



**A.C.N. 087 430 715 Pty Ltd (In Liquidation)**  
**(Formerly Pacific HVAC Engineering Pty Ltd)**  
**ACN 087 430 715**  
**(Pacific HVAC)**

**Statutory Report to Creditors (Report)**

Matthew Caddy and I were appointed Joint and Several Administrators (**Administrators**) of Pacific HVAC on 26 July 2019. Subsequently, on 30 August 2019, the second meeting of creditors (**Second Meeting**) was held and it was resolved that Matthew Caddy and I be appointed Joint and Several Liquidators (**Liquidators**) of Pacific HVAC.

The purpose of this report is to:

- provide you with an update on the progress of the liquidation since the Second Meeting; and
- advise you of the likelihood of a dividend being paid in the liquidation of Pacific HVAC.

This report is to be read in conjunction with our Administrators' report to creditors pursuant to 75-225 of the *Insolvency Practice Rules (Corporations) 2016* (Cth) dated 23 August 2019 (**Administrators' Report**).

Defined terms in this report are consistent with those in the Administrators' Report.

## **1. Background**

As outlined in the Administrators' Report, Pacific HVAC was incorporated in 1999 predominantly assembling and supplying fans and ancillary products to the ventilation market in Australia and New Zealand. It operated from premises in VIC, SA, QLD and Auckland, New Zealand in addition to having a number of sales agents throughout Australia and New Zealand. Pacific HVAC reported revenue of \$34.5 million in FY18 and employed 88 staff immediately prior to the Administrators' appointment.

Following the Administrators' appointment on 26 July 2019, the Administrators commenced a sale of business process seeking to either:

- sell the business as a going concern; or
- recapitalise the business through a Deed of Company Arrangement (**DOCA**).

During the first week of the sale of business process, the Administrators closed the MHP division of Pacific HVAC, leaving only the ventilation division for sale.

The Administrators entered into an asset sale agreement with Systemair AB (**Systemair**) on 9 August 2019 for the ventilation business and assets of Pacific HVAC with a headline purchase price (before deductions and other adjustments) of \$2.3 million. Settlement of the sale occurred on 15 August 2019.

In the absence of a going concern business sale or DOCA proposal, and noting that Pacific HVAC was insolvent, creditors resolved at the Second Meeting to place Pacific HVAC into liquidation, and that Matthew Caddy and I be appointed Liquidators.



## 2. Causes of failure

Our investigations, as detailed in the Administrators' Report, indicate that Pacific HVAC's failure was primarily a result of:

- ongoing losses from FY17 to 30 June 2019 caused by an increasing cost base largely associated with the MHP expansion, reducing gross margins and increasing working capital requirements;
- an increased headcount increasing wages costs and eroding profitability;
- insufficient working capital to finance the purchase of inventory to meet orders;
- an inability to obtain additional working capital from Pacific HVAC's financier or raise capital from investors; and
- an unsuccessful sale process that resulted in the inability of an interested party to commit to the required timing of the capital injection required.

The following sections provide an update on the various aspects of the insolvency to date.

## 3. Key actions undertaken since the Second Meeting

Following the Second Meeting, the Liquidators have undertaken the following key tasks:

- continued to collect debtors both owned by the company and also on behalf of Pacific HVAC's secured creditor, Westpac;
- attended to post business sale completion activities under the asset sale agreement, including PPSR stock purchases and transition, calculating transferring employee entitlements and other financial post completion adjustments;
- finalisation of trading matters including attending to final payment runs for suppliers and payment of payroll on costs (superannuation, payroll tax and other costs);
- realised MHP stock and plant and equipment not subject to the business asset sale;
- continued collection activities for non-financed pre-appointment and post-appointment debtors;
- completed further investigations into the date of insolvency and potential voidable transactions;
- held a Committee of Inspection (**COI**) meeting where we updated committee members on:
  - the likely return to priority (employee) creditors;
  - debtor collections; and
  - remuneration approval requests.
- declared and paid a dividend to priority creditors for unpaid wages, superannuation and superannuation guarantee charge (**SGC**);
- engaged with the Fair Entitlements Guarantee (**FEG**) and assisted Pacific HVAC staff with lodgement of their employee entitlement claims where relevant; and
- attended to all statutory and taxation deadlines.



