

## insolvency update

8 april 2008

### New South Wales Supreme Court decision gives some guidance on the operation of the new provisions in the Corporations Act dealing with the pooling of liquidations

In *Allen v Feather Products Pty Ltd* [2008] NSWSC 259 (**Allen**) Justice Barrett of the NSW Supreme Court recently had the opportunity to consider the new reforms dealing with the pooling of liquidations.

In *Allen*, the liquidator of 3 companies, Feather Products Pty Ltd, Snuggle Pty Ltd and Ilume Pty Ltd applied to the Court under section 579E(1) for an order determining that the companies form a “pooled group” such that:

- each company is taken to be jointly and severally liable for each debt payable by, and each claim against, each other company in the group;
- each debt payable by a company in the group to any other company in the group is extinguished; and
- each claim that a company in the group has against any other company in the group is extinguished.

Feather and Snuggle had both become subject to a creditors voluntary winding up on 16 November 2007. Ilume’s winding up was ordered by the court on 17 March 2008.

Justice Barrett was forced to find that, notwithstanding the merits of the liquidator’s application, an order for the pooling of the liquidations of the 3 companies was not allowed because the commencement of the winding up of Feather and Snuggle began before 31 December 2007. This is because pursuant to section 1480 (20) of the Corporations Act, section 579E(1)

applies in relation to a group of 2 or more companies only if the winding up of each company in the group begins on or after 31 December 2007.

Despite the ultimate finding, Justice Barrett’s written reasoning provides a good guide to the operation of section 579E.

For the Court to make a pooling order, the Court must be satisfied that:

- each company in the group is being wound up;
- one of the 4 subparagraphs in section 579E(1)(b) applies; and
- it is just and equitable for the Court to determine that the group is a pooled group.

In *Allen* the Court considered whether “one or more companies in the group own particular property that is or was used, or for use, by any or all of the companies in the group in connection with a business, a scheme, or an undertaking, carried on **jointly** by the companies in the group.”

Feather manufactured feather and down products and Snuggle marketed the finished products. Ilume employed the workforce, supplied services to Feather and Snuggle, and was responsible for payroll and workers compensation insurance. Justice Barrett found that it was sufficiently clear that “Feather, Snuggle and Ilume were parties to an arrangement under which each contributed part of what was required to carry on as a single business. Ilume provided human resources, Feather provided manufacturing facilities and Snuggle attended to the sale of the manufactured

product. The total business of manufacturing and selling feather and down products was carried on by them jointly. And those of them that owned relevant physical property caused it to be used in the joint enterprise.” It was held that subparagraph (iv) of section 579E(1)(b) applied.

Justice Barrett also remarked that the “just and equitable” criterion might have been found to be

satisfied in the case before him because it appeared that the employees who worked in the jointly operated enterprise, being creditors of Ilume alone, were left in a much worse position than the creditors of Feather and Snuggle. The creditors of Feather and Snuggle were likely to receive 100 cents in the dollar, and a surplus was likely to accrue to the shareholders of Feather.

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