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AAT approves registered liquidator application of non-resident and provides important clarification in respect of the new registration regime

By **Scott Atkins** and **Jonathon Turner** on June 8, 2018
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Norton Rose Fulbright represented Mitchell Mansfield, an Australian citizen but who now resides in and works in Singapore, of Borelli Walsh in a successful appeal before the Administrative Appeals Tribunal (**AAT**) in relation to his application for registration as a liquidator.

The appeal raises significant issues about the new statutory regime for the registration of liquidators following the reforms introduced by the *Insolvency Law Reform Act* 2016 (Cth) (**ILRA**) and is the first case before the AAT where the operation of the new regime has been considered. Deputy President J Redfern (**Redfern DP**) handed down her decision and reasons for decision on 5 June 2018.

To read the full decision, visit: http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2018/1510.html

New statutory scheme for registration of liquidators

Pursuant to the reforms introduced by ILRA, an applicant seeking to become a registered liquidator is required to apply to the Australian Securities and Investments Commission (**ASIC**). ASIC in turn refers the application to a specially convened committee (**Committee**) under section 20-10 of the *Insolvency Practice Schedule (Corporations)* (**Corporations Schedule**) for determination of the application against criteria specified in subsection 20-20(4) of the Corporations Schedule.

The Committee is comprised of a delegate of ASIC, a registered liquidator chosen by the Australian Restructuring Insolvency and Turnaround Association (**ARITA**) and an appointee of the Minister for Revenue and Financial Services. The *Insolvency Practice Rules (Corporations)* 2016 (Cth) (**Corporations Rules**) prescribe the standard of qualifications, experience, knowledge and abilities required for the purposes of 20-20(4)(a) of the Corporations Schedule.

Background

Mr Mansfield is a director of Borelli Walsh, Singapore, a global restructuring, insolvency and forensic accounting firm. Borelli Walsh has offices in a number of countries in Asia as well as in the Cayman and British Virgin Islands but no office in Australia.

Prior to December 2016, Mr Mansfield worked as an accountant in Australia for over 10 years in firms including Hall Chadwick, PKF Chartered Accountants and McGrathNicol. He retains extensive ties to Australia and gave evidence that he would be spending significant time in the jurisdiction.

In June 2017, Mr Mansfield made an application to become a registered liquidator in Australia. That application was rejected by the Committee on the basis that he had failed to satisfy the criteria prescribed by Division 20 of the Corporations Schedule.

The decision of the Committee was set aside by Redfern DP and substituted by the Tribunal's decision that Mr Mansfield should in fact be registered subject to certain conditions. The issues in dispute before the Tribunal were as follows:

(1) In light of his residency in Singapore, whether Mr Mansfield had demonstrated the capacity to satisfactorily perform the function and duties of a registered liquidator (see 20-1(2)(e) of the Corporations Rules);
(2) Notwithstanding that Mr Mansfield was unable to satisfy subsection 20-20(4)(i) of the Corporations Schedule and allegedly failed to meet subsection 20-20(4)(a), whether he ought to be registered subject to conditions; and
(3) The meaning of 'exposure' to processes under the Bankruptcy Act 1966 (Cth) (Bankruptcy Act).

It was not in dispute that, subject to point (3) above and concerns about his ability to undertake the role of a liquidator whilst based in Singapore, Mr Mansfield had the necessary qualifications, experience, knowledge and abilities to undertake the role of a registered liquidator. Further, Mr Mansfield's unchallenged evidence was that he would do whatever was necessary to fulfil his obligations, that Borelli Walsh were seeking to establish a practice in Australia and that he would be in attendance within the jurisdiction for significant periods and as required by any appointment.

Residency

Points (1) and (2) above both concerned Mr Mansfield's status as a resident of Singapore.

Subsection 20-20(4) of the Corporations Schedule provides a mandatory pathway to registration in that an applicant must be registered to the extent the Committee is satisfied that the applicant has met the criteria set out in (a) to (i). Subsection 20-20(4)(i) requires the applicant to be resident in Australia or in another prescribed country. It was not in dispute in the proceedings that Mr Mansfield was not resident in Australia or that no other country has been prescribed to date.

However, an alternative, discretionary pathway to registration is provided for in subsection 20-20(5), which provides that if the committee is not satisfied of certain elements of subsection 20-20(4), including (a) and (i), it may nonetheless determine that the applicant should be registered on a conditional basis.