#### 4. Estimated return to creditors

The table below summarises the Liquidators' estimated return to each class of creditor and variance to the estimate provided with the Administrators Report:

| Pacific HVAC - estimated return to creditors (cents/\$) |                   |      |                     |      |          |      |
|---|-------------------|------|---------------------|------|----------|------|
| Creditor class  | at 23 August 2019 |      | at 28 November 2019 |      | Variance |      |
|   | Low               | High | Low                 | High | Low      | High |
| Priority creditors                                      | 54                | 100  | 84                  | 100  | 30       | -    |
| Secured creditor  | 37                | 67   | 50                  | 55   | 13       | (13) |
| Unsecured creditors                                     | nil               | nil  | nil                 | nil  | -        | -    |

The variance between estimates primarily relates to:

- higher collections of pre-appointment company owned debtors, primarily New Zealand pre-appointment debtors;
- lower than anticipated realisations of financed debtors following negotiations with customers and increased collection costs incurred; and
- favourable inventory realisations following a final inventory stocktake in respect of the asset sale to Systemair.

#### 5. Estimated assets and comparison to Report on Company Activities and Property (ROCAP)

As previously reported, on 16 August 2019 the Administrators received a ROCAP setting out the financial position as at the Appointment Date from the Pacific HVAC directors, Shane Wallis and Sudevan Nallathamby.

Outlined below are the ROCAPs prepared by Pacific HVAC's directors, as well as the Liquidators' updated low and high estimated returns for the liquidation (including realisations to date):

| Pacific HVAC - estimated return to creditors                             |       |            |                  |              |
|--|-------|------------|------------------|--------------|
| GST exclusive<br>A\$'000   | Notes | ROCAP      | Liquidators' ERV |              |
|  |       |            | Low              | High         |
| <b>Estimated recoveries</b>  |       |            |                  |              |
| Cash on hand   | 1     | 171        | 191              | 191          |
| Pre-appointment debtors - financed                                       | 2     | 5,255      | 3,078            | 3,386        |
| Pre-appointment debtors - unfinanced                                     |       | 589        | 467              | 603          |
| Inventory  | 3     | 5,467      | 1,539            | 1,546        |
| Plant and equipment  | 4     | 1,201      | 502              | 502          |
| Other assets   | 5     | 159        | 1,073            | 1,073        |
| Estimated total recoveries   |       | 12,842     | 6,850            | 7,301        |
| <b>Estimated costs of realisation</b>                                    |       |            |                  |              |
| <i>Less: Trading of business &amp; asset realisation costs</i>           |       | n/a        | (542)            | (499)        |
| <i>Less: Sale of business settlement adjustments</i>                     | 6     | n/a        | (155)            | (155)        |
| <i>Less: Administrators' fees and disbursements (approved and paid)</i>  | 7     | n/a        | (940)            | (940)        |
| <i>Less: Liquidators' fees and disbursements (approved by creditors)</i> | 8     | n/a        | (440)            | (372)        |
| <i>Less: Legal fees and disbursements</i>                                |       | n/a        | (188)            | (163)        |
| <i>Less: Contingency</i>   |       | n/a        | (100)            | (100)        |
| Estimated total costs of realisation                                     |       |            | (2,366)          | (2,229)      |
| <b>Estimated net realisations</b>  |       | <b>n/a</b> | <b>4,484</b>     | <b>5,072</b> |

