**Submission to “Reforms to address corporate misuse of the Fair Entitlements Guarantee scheme” Consultation Paper May 2017**

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As a senior insolvency academic with a research interest in this are for over 20 years and with three publications[[1]](#footnote-1) specifically on this topic I am grateful for the opportunity to make a submission.

I commend the government for wanting to address the ‘sharp corporate practices’ that have seen claims on the scheme dramatically increase and their expressed desire to “ensure that employers take more responsibility” in this area. Even though Australia has had thirty years of growth there is a concern that a recession would see the costs and operation become unworkable and so it is prudent to address the FEG shortcomings in a time of relative calm.

It is important to acknowledge as the consultation paper does that “there have been no successful criminal or civil court actions under the provisions” of Part 5.8A. This was my prediction when Part 5.8A was introduced see Symes; “Will there ever be a prosecution under Part 5.8A?” (2002) 3(1) *Insolvency Law Bulletin* 17; and further developed in Symes, “A New Statutory Directors’ Duty for Australia – A ‘Duty’ to be Concerned about Employee Entitlements in the Insolvent Corporation” (2003) 12 *International Insolvency Review* 133-154.

Option 1

I support the change away from intention to recklessness and agree with the interpretation the Paper puts on its meaning. Further I support the increase of penalty so that the behaviour is on par with insider trading as the most serious of offences under the Corporations Law as provided in the Corporations Act 2001 (Cth). Given it is directors who will be likely to be charged this change does go beyond s184 and s588G(3) criminal offence provisions that presently apply to directors for reckless breaches of directors duties and insolvent trading. I do not feel the FEG sharp practices are necessarily more serious but perhaps those amounts should be increased. Whilst on these existing criminal provisions there are few instances of these provisions being used against directors and so is there a danger that by merely tweaking the criminal aspects of Part 5.8A, little will change if prosecutions are not taken. I am not sure why this is a problem perhaps it is reluctance by ASIC, perhaps difficulty in compiling evidence, perhaps the ‘blindness’ of liquidators and others who have access to the behaviour inside the company. What it does suggest though is that the problem now attempting to be fixed cannot be one of simply upping the Schedule 3 penalties.

Option 2A

The introduction of a reasonable person test would seem a worthwhile development. Given that directors all already tested against such a standard now as to the duty of care in s180 it would not be just the “long established common law principles” as the Consultation Paper argues but the parallel statutory provisions that would guide this development. Whilst there is an element of ‘looseness’ about testing the behaviour against the ‘person on the Bondi tram’ such a change could mean that external administrators have room to negotiate with directors in the same way that happens now with insolvent trading matters. Directors faced with a strong argument that a reasonable person would not have behaved as they did may be more willing to settle matters. If option @A is to be implemented consideration should be given to empowering external administrators to be involved.

Option 2B

A focus on ‘transactions’ is already present in the uncommercial transactions provisions in Part 5.7B and in particular s588FB is relatively useful and successful. Combined with this wording is the jurisprudence on ‘transactions’ from this provision and so whilst “specific statutory guidelines” as promised could be helpful to any new provision in Part 5.8A it would be possible to transplant some of this early understanding.

Option 3

I unreservedly agree that a wider range of parties needs to be given standing to initiate civil recovery actions in this area. As the Department of Employment FEG has promoted themselves as an ‘active creditor’ it seems only appropriate to permit them to carry through with their investigations. Perhaps the legislation could reflect this wider range by using ‘interested parties’ and then defining the phrase in the Regulations.

Option 4

I support the idea of a redraft to take into account the recognised compliance issues and sharp corporate practices. As there have been no cases on the existing Part 5.8A the ‘slate is still clean’ so to speak although careful drafting of new provisions would still be needed to deter certain behaviour, compensate and penalise.

Options 5-6

No comment.

Option 7

It would be helpful to assist the present interpretation of s556 although the law should continue to recognise the trust and that trust assets are not company assets.

Section 556 as it presently stands need to be overhauled in a number of ways not just to improve the treatment of trust assets. It may be best left until there is a major overhaul of all insolvency as to adjust s556 at this time seems very piecemeal.

Option 8

I support the proposal to amend the key provisions and adjusting around the word ‘debentures’. Recently reforms of these provisions were considered by me and a colleague, Lewis Gentry in the *Insolvency Law Journal.*  I now draw your attention to the following excerpts from this published paper.

***The ‘deeming provision’ – Section 558(1)***

Section 558 of the Act provides that where a contract of employment with a company ‘being wound up’ was subsisting immediately before the ‘relevant date’, the employee is ‘entitled to payment under s  556 of the Act *as if* his or her services with the company had been terminated by the company on the relevant date’ [emphasis added].[[2]](#footnote-2) In the context of liquidation ‘relevant date’ is that on which a winding up is deemed to begin,[[3]](#footnote-3) and in the case of receivership the relevant date is the date of the appointment of the receiver.[[4]](#footnote-4)

The term ‘as if’ in s 558(1) has been observed to be a ‘deeming device’ used to create a statutory fiction.[[5]](#footnote-5) Thus, pursuant to s 558 (or ‘*the deeming provision*’), even if employees have not been expressly terminated, or amounts have not otherwise crystallised into a payable sum, the employee will be deemed to have been terminated for the purpose of calculating their entitlements. If applicable, this ‘deemed’ termination crystallises accrued leave into a legal debt, allowing such amounts to be prioritised in favour of the employee from circulating assets ahead of any secured creditor.