It was submitted on behalf of Mr Mansfield that what subsection 20-20(5) evinces is an acceptance by Parliament that an inability to meet the factors in subsection 20-20(4)(a) and (i) does not automatically preclude registration, provided that there are conditions which can be imposed which mean the public is adequately protected.

Subsection 20-1(2)(e) of the Corporations Rules requires assessment of whether an applicant has demonstrated the capacity to satisfactorily perform the functions and duties of a registered liquidator. In determining Mr Mansfield's application, the Committee had referred to unspecified 'logistical problems' as a result of his status as a resident in Singapore. These difficulties were expanded upon during the course of the appeal and primarily concerned ASIC's ability to effectively supervise and regulate a non-resident practitioner.

The position advanced by the Committee was that there were no conditions that would be capable of addressing the regulatory and supervisory concerns of ASIC in respect of a non-resident liquidator.[1] This position was primarily dependent on the assertion that Mr Mansfield's status as a non-resident would deprive ASIC of certain regulatory mechanisms otherwise available to it. In particular, it was submitted that due to the fact that the *Australian Securities and Investments Commission* Act 2001 (Cth) (**ASIC Act**) does not have extraterritorial effect, ASIC would be unable to validly issue notices requiring attendance and/or the production of information or documentation under sections 19 and 30B of the ASIC Act to a non-resident.

The Tribunal held, consistent with the submissions of counsel for Mr Mansfield, that the position advanced by the Committee would effectively render subsection 20-20(5) redundant. In other words, to accept that there was no condition sufficient to deal with Mr Mansfield's status as a non-resident would mean that he could never be registered as a liquidator which clearly contradicts the express terms of subsection 20-20(5). In so doing, the Tribunal held that the relevant test is not whether the regulatory regime for a non-resident liquidator is identical to that of a resident liquidator but whether conditions of registration would provide an adequate level of protection of the public, which is to be determined on a case by case basis.

The Tribunal went on to note that the conditions that had been agreed between the parties resolved the majority of concerns raised in respect of residency. The conditions related to issues of service, Mr Mansfield's presence within the jurisdiction, the establishment of a Borelli Walsh office in the jurisdiction, disclosure to creditors, methods of contact, interaction with the regulator, the retention and availability of books and records and membership of ARITA. It was also noted that there were alternative processes available to ASIC, albeit that they may be more time consuming and/or costly, under the *Corporations Act* 2001 (Cth) (e.g. the public examination process) and the Corporations Schedule, Singaporean statutes and the UNCITRAL Model Law on Cross-Border Insolvency to effectively regulate Mr Mansfield for the periods of time that he was not present within the jurisdiction.

The one condition that was not agreed between the parties and that was imposed by the Tribunal was a condition that Mr Mansfield only accept appointments on a joint and several basis with a registered liquidator resident in Australia for a period of 12 months.

Exposure to processes under the Bankruptcy Act

Subsection 20-1(2)(c) of the Corporations Rules requires an applicant, who wishes to be registered to practise as an external administrator of companies, receiver and receiver and manager, to have, during the 5 years prior to the date of the application, been engaged in at least 4,000 hours of 'relevant employment' at senior level. Relevant employment is in turn defined in subsection 20-1(3) of the Corporations Rules. It includes, employment that "*provides exposure to processes (including bankruptcy) under the*" Bankruptcy Act.

Mr Mansfield's evidence was that he had undertaken a number of complex corporate administrations and receiverships in both Australia and Singapore since 2012. His experience in respect of bankruptcies during the relevant period was obtained in the context of these corporate insolvencies and receiverships. It was not in dispute that Mr Mansfield was not directly involved in undertaking bankruptcy work during this period. This is likely to be a common scenario across the industry given that a number of insolvency and restructuring firms focus on corporate insolvency and do not have the capability to undertake registered trustee work under the Bankruptcy Act.

Notwithstanding that the Committee did not raise any concerns with Mr Mansfield during his interview about his bankruptcy experience, the Committee ultimately determined that Mr Mansfield had failed to meet the level of experience required by the regime. The basis for the Committee's decision was the suggestion that Mr Mansfield could not demonstrate exposure to the full range of bankruptcy processes, namely all of the processes set out under the Bankruptcy Act.