Source: Director's ROCAP



- Note 1** Both the high and low reflects funds on appointment. The Directors' ROCAP excluded funds swept from a pre-appointment \$USD bank account on 12 September 2019.
- Note 2** Westpac provided an invoice financing facility to Pacific HVAC and has a first ranking charge over financed debtors. The Liquidators have distributed c.\$2.9m to Westpac to 12 November 2019.
- Note 3** The inventory balance is net of secured inventory purchases of c.\$0.6m where the Liquidators made payment for inventory (under the asset sale agreement) subject to a supplier retention of title claim or a warehouse lien.
- Note 4** Both the low and high reflect the ASA completed in August 2019. Additional amounts realised relate to plant and equipment not subject to the ASA (c.\$2k)
- Note 5** Both the low and high reflect the ASA price attributed to Goodwill, as well as the non-refundable deposit provided by the purchaser on execution of the ASA. The Directors' ROCAP did not attribute any value to goodwill.
- Note 6** Following completion of the ASA, the final settlement adjustments were completed on 2 October 2019 and included adjustments relating to:
- i) employee entitlements; and
  - ii) lease costs
- Note 7** The Administrators have paid the remuneration approved by creditors.
- Note 8** The low reflects all of the creditor approved Liquidator remuneration, the high reflects a lower amount being incurred.

| <b>Pacific HVAC - estimated return to creditors</b>            |              |              |              |              |
|--|--------------|--------------|--------------|--------------|
| <b>A\$'000</b>   | <b>Notes</b> | <b>ROCAP</b> | <b>Low</b>   | <b>High</b>  |
| Distributions paid to priority creditors to date               |              |              | 102          | 102          |
| Estimated future distributions to priority creditors           | <b>1</b>     |              | 504          | 621          |
| <b>Estimated total distributions to priority creditors</b>     |              |              | <b>606</b>   | <b>723</b>   |
| Priority creditor claims                                       |              | (938)        | (723)        | (723)        |
| <b>Total estimated dividend to priority creditors (c/\$)</b>   |              | <b>n/a</b>   | <b>84</b>    | <b>100</b>   |
| Distributions to secured creditor to date                      |              |              | 3,736        | 3,736        |
| Estimated future distributions to secured creditor             | <b>2</b>     |              | 142          | 511          |
| <b>Estimated total distributions to secured creditor</b>       |              |              | <b>3,878</b> | <b>4,247</b> |
| Secured creditor claim   |              | (7,138)      | (7,788)      | (7,788)      |
| <b>Total estimated dividend to the secured creditor (c/\$)</b> |              | <b>n/a</b>   | <b>50</b>    | <b>55</b>    |
| Estimated amount available to unsecured creditors              | <b>3</b>     |              | -            | -            |
| Trade creditor claim   |              | (7,179)      | (10,121)     | (10,121)     |
| Statutory creditor claim                                       |              | (1,275)      | (1,275)      | (1,275)      |
| <b>Total estimated dividend to unsecured creditors (c/\$)</b>  |              | <b>n/a</b>   | <b>-</b>     | <b>-</b>     |

- Note 1** The high reflects additional recoveries of non-financed debtors, the low reflects no further recoveries from non-financed debtors or voidable transactions. Priority creditors are required to be paid in full before any amounts are available for distribution to the secured creditor from circulating assets.



**Note 2** The high and low reflects additional amounts expected to be recovered from financed debtors. The high side also includes a small surplus from the circulating asset estate is payable to the secured lender.

**Note 3** As advised in the Administrators' Report, we do not expect a dividend to be paid to unsecured creditors.

## 6. Investigations

Creditors should refer to section 6 of the Administrators' Report for an overview of the investigations undertaken during the voluntary administration.

Liquidators have certain powers available to them under the *Corporations Act 2001* (Cth) in relation to voidable transactions and, in certain circumstances, can take steps to unwind transactions that occurred prior to the Liquidators' appointment. In order to pursue voidable transactions however, it requires that the company was insolvent at the time the transaction was entered into.

As outlined in the Administrators' Report, the Liquidators' preliminary view was that Pacific HVAC was likely insolvent some time between May 2019 and 23 July 2019. A key determinant of the specific date of insolvency rested on an assessment of the offers the Directors received during the capital raise and business sale process undertaken in the months prior to the Administrators' appointment.