***Does the deeming provision apply in receivership?***

Despite the apparent convenience and intent of s 558 in ensuring entitlements such as accrued leave are prioritised in insolvency, thereby ‘filling the gap’ left by the other legislative provisions, the question of whether Parliament intended for employees in receivership to have the benefit of this provision remains the subject of inconsistent judgments.

It has been described as ‘heroic’ to interpret s 558 as intending to apply to receivership.[[6]](#footnote-6) Such a description is perhaps aided by the express reference to a ‘company being wound up’ in s 558 itself. However, if the courts found that Parliament did intend for s 558 to apply to receiverships, accrued leave entitlements would be prioritised in favour of employees. This was the interpretation favoured by the Supreme Court of Queensland in the first of a line of authorities to consider the application of the deeming provision.[[7]](#footnote-7)

***Deeming provision applied in receivership***

In *Office-Co* the Supreme Court of Queensland considered an application by the receivers and managers of Office-Co Furniture Pty Ltd regarding the distribution of priority employee entitlements following the sale of certain circulating assets.[[8]](#footnote-8) The receivers and managers submitted that s 558(1) was to be read in conjunction with ss 433 and 556 in the context of receivership. Chief Justice de Jersey, agreeing with the receivers’ submissions and holding that s 558(1) applied in receiverships, remarked:

The clear intent of s.433 is that similar priority be accorded in a receivership as in a winding up…It would be odd were the result of the application of these provisions to be different in the case of a receivership, because the intent seems to be to equate the two regimes in this respect. But apart from that, and more importantly, the language of the provisions to my mind leads intractably to the conclusion [the receivers’] urge.[[9]](#footnote-9)

De Jersey CJ found that the deeming provision applied not only in liquidation but in receivership as well, and accordingly that employees under receivership would be paid entitlements, such as accrued leave, as a priority.

***Deeming provision not applied in receivership***

After the judgment in *Office-Co*, the Federal Court of Australia embarked on a line of authority which departed from the conclusion reached by de Jersey CJ and which, to this day, significantly curtails the benefit conferred on employees by s 433.

The application of s 558 was considered in *McEvoy* and *Vickers*. Justice Finkelstein determined in the former case that the reasoning of de Jersey CJ in *Office-Co* was flawed because it did not consider the ‘enacting history’ of the deeming provision.[[10]](#footnote-10) After an analysis of the history and associated amendments of s 558, Finkelstein J concluded in *McEvoy* that the provision was designed to apply in the case of a winding up, and there was no parliamentary intention to give the same benefit to employees in a receivership scenario.[[11]](#footnote-11) Justice Finkelstein was particularly concerned to avoid any construction which would result in employees in both receivership and winding up having the benefit of the priority as the employees in a receivership have the extra benefit of retaining their employment, unlike employees of a company in liquidation.[[12]](#footnote-12) The deeming provision was found not to apply in receivership and employees’ accrued leave entitlements were not given priority under s 433.

In the subsequent case of *Vickers*, Barker J considered the conflicting authorities on the subject, and ultimately followed the judgment of Finkelstein J in *McEvoy*, finding employees in receivership did not get the benefit of the deeming provision, thereby losing priority to certain entitlements. Justice Barker’s application of *McEvoy* has been subsequently followed in a number of cases.[[13]](#footnote-13)

***Receivers to hold funds on trust?***

Just as section 433 governs the priority of employees to circulating assets during receivership, section 561 applies for a similar purpose in liquidation.

In a winding up, section 561 of the Act requires the priority payment from circulating assets of employee wages, superannuation, leave and retrenchment entitlements, but only if the company’s unsecured or free assets cannot pay these amounts.

The case law examined above confirms that the ‘deeming provision’ will apply in liquidation. Therefore, in a winding up, the deeming provision will be triggered, which will crystallise all accrued (but not yet legally owing) entitlements into a due and payable sum. For continuing employees, this means that any unapproved or untaken annual or long service leave will be deemed to be due and payable debts by the company under section 558, and will be prioritised from circulating assets.

Conversely, the weight of authority has held that the ‘deeming provision’ will have no application in receivership alone. Therefore, in receivership, any accrued leave entitlements will retain status as an uncrystallised amount not technically due and payable by the company to the employee. As a result, the employee will not receive a priority payment for such amounts from the circulating assets of the company.

In summary, in a winding up, employees will receive accrued leave as a priority, which will not be the case in a stand-alone receivership.

In the case of *Great Southern*,[[14]](#footnote-14) the receivers of Great Southern Ltd (in liq) sought directions regarding the operation of s 561 in circumstances where voluntary administrators had also been appointed, and who later became liquidators. Master Sanderson of the Supreme Court of Western Australia found that:

* Sections 433 and 561 can be enlivened concurrently;[[15]](#footnote-15) and
* the receivers were firstly obliged to meet the debts or claims under s 433 in accordance with *McEvoy* and *Vickers,*[[16]](#footnote-16) which would result in the employees not receiving accrued leave as a priority. Subsequent to this payment, and in anticipation of the company being wound up and the deeming provision being triggered in the future,[[17]](#footnote-17) the receivers were entitled to hold on trust further circulating asset proceeds to meet the accrued leave entitlements.[[18]](#footnote-18) The entitlement to hold these funds on trust (the ‘*section 561 trust*’) would mean that these amounts could not, for the moment, be paid by the receivers in reduction of their appointers’ secured debt.

