

## Episode 44: Summary



**Episode name:** Special purpose liquidators

**Guest(s):** Stephen Parbery

**What area(s) of law does this episode consider?**

Special purpose liquidators (SPLs) appointed under the *Corporations Act 2001* (Cth) Schedule 2 Section 90-15 of the Insolvency Practice Schedule.

**Why is this topic relevant?**

Special purpose liquidators are a rare type of insolvency appointment that are commenced by order of the Court under s 90-15 of the Insolvency Practice Schedule. Special purpose liquidators carry out a specific task that's not appropriate for the general purpose liquidators to do so themselves. Usually, a special purpose liquidator steps in when there is a conflict of interest that prevents the general purpose liquidator from fulfilling a certain task, such as pursuing litigation against a person that they owe a duty towards.

Legal professionals involved in, or interested in, the insolvency space should be aware of the role and function of a special purpose liquidator to enhance their understanding of the insolvency process.

**What legislation is considered in this episode?**

*Corporations Act 2001* (Cth) ('*Corporations Act*')

*Fair Entitlements Guarantee Act 2012* (Cth)

**What cases are considered in this episode?**

*Queensland Nickel Pty Ltd (in liq) v QNI Metals Ltd & Ors* [2021] QCA 138

- The series of cases emerging from the case of Queensland Nickel involved three parties engaged in a joint venture agreement for the operation of a nickel plant in Townsville, Queensland. Queensland Nickel went into voluntary administration and disputes subsequently arose between the parties due to the impending liquidation. The Commonwealth Government under the Fair Entitlements Guarantee (FEG) scheme became a major creditor of the company (with claims amounting to \$66 million, the largest FEG payout ever at the time) and wanted to pursue claims against the joint venture partners without becoming involved in the disputes amongst themselves.

Stephen Parbery was appointed by the court as special purpose liquidator to represent the interests of the Commonwealth Government, as a creditor, to investigate their claims and enforce them against the joint venture partners. The matter concluded by a confidential settlement.

The case also sparked debate in the media about the legal personality of companies and the personal responsibility of the owners and directors of companies. Directors and shareholders of a company are ordinarily not liable for debts incurred, but Australian courts may hold them responsible i.e. 'pierce the corporate veil' if the case falls into one of the following categories: (a) agency; (b) fraud; (c) sham or façade; (d) unfairness/justice; and finally (e) group enterprise.

- The series of One Tel cases emerged following the 2001 corporate collapse of One Tel – a major Australian telecommunications company aimed towards young people. The company went into voluntary administration following significant losses in 2000, and later went into liquidation. ASIC commenced proceedings against its directors for failing to disclose company information.

Stephen Parbery was appointed as SPL in this matter because the major creditors of the company sought to replace the existing SPL. His engagement concluded via a settlement agreement.

### What are the main points?

- Special purpose liquidators are appointed by the court to carry out specific tasks in a liquidation where it is undesirable for the general purpose liquidator to complete them. It may be beneficial to appoint a special purpose liquidator where there are conflicts of interest that prevent an appointed liquidator conducting investigations or litigation, or where a particular creditor seeks to pursue a claim, or generally where the appointed liquidator is unwilling or unable to pursue that claim.
- Under the FEG scheme, when Commonwealth Government pays the employee entitlements which an insolvent company owes its employees, the Commonwealth becomes a creditor of the company and is subrogated to the rights of the employees - in other words, 'it stands in the shoes' of the employees for priority purposes - due to operation of s 560 of the *Corporations Act*.
- An SPL has similar powers to a general purpose liquidator in relation to collecting information about the company and can publicly examine officers of the company under s 596A of *Corporations Act*, seek an order to publicly examine other relevant people under s 596B of the *Corporations Act*, and obtain an order requiring a public examinee to produce documents before or at the public examination hearing, for example under Rule 30.35 of the Federal Court Rules.

### What are the practical takeaways?

- As an experienced litigator, Stephen suggests that before you commence any litigation, you should: 1) get good prospects advice from counsel, 2) quantify the loss, and 3) assess the ability of the defendant to pay.
- The specific tasks and role of a special purpose liquidator is set out in the terms of their appointment. Depending on the terms of the appointment, a key role of an SPL is to keep in mind the prospects of success and recoverability of the claim they are pursuing.
- Keeping options open for settlement and facilitating open dialogue between the parties during litigation is important. In any litigation matter there is a risk that the time, effort, legal fees and money spent funding a claim in the court may mean that the financial return of a successful claim is significantly reduced or completely outweighed, and a commercial settlement is one means by which to avoid this risk.