Following the Second Meeting, the Liquidators reviewed the offers received from interested parties in the months leading up to the Administrators' appointment on 26 July 2019.

These further investigations undertaken by the liquidators indicate that Pacific HVAC was likely insolvent from 18 June 2019, based on the following factors;

- the final credible offer received for the recapitalisation or sale of the Pacific HVAC business expired on 18 June 2019, when the interested party advised that they would not be submitting a binding offer;
- on 18 June 2019 one of Pacific HVAC's key suppliers served winding up proceedings on it; and
- whilst the Directors continued discussions with a further potential interested party to provide a capital injection after 18 June 2019, the Liquidators do not consider the Directors had a reasonable basis to believe that Pacific HVAC would remain solvent if this offer proceeded, based on the following:
  - the Directors had identified that a capital injection of \$5 million was required in May 2019, and the capital injection offer received after 18 June 2019 was well below this amount;
  - previous offers received for the sale of business were from well-known industry participants or existing shareholders who were familiar with Pacific HVAC's business, whereas this new interested party was not known to the Directors, its bona fides were unknown, and it required a significant level of due diligence;
  - the interested party expressed it was not committed to paying down Pacific HVAC existing debts, indicating that any proposal forthcoming would not present a solvent solution to Pacific HVAC's financial position;
  - its offer was highly conditional on further due diligence and stakeholder support, including from Pacific HVAC's minority shareholder, key creditors, and Westpac; and
  - the offer did not provide certainty of timing for any capital injections.

Accordingly, the Liquidators consider that Pacific HVAC was likely insolvent from 18 June 2019. This may give rise to certain voidable transactions being able to be pursued, which are discussed in the sections following.

### 6.1 Voidable transactions

Section 588FA of the *Corporations Act 2001* (Cth) gives a liquidator the power to recover certain transactions within six months of the commencement of the winding up that result in the creditor receiving more than the creditor would receive from the company if the transaction were set aside and the creditor were to prove for the debt in a winding up of the company.



The Liquidators preliminary investigations have identified up to \$600,000 of potential preference payments made during the period 18 June 2019 to 26 July 2019.

Further investigations are required to assess the merits of each of the preferences identified in this period, and to assess whether there would be a commercial benefit to creditors in pursuing same. The Liquidators have not included an estimate of the potential return to creditors from preference recoveries until these investigations have been undertaken.

#### 6.2 *Insolvent trading / other director offences*

The Liquidators' investigations to date have focused on identifying the specific date of insolvency, which is necessary before any voidable transactions can be recovered.

Consequently, further investigations are required in order to quantify the value and merits of any potential insolvent trading claim, including consideration of:

- the costs to recover such a claim (including litigation costs if applicable, noting insolvent trading claims are a complex legal action);
- any insurance policies in place that may respond to an insolvent trading claim; and
- the financial capacity of the Directors (in the absence of insurance).

If any breaches of directors' duties are identified, the Liquidators will report these in the section 533 report issued to ASIC which will be lodged in the coming months (in accordance with the statutory deadline).

### 7. **Receipts and payments to date**

Outlined at Annexure A is a summary of all receipts and payments during the period from 17 August 2019 to 12 November 2019.

We have included receipts and payments for this period (i.e. before the date the Liquidators were appointed) as the Administrators' Report last reported summarised receipts and payments up until 15 August 2019.

### 8. **Likelihood of a dividend**

To 12 November 2019, the Liquidators paid the following dividends:

| <b>Pacific HVAC - dividends paid</b>            |                |
|---|----------------|
| <b>Creditor class</b>                           | <b>A'\$000</b> |
| Secured creditor: financed debtors              | 2,936          |
| Secured creditor: other                         | 800            |
| Priority creditors: wages                       | 41             |
| Priority creditors: superannuation              | 62             |
| <b>Total dividends paid to 12 November 2019</b> | <b>3,838</b>   |

Dividends to Westpac for financed debtors reflect payments made directly by debtors into a Westpac controlled invoice finance facility bank account not controlled by the Liquidators.

