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Australia's External Administrators Afforded Significant Latitude under IPS 90-15

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The Insolvency Practice Schedule (Corporations) (Practice Schedule) was introduced in 2015 via the Insolvency Law Reform Bill 2015. The Practice Schedule was introduced together with the Insolvency Practice Schedule (Bankruptcy) with the intention of providing specific rules to aid in the handling of personal bankruptcies and corporate external administration.

The Practice Schedule implemented many provisions, one key provision being s90-15, which empowered the court to make directions concerning the external administration of a company. The scope of the power was, and remains, expansive, such that it allows the court to "make such orders as it thinks fit in relation to the external administration of a company". "External administration" includes, without limitation, a corporation that is under administration, subject to a deed of company arrangement, or liquidation.[1] External administrators have standing to bring an application under s90-15(1) of the Practice Schedule by virtue of having a "financial interest" in the external administration of a relevant company and/or being "officers" of the companies.[2]

S90-15 of the Practice Schedule replaced the former power under the repealed s447D of the Corporations Act. S447D was limited and constrained the court with power to give "directions about a matter arising in connection with the performance or exercise of any of the administrator's functions and powers". Since the introduction of the Practice Schedule, the courts have accepted that s90-15 "permits the courts to take a broader view of their power to determine substantive rights and is probably more extensive than the powers formerly available to the court under ss479(3) and 511 of the Corporations Act".[3]

While there was no indication in the explanatory memorandum that s90-15 would be of wider or broader scope and power, the expansive power conferred upon the court is inherent and clear from the terms of the provision. S90-15(4) of the Practice Schedule contains a non-exhaustive list of matters the court may consider in exercising the discretion under s90-15(1). It is evident from the wording associated with the section that the legislature intended for the provision to be unconstrained and have a broad scope and application.

This is evident in the judicial interpretation and consideration of the section. In particular, the words "in relation to" have received expansive judicial consideration, including that the expression is wide and that it should not be read down without compelling reason.[4]

Limitations on Application

The court has accepted that, although the power conferred under s90-15 of the Practice Schedule is wide, and allows for the determination of substantive rights, the court would not, or should not, exercise its jurisdiction without affording potentially affected parties an opportunity to be heard.[5]

External administrators must be cognisant of the potential parties that may be affected by the potential relief sought and ensure appropriate notice of the application and subsequent orders is given to those third parties. With the varying scope of potentially impacted or interested third parties relative to the specific context of each estate, particularly in the growing cryptocurrency market, external administrators must be flexible in their approach and ensure sufficient consideration is given to potentially impacted third parties, to ensure their interests are not intentionally or inadvertently defeated or curtailed.

Many applications brought under s90-15 of the Practice Schedule are brought on an expedited ex parte basis; however, external administrators must ensure sufficient notice is provided to impacted third parties, including obtaining appropriate orders concerning notice, if necessary. While the terms of s90-15 are very favourable to external administrators and generally assist in the timely management of estates and resolution of contentious matters, the statutory latitude afforded comes with statutory and equitable obligations.

1 S5-15 IPSC.

2 ss5-30, 90-20 IPSC; s 9 Corporations Act 2001 (Cth) (Corporations Act).

3 *Re Australian Property Custodian Holdings Ltd (in liq)* [2021] VSC 51 at [35], Sloss J

4 *Law Society of NSW v Bruce & Ors* (1996) 40 NSWLR 77 at 84 cited in *Frigger v Mervyn Jonathan Kitay as liquidator of Computer Accounting & Tax Pty Ltd* [2022] WASC 347 at [38].

5 *Re Hawden Property Group Pty Ltd (in liq)* [2018] NSWSC 481 at [8], Gleeson JA

The Outlook for External Administrators

The overarching purpose of s90-15 is directed at achieving an outcome most beneficial to the external administration and creditors, including in the most cost effective and efficient way. The power and scope of s90-15 of the Practice Schedule remains relatively unconstrained for the time being. It has not yet been judicially refined or qualified to any significant degree. That ultimately means while the economic uncertainty continues in some sectors, external administrators can take some comfort from knowing that there is a broad range of potential applications that may be brought under s90-15. Those application could seek relief in the form of declarations, orders or perhaps even judicial advice.

The anticipated increase in insolvencies may give rise to an increased use of, and reliance on, the power of the court to provide different forms of relief for external administrators.

This is expected to particularly be the case in sectors or commercial contexts where there are new and novel situations that external administrators are faced with, such as the cryptocurrency market, where the uncertainty levels have been increased this quarter. External administrators cognisant of their duties and obligations may even require direction on matters as simple as issuing circulars or notice to creditors in circumstances where the potential creditor pool cannot be identified. On the other end of the spectrum, they may require direction and declarations when dealing with virtual currencies, undefined or unregulated legal structures in the fintech space, or stakeholder interests traversing multiple unique jurisdictions.

Prudent external administrators should continue to rely upon the expansive power and scope of s90-15 of the Practice Schedule to obtain guidance from the court, or to have their actions or inactions justified and sanctioned by the court, either retrospectively or prospectively. Failing, or delaying, to take those steps may not only invite, or cause, jeopardy for external administrators personally, but it may also have detrimental implications for the transactions they seek to complete or the estates they seek to administer.

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