The position as advanced by counsel for the Committee, who was instructed by ASIC, that the criteria set down by the new regime required exposure to the full spectrum of extant processes under the Bankruptcy Act not only those processes relevant to appointments to corporations. It was submitted that a narrow construction of this phrase should be adopted and that direct involvement in all processes under the Bankruptcy Act was required. In other words, this construction would require actual and direct involvement on bankruptcy assignments governed by the Bankruptcy Act and under the supervision of a trustee in bankruptcy. This construction, if correct, would seemingly constitute a major reform of the eligibility requirements for registered liquidators and a particularly onerous requirement which is likely to prove problematic for a large proportion of future applicants. In particular, with respect to applicants that work in firms that focus on corporate insolvency and outsource bankruptcy processes. Indeed, ASIC has previously reported that 'many' of the applicants who have applied under the new regime have been found by the relevant committee to have not satisfied the bankruptcy requirement, presumably on the basis of this strict construction of the requirement, with the committee either refusing their application or imposing conditions, such as the 'joint appointment condition'.[2]

It was submitted on behalf of Mr Mansfield that this narrow interpretation was plainly wrong and that it should be sufficient for an applicant to have knowledge and experience of the processes of bankruptcy in so far as they relate to the external administration of a corporation. It was suggested that he had in fact satisfied the condition on the basis that his prior employment had exposed him to such processes under the Bankruptcy Act necessary to allow him to adequately perform the functions and duties of a registered liquidator. Further, the expression

'exposure to processes' should be given a broad interpretation and an interpretation that is consistent with the object that it seeks to achieve (i.e. to ensure a liquidator who is registered is competent to perform that role). In this respect, we note that evidence given by Mr Adrian Brown (a Senior Executive in ASIC's Insolvency Practitioners Team) on behalf of the Committee was to the effect that a registered liquidator is required to "*consider strategically and tactically*" bankruptcy issues arising in the context of corporate appointments.

The Tribunal accepted the submissions made on behalf of Mr Mansfield and held, we would submit correctly, that this requirement did not require direct or actual involvement in bankruptcy processes or exposure to all processes under the Bankruptcy Act. Consistent with the object of the eligibility regime under the Corporations Schedule, all that is required is "*exposure to or experience in the range of bankruptcy processes at a general level*".[3] The Tribunal was not persuaded that the narrow and restrictive interpretation advocated by the Committee ought to apply and concluded that Mr Mansfield's experience gained in respect of significant and complicated corporate administrations, and which included the commencement of bankruptcy proceedings through to recoveries and the discharge or annulment of bankruptcy, was sufficient.

Conclusion

The decision provides clear and persuasive guidance to applicants, registered liquidators, ASIC and future committees pursuant to subsection 20-10 of the Corporations Schedule in respect of the construction of the new regime concerning the registration of liquidators. In particular, with respect to the discretionary pathway to registration pursuant to subsection 20-20(5) of the Corporations Schedule and the meaning of 'exposure to processes' under the Bankruptcy Act.

The specific circumstances of Mr Mansfield's application, in particular his extensive Australian experience and relatively short residency in Singapore, make it unlikely that the Tribunal's decision will open the door to registration of foreign practitioners that do not have a substantial and real connection with the jurisdiction and prior Australian experience, training and education. Having said that, it may be the case that the clarification provided by the decision may assist to enable practitioners to strengthen their cross-border capabilities and to provide a pathway for practitioners to return to the jurisdiction following temporary absence.

We are pleased that the Tribunal agreed with our and our client's view that the requirement around 'exposure to processes' under the Bankruptcy Act was not intended to be interpreted narrowly and consider that the position held by the Tribunal accords with the natural and correct construction of this provision and will be of relief and provide comfort to the profession. This is especially the case in relation to insolvency practitioners seeking to become registered liquidators in the future and who have not had actual or direct Australian bankruptcy experience.

[1] *Mansfield* at [72].
[2] Thea Eszenyi (Senior Executive Leader Insolvency Practitioners ASIC), "Registration committee requirements, interstate appointments and reviewing liquidator funding", *ARITA Journal*, (2018) 30(1) at page 44.
[3] *Mansfield* at [62].

Scott Atkins

Partner, Sydney
+61 2 9330 8015
scott.atkins@nortonrosefulbright.com

Jonathon Turner

Senior Associate, Sydney
+61 2 9330 8253
jonathon.turner@nortonrosefulbright.com