In February 2013, and pursuant to the orders made by the Supreme Court of Western Australia, the receivers of Great Southern transferred to the liquidators of that entity funds subject to the ‘section 561 trust’ referred to by Master Sanderson. Whilst the secured creditors of Great Southern had been repaid by other means, there were not enough general funds available for payment of the costs of the liquidation, as well as the balance of priority employee entitlements, which, whilst still a priority, ranked lower than any costs of the liquidation.[[19]](#footnote-19)

The liquidators applied to the Federal Court of Australia seeking clarification as to whether the funds transferred to them by the receivers were in fact held on trust for the benefit of the employees, or if they could instead be applied towards the amounts owed to the liquidators,[[20]](#footnote-20) in accordance with the order or priority established by section 556 of the Act.

Justice McKerracher of the Federal Court of Australia found, in his reasons for judgment in *Saker, in the matter of Great Southern Ltd*,[[21]](#footnote-21) that:

* Notwithstanding the findings of the Supreme Court of Western Australia, no trust in fact existed with respect to the amounts transferred from the receivers to the liquidators,[[22]](#footnote-22) and accordingly the liquidators were not trustees with respect to those funds.[[23]](#footnote-23)
* As no ‘section 561 trust’ existed, the liquidators were free to apply the amounts transferred by the receivers towards payment of their own costs in accordance with s 556 of the Act.[[24]](#footnote-24)

McKerracher J required the applicant liquidators to consider, as part of their duties, if the receivers of Great Southern failed to discharge any duty under section 561, by not paying entitlements to employees from circulating asset proceeds.[[25]](#footnote-25) In other words, were the receivers required by s 561 at any stage to use circulating assets proceeds to pay accrued leave entitlements, rather than merely holding those funds in trust or causing them to be transferred to the liquidator.

In summary, the Court in *Saker* found that the ordering of priority payments in a winding up set out in s 556 of the Act was unaffected by the ‘section 561 trust’ concept which had been created in *Great Southern* for the benefit of the employees.[[26]](#footnote-26)

As a result, receivers do not appear to be subject to any specific obligation to act as trustees over circulating asset proceeds, for example to meet accrued leave, when it is anticipated that s 561 and the deeming provision may be enlivened in the future.

*Saker* detracted from an employee’s claim to accrued leave entitlements. This is because, following *Saker*, circulating asset proceeds may be paid to the company’s secured creditor by a receiver, instead of being retained until the company is wound up, when those amounts would be prioritised in favour of the employee.

***Deeming provision in concurrent winding up and receivership***

It is not uncommon for a company to be subject to the appointment of receivers and liquidators at the same time.

In *ExDvD* the Federal Court of Australia determined that payments made by the receivers of ExDVD Pty Ltd (in liq) to employees had been properly made under s 433. In this case, voluntary administrators had been appointed on the same day as the receivers, and subsequently became the liquidators pursuant to a creditors’ resolution.[[27]](#footnote-27)

During the receivership a variety of employee entitlements had been paid by the receivers, including amounts by way of leave of absence and retrenchment payments.

In confirming each payment had been properly made by the receivers pursuant to s 433, White J found that:

* Section 433 does not cease to operate after a company commences to be wound up;[[28]](#footnote-28)
* s 561 does not supplant s 433,[[29]](#footnote-29) and thus they can operate concurrently;
* whilst the Federal Court in *McEvoy, Vickers,* and *White v Norman* had found that the deeming provision has no application in receiverships, these cases were decided in the context of a stand-alone receivership;[[30]](#footnote-30) and
* there is no reason why the deeming provision would not be invoked when a company in receivership later commences to be wound up.[[31]](#footnote-31)

In accordance with these findings, White J found that s 558 had crystallised entitlements (including leave and retrenchment payments) as at the date of the appointment of receivers and voluntary administrators, and required the receivers to pay these as a priority under s 433.[[32]](#footnote-32)

***Summary – deeming provision and leave of absence***

*McEvoy* and *Vickers* found that when in receivership, s 558 will have no application. In consequence, accrued leave will not be prioritised, unless the employee is expressly terminated on or before the day of the receivers’ appointment. A practical and alarming effect of these cases is that an employee terminated by receivers on the day of the receivers’ appointment *will* receive accrued leave as a priority, but would miss out on this priority entirely if terminated *the very next day*.

The employees’ position has been improved in the context of a concurrent receivership and winding up. In this scenario, accrued leave will be deemed, as a result of the operation of s 558, to fall due and attract the priority under s 433.[[33]](#footnote-33)

Whilst receivers need to be cognisant of their obligations under s 433 and s 561, they are under no specific obligation to hold any portion of circulating asset proceeds on trust pending any possible application of the deeming provision in the future.[[34]](#footnote-34)

***Retrenchment Payments***

Section 433 of the Act obliges receivers to pay as a priority, from circulating assets, amounts payable in a winding up under s 556(1)(h), being retrenchment payments payable to employees of the company. Retrenchment payments are amounts payable to the employee by virtue of an industrial instrument in respect of termination of employment, whether the amount becomes payable *before, on or after the relevant date*.[[35]](#footnote-35) In the present context, the relevant date is the date of the appointment of receivers.[[36]](#footnote-36)

Justice Bryson in *Whitton* found that this required a receiver to prioritise retrenchment entitlements for an employee discharged by the receiver after their appointment.[[37]](#footnote-37) Justice Bryson observed that the definition of retrenchment payments necessarily attracts the s 433 priority ‘for any retrenchment payment whenever it becomes payable, even if after the controller’s assuming control.’[[38]](#footnote-38)