#### 8.1 *Priority creditors*

Priority employee creditors have been paid in full for all outstanding wages and superannuation to their nominated superannuation funds, in accordance with Section 556 priority payments of the *Corporations Act 2001* (Cth)

Following the distribution to priority creditors, we have been made aware that Pacific HVAC had outstanding interest and administration charges payable to the ATO as a result of late superannuation payments to employees, giving rise to SGC. We are currently calculating the SGC amount and will remit this to the ATO.



Priority creditors may receive further distributions from net circulating assets depending upon:

- the level of future non-financed debtor realisations;
- any realisations generated from voidable transactions; and
- the quantum of future costs incurred to finalise the liquidation.

#### 8.2 *Secured creditors*

Based on the information available, it is estimated there will be a deficiency to the secured creditor.

Any further return to the secured creditor is dependent on:

- the recoverability of financed debtors; and
- any surplus net circulating asset recoveries (subject to payment of priority creditors in full).

#### 8.3 *Unsecured creditors*

As advised in the Administrators' Report, we do not expect a dividend to be paid to unsecured creditors.

If a dividend is going to be paid to any class of creditor, you will be contacted before that happens and, if you have not already done so, you will be asked to lodge a proof of debt. This formalises the record of your claim in the liquidation and is used to determine all claims against Pacific HVAC.

### 9. **Cost of the liquidation**

We estimate that the total remuneration for the liquidation will be \$440,470.50 (excluding GST and disbursements).

**This report is not seeking approval of further remuneration.**

The below prospective remuneration was approved at the second meeting of creditors held on 30 August 2019:

| Remuneration type   | AUD amount (ex GST) |
|---|---------------------|
| Liquidator remuneration approved at the second meeting of creditors on 30 August 2019 | 146,985.00          |

The below remuneration was subsequently approved at a meeting of the Committee of Inspection (COI) held on 14 October 2019:

| Remuneration type   | AUD amount (ex GST) |
|---|---------------------|
| Retrospective remuneration approval (Liquidation) – 24 September 2019 to 4 October 2019 | 70,040.50           |
| Prospective remuneration approval (Liquidation) – 5 October 2019 to end of liquidation  | 223,445.00          |

To date, the Liquidators' remuneration is within the capped amount. Creditors should also note that the Liquidators are in discussion with Pacific HVAC's secured creditor regarding the potential funding of the Liquidators time costs that specifically relate to the future realisation of its secured assets, principally its financed debtors.



**10. What happens next?**

We will proceed with the liquidation, which will include:

- collecting outstanding debtors and paying residual post-appointment trading liabilities;
- completing our investigations into Pacific HVAC's affairs and pursuing any viable claims for statutory recovery actions that may flow from these;
- distributing further net realisations to secured and priority creditors as appropriate; and
- completing our reporting to the corporate insolvency regulator, the Australian Securities and Investments Commission (**ASIC**).

We may write to you again with further information on the progress of the liquidation.

We expect to have completed this liquidation within 12 months.

**11. Where can you get more information?**

You can access information which may assist you on the following websites:

- ARITA at [www.arita.com.au/creditors](http://www.arita.com.au/creditors)
- ASIC at [www.asic.gov.au](http://www.asic.gov.au) (search for "insolvency information sheets")

If you have any queries, please contact Hayden Schreurs on (03) 9278 1052. For further information about this engagement, please refer to the website [www.mcgrathnicol.com/creditors](http://www.mcgrathnicol.com/creditors).

