section**