*Vickers* also approved the priority payment of redundancy benefits resulting from terminations after the receivers’ appointment, in circumstances where the deeming provision had no application.[[39]](#footnote-39)

The employee in *Fisher* was held not to be prioritised for these amounts. This case considered whether a variation of an employment contract by the Industrial Relations Commission to include an entitlement to retrenchment pay would be afforded priority under s 433.[[40]](#footnote-40) The Court answered this question in the negative in circumstances where the variation occurred after the appointment of receivers.[[41]](#footnote-41) The only question of relevance as to priorities was whether or not, at the time the receivers were appointed, the contract contained any contingent entitlement to retrenchment.[[42]](#footnote-42) If so, it would be prioritised from circulating assets in the receivership. If there was no entitlement of any nature to any retrenchment pay when the receiver was appointed, there would be no priority payment for such an amount, even if such an entitlement were later added to the contract. This would be so even if the Industrial Relations Commission varied the employment contract to include such an entitlement ab initio.[[43]](#footnote-43) The Court was aware of the pragmatic necessity for a receiver (and, it would appear, a liquidator)[[44]](#footnote-44) to be in a position to list and value all priority claims (whether presently due or merely contingent) on the one date.[[45]](#footnote-45)

The Court in *BE Australia WD Pty Ltd (subject to a Deed of Company Arrangement) v Sutton* (2011) 256 FLR 67 observed that *the Act* set no temporal constraints on when a retrenchment payment must become due to be given priority.[[46]](#footnote-46) This may be subject to the practical observation of Bryson J in *Whitton* that there must be a cessation of the receivers’ liability after their retirement.[[47]](#footnote-47)

Quite distinct from these authorities, White J in *ExDvD* appeared toexpressly require the deeming provision to crystallise retrenchment payments for employees terminated after the appointment of the receivers.[[48]](#footnote-48) It is the respectful view of the authors that, absent the application of s 558(1), the judgment implies no priority ought to exist on account of redundancy benefits triggered after appointment.[[49]](#footnote-49) After consideration of both *Fisher* and *Whitton*,White J reasoned that:

These authorities proceeded on the basis that a liability which exists at the relevant date, albeit being contingent in the sense that it will arise if the employee’s employment is terminated, is sufficient to attract the operation of ss556(1)(h) and 561.[[50]](#footnote-50)

White J proceeded to find that in this case, the entitlement of the employees to retrenchment payments as a priority was due to the deeming provision applying in that case. In other words, had it not been for the concurrent appointment of liquidators, and the application of s 558(1), the employees in *ExDvD* may not have been entitled to be paid retrenchment entitlements as a s 433 priority. If this is the case, in the authors’ view, it is open to argument that employees terminated during a receivership alone (without any concurrent winding up) are not prioritised for any retrenchment payments, unless the receivership was accompanied by a winding up. This argument would be at odds with the prevailing common practice regarding retrenchment entitlements, which sees employees receiving priority payments for these amounts if made redundant after the appointment of receivers, in accordance with the earlier authorities discussed above

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The reasons of White J echo the criticism levelled by Finkelstein J at the earlier authorities of *Whitton* and *Love*, for failing to consider s 558 in the context of retrenchment entitlements.[[51]](#footnote-51) Justice Finkelstein observed that, but for the operation of the deeming provision, ‘neither their leave entitlements nor any retrenchment payments were “due” (in the sense of being payable as a debt) at the time the receiver was appointed.’[[52]](#footnote-52) White J appears to build on this and premise his finding that redundancy payments were only to be prioritised if s 558 were triggered.

It is the authors’ experience that a great proportion of receiverships are accompanied by a liquidation, in which case *ExDvD* makes the position quite clear and favourable from the employees’ perspective. Nevertheless, it is submitted that, following the judgment in *ExDvD*, the position with respect to the receivers’ obligation to prioritise retrenchment amounts from circulating assets, when not subject to concurrent liquidation, would benefit from legislative clarification.

***Delay in payment of entitlements in concurrent winding up and receivership***

It has been held that s 561 of the Act requires, before using circulating assets to pay priority employee entitlements, “all actual and potential realisations” of the company to be contemplated such that ‘only one assessment of the sufficiency of the company’s assets’ is undertaken.[[53]](#footnote-53) Justice Finkelstein in *Italiano* held that the liquidators of the Italiano Family Fruit Company Pty Ltd (in liq) failed to properly discharge these obligations, as the decision to pay entitlements from circulating assets was premature and premised on an ‘interim assessment of the company’s financial position…which only look[ed] at the position at a single point in time.’[[54]](#footnote-54)

Justice Finkelstein determined that upon the sale of the company’s circulating assets, a trust came into existence over the proceeds due to the operation of s 561,[[55]](#footnote-55) and that the liquidators had breached the trust by using those funds before they could be satisfied as to whether sufficient free funds were available to pay the priority entitlements.[[56]](#footnote-56) This allowed the secured creditor to be subrogated to the rights of the unsecured creditors to any unsecured realisations made, for instance, by any subsequent recoveries made by the liquidator for unfair preferences.[[57]](#footnote-57)

This decision may prevent the speedy payment of employee priorities as it places practitioners at risk of liability for Finkelstein J’s ‘breach of trust’. Importantly, the more recent case of *ExDvD* found that in similar circumstances, a secured creditor’s right to subrogation was premised on general equitable principles, and not on a practitioner having committed a breach of trust.[[58]](#footnote-58)

Whilst *ExDvD* creates a welcome distance from the breach of trust concept found in *Italiano*, the prospect of practitioner liability in such circumstances still looms.