Dated: 29 November 2019

Robert Smith  
*Liquidator*

Enclosures:

1. Summary of receipts and payments from 31 August 2019 to 12 November 2019
2. ARITA Information Sheet – Offences, Recoverable Transactions & Insolvent Trading



## Annexure A – Summary of receipts and payments from 17 August 2019 to 12 November 2019

| Summary of receipts and payments for the period 17 August 2019 to 12 November 2019            |                    |
|---|--------------------|
| A\$ (incl GST)  | Total              |
| <b>Receipts</b>   |                    |
| Post-appointment trading receipts   | 547,741            |
| Stock/Inventory on Hand   | 290,549            |
| Pre-appointment debtor receipts (financed)  | 2,070,494          |
| Pre-appointment debtor receipts   | 223,796            |
| Post completion adjustment payment from purchaser   | 633,546            |
| Other receipts  | 63,132             |
| Pre-appointment bank account transfers  | 20,277             |
| <b>Total receipts (incl GST)</b>  | <b>3,849,535</b>   |
| <b>Payments</b>   |                    |
| Salaries and wages  | (241,823)          |
| Cleaning Services   | (1,384)            |
| Computer software subscriptions   | (17,653)           |
| Legal settlements   | (24,986)           |
| Employee Expense Reimbursements   | (50)               |
| Freight   | (14,682)           |
| Fuel & Oil  | (80)               |
| Leased assets   | (2,136)            |
| Manufacturing services  | (5,809)            |
| Pallets   | (6,047)            |
| Payroll Tax   | (3,565)            |
| Inventory   | (82,173)           |
| Post-appointment trading receipts incorrectly deposited into Liquidators' account             | (49,806)           |
| Rent & Rates  | (716)              |
| Repairs and Maintenance   | (1,456)            |
| Stamp Duty  | (287)              |
| Storage & Warehousing   | (6,523)            |
| Sundry Expenses   | (181)              |
| Workers Compensation Insurance  | (5,737)            |
| Bank Charges  | (46,820)           |
| Data Room: Sale of Business Expense   | (934)              |
| GST Control: GST Paid/Received  | (269,728)          |
| Voluntary Administrators Fees (including GST)   | (1,014,631)        |
| Voluntary Administrators Disbursements  | (12,277)           |
| Legal Fees (including GST)  | (144,557)          |
| Legal Fees: Disbursements   | (45)               |
| Insurance   | (7,345)            |
| Distribution to secured creditor (non-circulating asset recoveries)                           | (300,000)          |
| Distribution of financed debtors to secured creditor (non-circulating asset recoveries)       | (2,172,441)        |
| Secured stock purchases   | (644,961)          |
| Priority Creditor Dividend  | (102,838)          |
| Asset Valuation & Auctioneers Fees  | (25,711)           |
| <b>Total payments (incl GST)</b>  | <b>(5,207,381)</b> |
| <b>Net receipts and payments (incl GST) for the period 17 August 2019 to 12 November 2019</b> | <b>(1,357,846)</b> |

*Transactions in NZD have been translated to AUD at an FX rate of 0.96*



**Annexure B – ARITA Information Sheet – Offences, Recoverable Transactions & Insolvent Trading**

# Creditor Information Sheet

## Offences, Recoverable Transactions and Insolvent Trading



### Offences

A summary of offences under the Corporations Act that may be identified by the administrator:

|         |  |
|---------|--|
| 180     | Failure by company officers to exercise a reasonable degree of care and diligence in the exercise of their powers and the discharge of their duties.   |
| 181     | Failure to act in good faith.  |
| 182     | Making improper use of their position as an officer or employee, to gain, directly or indirectly, an advantage.  |
| 183     | Making improper use of information acquired by virtue of the officer's position.   |
| 184     | Reckless or intentional dishonesty in failing to exercise duties in good faith for a proper purpose. Use of position or information dishonestly to gain advantage or cause detriment. This can be a criminal offence.  |
| 198G    | Performing or exercising a function or power as an officer while a company is under administration.  |
| 206A    | Contravening a court order against taking part in the management of a corporation.   |
| 206A, B | Taking part in the management of corporation while being an insolvent, for example, while bankrupt.  |
| 206A, B | Acting as a director or promoter or taking part in the management of a company within five years after conviction or imprisonment for various offences.  |
| 209(3)  | Dishonest failure to observe requirements on making loans to directors or related companies.   |
| 254T    | Paying dividends except out of profits.  |
| 286     | Failure to keep proper accounting records.   |
| 312     | Obstruction of an auditor.   |
| 314-7   | Failure to comply with requirements for the preparation of financial statements.   |
| 437D(5) | Unauthorised dealing with company's property during administration.  |
| 438B(4) | Failure by directors to assist administrator, deliver records and provide information.   |
| 438C(5) | Failure to deliver up books and records to the administrator.  |
| 590     | Failure to disclose property, concealed or removed property, concealed a debt due to the company, altered books of the company, fraudulently obtained credit on behalf of the company, material omission from Report as to Affairs or false representation to creditors. |