It is submitted by the authors’ that the risk of practitioner liability for an *Italiano* breach of trust should not be mitigated by receivers and liquidators obtaining the consent of the secured creditor to pay employee entitlements from circulating asset proceeds.[[59]](#footnote-59) This is because both ss 433 and 561 expressly require the priority payment of those amounts, regardless of whether or not a secured creditor has consented.[[60]](#footnote-60) In the view of the authors, even if a secured creditor did not provide its consent upon request, a practitioner would still be obliged to pay those amounts pursuant to ss 433 and 561, and a secured creditor’s objection to that course would be no grounds for non-compliance.

***Post Appointment Employee Entitlements***

Section 419 of *the Act* applies to any controller of corporate property appointed to enforce a security interest, including a receiver or receiver and manager. This provision renders the receiver personally liable for debts incurred for services rendered, amongst other amounts, during the course of the receivership. This personal liability is in addition to, and quite separate from, the company’s primary liability for such debts.

The words ‘services rendered’ encompasses employment contracts,[[61]](#footnote-61) and on the face of it, would appear to impose personal liability on receivers for employee entitlements attributable to services rendered throughout the course of the receivership. That is the case with one caveat. It is likely that in Australia, a receiver will not incur any such personal liability for an employment contract which is merely allowed to continue, as is, following the receivers’ appointment.[[62]](#footnote-62) However if the receiver undertakes some positive act with respect to the employee contract, including causing the contract to be varied, or otherwise agreeing to personally adopt or become bound by the contract, s 419 personal liability will be triggered.[[63]](#footnote-63) These acts constitute the threshold requirement of personal liability, that a debt must be *incurred* by the receiver during the receivership. Any *new* employment contracts entered into by the company during the receivership will enliven s 419 personal liability.

In the event personal liability is imposed on receivers for employee entitlements incurred during the receivership, this liability will remain notwithstanding any agreement to the contrary.[[64]](#footnote-64) Thus a receiver is not able to contractually escape personal liability when s 419 is otherwise triggered. The receiver retains the right to be indemnified by the company’s assets for any personal liability incurred.

The issue of personal liability is quite separate from the priority regime provided for in sections 433 and 561. Thus the payment of employee entitlements for which receivers have incurred personal liability will not be contingent on the availability of sufficient circulating assets. These amounts would typically be paid as an expense from the general trading funds of the company in receivership.

**E. ANALYSIS OF CURRENT LAW**

***Analysis of section 558 and its application to receivership***

The authors respectfully submit that the reasoning adopted in *McEvoy* and followed by the Federal Court in later cases is unsound, and the deeming provision ought to apply in receivership for the following reasons:

1. The practical reality is that receivership often results in employees losing their jobs;
2. s 433 appears to direct receivers to apply the deeming provision; and
3. the priority denied to employees in receivership in *McEvoy* and *Vickers* is enjoyed by employees in other forms of insolvency administration, including a deed of company arrangement (‘DOCA’).

Let us firstly consider the concern expressed by Finkelstein J in *McEvoy* that employees in receivership ought not to receive priority payment for accrued leave because their employment ‘may survive the receivership.’[[65]](#footnote-65) This, according to Finkelstein J, would be undesirable as it may confer a double benefit as compared to the employee in a winding up.[[66]](#footnote-66) With respect, this assessment does not appear to contemplate the position of employees subject to a DOCA who are effectively conferred this double benefit by Parliament.[[67]](#footnote-67) This is because s 444DA of *the Act* gives employees during a DOCA the same priority they would enjoy if the company was wound up, incorporating the deeming provision in s 558, which will crystallise accrued leave into a payable debt. In addition, the employees may also retain their job (and thus the ‘double benefit’ may be realised) as a DOCA is designed to restore and rehabilitate the company such that it may continue in existence.[[68]](#footnote-68)

In addition, this rationale, which was accepted by Barker J in *Vickers* ‘with hesitation’,[[69]](#footnote-69) may be unsound because, as observed by Barker J, ‘in so many cases, a receivership does spell an end to a company.’[[70]](#footnote-70) Thus, regardless of there being a chance of retaining employment, the practical likelihood is that the company’s receivership will end in the inevitable termination of its employees.

Finally, and from a technical perspective, s 433(3)(c) expressly directs the receivers to pay any amount ‘*that in a winding up*’ is payable to employees under subsections 556(1)(e), (g), and (h). *In a winding up* there is no doubt s 558 would be enlivened to crystallise accrued amounts into payable debts, so the present exception in the case of receiverships appears incongruous. Similarly, s 433(5) requires receivers to pay the relevant employee entitlements ‘in the same order of priority as is prescribed by Division 6 of Part 5.6 in respect of those debts and amounts.’ The authors submit that, on the face of it, this requires receivers to apply s 558(1) which is found in Division 6 of Part 5.6 of *the Act*.

***Conferring the broader entitlement – a matter of practicality***

The authors are aware of some reluctance amongst experienced insolvency practitioners, when acting as receivers, to strictly follow the decisions of *McEvoy* and *Vickers*. For receivers, it may be preferable, on occasion, to distribute the broader employee entitlements whilst discharging their function under s 433.[[71]](#footnote-71) This would see employees paid entitlements such as accrued leave, notwithstanding this may not strictly be necessary by reason of *McEvoy* and *Vickers*.[[72]](#footnote-72) The receivers and in particular their appointing secured creditors may not wish, out of concerns for reputation, to be regarded as having taken advantage of what is perceived as an artificial, highly technical and impractical distinction drawn in cases such as *McEvoy* and *Vickers* at the direct expense of employees, whose cooperation is necessary when trading on.

And to conclude I draw your attention to excerpts taken from later in our 2016 paper where we suggested:

The authors propose reform which seeks to give certainty to practitioners and secured creditors, as well as conferring employees with appropriate protection in the form of priority entitlements.

Justice Finkelstein expressed his view in *McEvoy* that the position of employees in receivership ‘can only be remedied by Parliament’. Justice Barker echoed this sentiment in *Vickers* and remarked that Parliament in the future may well ‘agree with the outcome found by de Jersey CJ in *Re Office-Co Furniture*’ and that ‘parliament was only ever focusing on winding up and did not apply its legislative mind to the circumstances of receivership.’[[73]](#footnote-73)

In recognising the call for reform the following amendments to *the Act* are proposed:

Firstly, s 433(3)(c) could be expanded to give clarification by the addition of the following words at the end of that provision: ‘*and in accordance with subsection 433(10)*’*.* Thus, s 433(3)(c) would read:

Subject to subsections (6) and (7), next, any debt or amount in a winding up is payable in priority to other unsecured debts pursuant to paragraph 556(1)(e),(g) or (h) or section 560*, and in accordance with subsection 433(10)*.

Next the bifurcation that exists in the law with regard to the application of s 558(1) can be eliminated with a new provision that specifically addresses receivership. A suggested new provision, subsection 433(10), could read as follows:

(10) [**Right to payment in receivership**] Where a contract of employment with a company that is in receivership was subsisting immediately before the relevant date,[[74]](#footnote-74) the employee under the contract is, whether or not he or she is continuing as an employee of the company while under receivership, entitled to payment under section 556 as if his or her services with the company had been terminated by the company on the relevant date. Nothing in this subsection affects the continuing nature of the contract of employment.

These additions seek to remove any doubt that accrued leave and retrenchment entitlements will be prioritised in receivership under s 433, in circumstances where there may be doubt as to whether such amounts are technically due and payable. It is submitted that these amendments will bring welcome clarity regarding the legal position with respect to prioritising leave of absence and retrenchment entitlements.

There may be argument to be made that, instead of the form of amendment proposed above, s 558(1) might simply be expanded or amended to indicate an intention that it was to apply to stand-alone receiverships, which would be the path of least resistance in terms of achieving the desired reform. The authors would favour the proposed amendments to section 433 over any such amendment to section 558 because:

* Section 558 is found in Part 5.6 of the Act which applies to “Winding-up generally”, whereas section 433 is found in Part 5.2 which is intended to deal with matters of receivership, as is evident from its title: “*Receivers, and other controllers, of property of corporations.*” As such the natural home for such change ought to be Part 5.2 of the Act, and specifically section 433.

Any such change would require a reference to the “relevant date”, which has different meanings depending upon whether the context is receivership or a winding up. This may result in confusion if s 558 were amended to achieve the desired reform as it would effectively require a reference to “relevant date” as that term currently appears in reference to a winding up, and in addition, a new reference to “relevant date” as that phrase exclusively applies in the context of receivership. In the authors’ view this potential confusion would be avoided by adopting the proposed reform of Part 5.2 of the Act.

Again I thank you for the opportunity to make a submission to this excellent Consultation Paper.