### Recoverable Transactions

#### Preferences

A preference is a transaction, such as a payment by the company to a creditor, in which the creditor receiving the payment is preferred over the general body of creditors. The relevant period for the payment commences six months before the commencement of the liquidation. The company must have been insolvent at the time of the transaction, or become insolvent because of the transaction.

Where a creditor receives a preference, the payment is voidable as against a liquidator and is liable to be paid back to the liquidator subject to the creditor being able to successfully maintain any of the defences available to the creditor under the Corporations Act.

#### Uncommercial Transaction

An uncommercial transaction is one that it may be expected that a reasonable person in the company's circumstances would not have entered into, having regard to:

- the benefit or detriment to the company;
- the respective benefits to other parties; and,
- any other relevant matter.

To be voidable, an uncommercial transaction must have occurred during the two years before the liquidation. However, if a related entity is a party to the transaction, the period is four years and if the intention of the transaction is to defeat creditors, the period is ten years.

The company must have been insolvent at the time of the transaction, or become insolvent because of the transaction.

### **Unfair Loan**

A loan is unfair if and only if the interest was extortionate when the loan was made or has since become extortionate. There is no time limit on unfair loans – they only must be entered into before the winding up began.

### **Arrangements to avoid employee entitlements**

If an employee suffers loss because a person (including a director) enters into an arrangement or transaction to avoid the payment of employee entitlements, the liquidator or the employee may seek to recover compensation from that person. It will only be necessary to satisfy the court that there was a breach on the balance of probabilities. There is no time limit on when the transaction occurred.

### **Unreasonable payments to directors**

Liquidators have the power to reclaim '*unreasonable payments*' made to directors by companies prior to liquidation. The provision relates to payments made to or on behalf of a director or close associate of a director. The transaction must have been unreasonable, and have been entered into during the 4 years leading up to a company's liquidation, regardless of its solvency at the time the transaction occurred.

### **Voidable charges**

Certain charges over company property are voidable by a liquidator:

- circulating security interest created within six months of the liquidation, unless it secures a subsequent advance;
- unregistered security interests;
- security interests in favour of related parties who attempt to enforce the security within six months of its creation.

## **Insolvent trading**

In the following circumstances, directors may be personally liable for insolvent trading by the company:

- a person is a director at the time a company incurs a debt;
- the company is insolvent at the time of incurring the debt or becomes insolvent because of incurring the debt;
- at the time the debt was incurred, there were reasonable grounds to suspect that the company was insolvent;
- the director was aware such grounds for suspicion existed; and
- a reasonable person in a like position would have been so aware.

The law provides that the liquidator, and in certain circumstances the creditor who suffered the loss, may recover from the director, an amount equal to the loss or damage suffered. Similar provisions exist to pursue holding companies for debts incurred by their subsidiaries.

A defence is available under the law where the director can establish:

- there were reasonable grounds to expect that the company was solvent and they did so expect;
- they did not take part in management for illness or some other good reason; or
- they took all reasonable steps to prevent the company incurring the debt.

The proceeds of any recovery for insolvent trading by a liquidator are available for distribution to the unsecured creditors before the secured creditors.

**Important note:** This information sheet contains a summary of basic information on the topic. It is not a substitute for legal advice. Some provisions of the law referred to may have important exceptions or qualifications. This document may not contain all of the information about the law or the exceptions and qualifications that are relevant to your circumstances.