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1. Symes, “A New Statutory Directors’ Duty for Australia – A ‘Duty’ to be Concerned about Employee Entitlements in the Insolvent Corporation” (2003) 12 *International Insolvency Review* 133-154.Symes; “Will there ever be a prosecution under Part 5.8A?” (2002) 3(1) *Insolvency Law Bulletin* 17; Gentry & Symes, “Receivers and employees: An analysis of receivership and its effects on employee contracts and entitlements” (2016) 24 *Insolvency Law Journal* 192-208. [↑](#footnote-ref-1)
2. *Corporations Act 2001* (Cth), s 558(1). [↑](#footnote-ref-2)
3. *Corporations Act 2001* (Cth), s 9 (definition of ‘relevant date’). [↑](#footnote-ref-3)
4. *Corporations Act 2001* (Cth), s 433(9). Under previous legislation the date was determined as the date the receiver was appointed see *Steinberg v Herbert* (1988) 14 ACLR 80 and *Fisher v Maddern* (2001) 54 NSWLR 179; [2002] NSWCA 28 (‘*Fisher*’). [↑](#footnote-ref-4)
5. *Re Macks; Ex Parte Saint* (2000) 204 CLR 158 at 203 [115]; [2000] HCA 62. [↑](#footnote-ref-5)
6. Taylor T, “Employee Entitlements in Corporate Insolvency Administrations” (2000) 8 InsolvLJ 32, 38. [↑](#footnote-ref-6)
7. *Re Office-Co Furniture* [2000] 2 Qd R 49; [1999] QSC 63. [↑](#footnote-ref-7)
8. *Re Office-Co Furniture* [2000] 2 Qd R 49; [1999] QSC 63. [↑](#footnote-ref-8)
9. *Re Office-Co Furniture* [2000] 2 Qd R 49 at 52; [1999] QSC 63. [↑](#footnote-ref-9)
10. *McEvoy* (2003) 130 FCR 503 at 514[22]; [2003] FCA 810. [↑](#footnote-ref-10)
11. Ibid 515 [26]. [↑](#footnote-ref-11)
12. Ibid 514–15 [25]. [↑](#footnote-ref-12)
13. *White v Norman* (2012) 199 FCR 488; [2012] FCA 33; *Great Southern Ltd (recs and mgrs apptd) (in liq): Ex Parte Thackray* (2012) 260 FLR 362; [2012] WASC 59 (‘*Great Southern Ltd*’); *ExDVD* (2014) 223 FCR 409; [2014] FCA 696 [↑](#footnote-ref-13)
14. *Great Southern Ltd* (2012) 260 FLR 362; [2012] WASC 59. [↑](#footnote-ref-14)
15. Ibid. [↑](#footnote-ref-15)
16. *Great Southern Ltd* (2012) 260 FLR 362 at 369–70 [25]; [2012] WASC 59. [↑](#footnote-ref-16)
17. At which time a liquidator would be obliged to pay the wider entitlements under *Corporations Act 2001* (Cth), s 561. [↑](#footnote-ref-17)
18. *Great Southern Ltd* (2012) 260 FLR 362 at 370 [27]; [2012] WASC 59. Master Sanderson observed that the obligation imposed by administering such a trust would not prevent the receivers from retiring in the event the objects of their appointment have been otherwise achieved, as they will be entitled to arrange for the liquidators to become the substitute trustees of the further funds. [↑](#footnote-ref-18)
19. See *Corporations Act 2001* (Cth), s 556(1)(de) and ss 556(1)e),(f). [↑](#footnote-ref-19)
20. *Saker, in the matter of Great Southern Ltd* (2014) 32 ACLC 14-043 at 552 [17]; [2014] FCA 771 (‘*Saker*’). [↑](#footnote-ref-20)
21. *Saker* (2014) 32 ACLC 14-043; [2014] FCA 771. [↑](#footnote-ref-21)
22. The Court found that if legislation required a person to apply money for the benefit of others, that person is not necessarily a trustee for that purpose: see *Visbord v Commissioner of Taxation* (1943) 68 CLR 354 at 369; [1943] HCA 4. [↑](#footnote-ref-22)
23. *Saker* (2014) 32 ACLC 14-043 at 556 [44]; [2014] FCA 771. [↑](#footnote-ref-23)
24. The Court’s orders in this regard were subject to the liquidators’ satisfying themselves that s561 of the *Corporations Act 2001* (Cth) had been complied with *Saker* (2014) 32 ACLC 14-043 at 556–7 [44]–[45]; [2014] FCA 771. [↑](#footnote-ref-24)
25. *Saker,* (2014) 32 ACLC 14-043 at 557 [46]; [2014] FCA 771. [↑](#footnote-ref-25)
26. The concept stems from the judgment of Finkelstein J in *Cook v Italiano Family Fruit Co Pty Ltd (in liq)* (2010) 190 FCR 474; [2010] FCA 1355 (‘*Italiano’*). [↑](#footnote-ref-26)
27. *ExDVD* (2014) 223 FCR 409 at 411 [5]; [2014] FCA 696. [↑](#footnote-ref-27)
28. Ibid 415–16 [29]. [↑](#footnote-ref-28)
29. Ibid 415–16 [29]; see also *Perrins v State Bank of Victoria* [1991] 1 VR 749. [↑](#footnote-ref-29)
30. Ibid 419 [46]. [↑](#footnote-ref-30)
31. Ibid 419 [45]. [↑](#footnote-ref-31)
32. Ibid 420 [48]. [↑](#footnote-ref-32)
33. *ExDVD* (2014) 223 FCR 409; [2014] FCA 696. [↑](#footnote-ref-33)
34. *Saker* (2014) 32 ACLC 14-043; [2014] FCA 771. For a discussion on the relationship of ss 433 and 561 see *Re CMI Industrial Pty Ltd (in liq) Byrnes &Ors v CMI Ltd* [2016] 1 Qd R 241; [2015] QSC 96. [↑](#footnote-ref-34)
35. *Corporations Act 2001* (Cth), s 556(2) [↑](#footnote-ref-35)
36. *Corporations Act 2001* (Cth), s 433(9). [↑](#footnote-ref-36)
37. O’Donovan J*, Company Receivers and Administrators*, (Thomson Reuters (Professional) Australia, 2015) 11-8070 and 11-8081 – 11-8082. [↑](#footnote-ref-37)
38. *Whitton* (1996) 42 NSWLR 123 at 148; [1996] NSWSC 534. [↑](#footnote-ref-38)
39. *Vickers* (2011) 190 FCR 569 at 576[44], 571[10]–[11]; [2011] FCA 10. [↑](#footnote-ref-39)
40. *Fisher* (2001) 54 NSWLR 179; [2002] NSWCA 28. [↑](#footnote-ref-40)
41. *Fisher* (2001) 54 NSWLR 179 at 193 [44]; [2002] NSWCA 28. [↑](#footnote-ref-41)
42. *Fisher* (2001) 54 NSWLR 179 at 192–3 [41]; [2002] NSWCA 28. [↑](#footnote-ref-42)
43. From the beginning. [↑](#footnote-ref-43)
44. See *New Cap Reinsurance Corp Ltd v Faraday Underwriting Ltd* (2003) 177 FLR 52 at 64 [24]; [2003] NSWSC 842. [↑](#footnote-ref-44)
45. See *Steinberg v Herbert* (1988) 14 ACLR 80. To this effect, the Court in *Fisher* (2001) 54 NSWLR 179 at 188–9[29]; [2002] NSWCA 28 drew upon the words of Bryson J in *Whitton* (1996) 42 NSWLR 123; [1996] NSWSC 534 who commented: “*there must as a matter of implication and to avoid absurdity, be some ultimate limit to the time when a retrenchment payment becomes payable if it is to qualify for priority, notwithstanding the references to time in the definition of “retrenchment payment”. It is difficult to suppose that a retrenchment which occurred*[after] *a controller had completed his operations and accounted to all interested parties of whom he was aware would involve liability under section 433(3).*” [↑](#footnote-ref-45)
46. *BE Australia WD Pty Ltd (subject to a Deed of Company Arrangement) v Sutton* (2011) 82 NSWLR 336 at 352 [70]; [2011] NSWCA 414. [↑](#footnote-ref-46)
47. *Whitton* (1996) 42 NSWLR 123 at 148; [1996] NSWSC 534; *ExDVD* (2014) 223 FCR 409 at 416 [32]; [2014] FCA 696. [↑](#footnote-ref-47)
48. *ExDVD* (2014) 223 FCR 409 at 420 [48]; [2014] FCA 696. [↑](#footnote-ref-48)
49. *ExDVD* (2014) 223 FCR 409 at 416–20 [31]–[48]; [2014] FCA 696. [↑](#footnote-ref-49)
50. *ExDVD* (2014) 223 FCR 409 at 417 [36]; [2014] FCA 696. [↑](#footnote-ref-50)
51. *ExDVD* (2014) 223 FCR 409 at 416–17 [32], [37]; [2014] FCA 696; *McEvoy* (2003) 130 FCR 503 at 513–14 [19], [21]; [2003] FCA 810. [↑](#footnote-ref-51)
52. *McEvoy* (2003) 130 FCR 503 at 513–14 [19], [21]; [2003] FCA 810; Wellard M, “Debts ‘incurred’ by receivers, administrators and liquidators: The case for a harmonised construction of ss 419, 443A and 556(1)(a) of the Corporations Act” (2013) 21 Insolv LJ 60 at 71. [↑](#footnote-ref-52)
53. *Italiano* (2010) 190 FCR 474 at 491 [70]; [2010] FCA 1355. [↑](#footnote-ref-53)
54. Ibid. [↑](#footnote-ref-54)
55. Ibid 492–3[79]. [↑](#footnote-ref-55)
56. Ibid493 [80]. [↑](#footnote-ref-56)
57. *Italiano* (2010) 190 FCR 474 at 496 [98]; [2010] FCA 1355. [↑](#footnote-ref-57)
58. See Gentry L, “Clarification of employee entitlements in Insolvency – *Re Divitkos; ExDVD Pty Ltd (in liq)*” (2014) 15(5-6) INSLB 74. [↑](#footnote-ref-58)
59. See *Italiano* (2010) 190 FCR 474; [2010] FCA 1355; and *Re Carter; Damilock Pty Ltd (in liquidation)* [2012] FCA 1445. [↑](#footnote-ref-59)
60. Gentry L, “Still a Priority? Employee Entitlements in Insolvency” (2013) 25(1) Australian Insolvency Journal 8; *ExDVD Pty Ltd (in liq)* (2014) 223 FCR 409 at [64]; [2014] FCA 696; O’Donovan J*, Company Receivers and Administrators*, (Thomson Reuters (Professional) Australia, 2015) 11-8064. [↑](#footnote-ref-60)
61. *Associated Newspapers Ltd v Grinston* (1949) 66 WN (NSW) 211; *Re WorkCover Queensland* [2000] 1 Qd R 107; [1998] QSC 32; O’Donovan J*, Company Receivers and Administrators*, (Thomson Reuters (Professional) Australia, 2015) 11-5061. [↑](#footnote-ref-61)
62. *Love* (1991) 33 AILR 406 (Young J); See generally O’Donovan J*, Company Receivers and Administrators*, (Thomson Reuters (Professional) Australia, 2015)11-5066. [↑](#footnote-ref-62)
63. Thus it was held that there was no s 419 personal liability for wages, superannuation and leave of absence entitlements which accrue or become due during the receivership in respect of employment contracts merely allowed to continue following the appointment of receivers: *Vickers* (2011) 109 FCR 569; [2011] FCA 10.See also *Green v Giljohann* (1995) 17 ACSR 518; O’Donovan J*, Company Receivers and Administrators*, (Thomson Reuters (Professional) Australia, 2015) 11-5067. [↑](#footnote-ref-63)
64. *Corporations Act 2001* (Cth), s 419(1). [↑](#footnote-ref-64)
65. *McEvoy* (2003) 130 FCR 503 at 515 [26]; [2003] FCA 810. [↑](#footnote-ref-65)
66. Ibid. [↑](#footnote-ref-66)
67. Gentry, n 60. [↑](#footnote-ref-67)
68. *Corporations Act 2001* (Cth), s 435A. [↑](#footnote-ref-68)
69. *Vickers* (2011) 190 FCR 569 at 579 [62]; [2011] FCA 10. [↑](#footnote-ref-69)
70. Ibid. [↑](#footnote-ref-70)
71. This practice appears to be acknowledged by Barker J in *Vickers* (2011) 190 FCR 569 at 575–6[43]; [2011] FCA 10. [↑](#footnote-ref-71)
72. Gentry, n60. [↑](#footnote-ref-72)
73. *Vickers* (2011) 109 FCR 569 at 579 [63]; [2011] FCA 10. [↑](#footnote-ref-73)
74. *For the purpose of this proposed new provision the “relevant date” is as defined in Corporations Act 2001* (Cth), s 433(9), being the date of the appointment of the receiver. [↑](#footnote-ref-74)