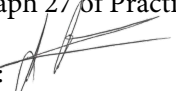


I, Kevin Lee Christensen, solicitor on record for the Applicants, hereby certify that the Applicants written submissions are suitable for publication pursuant to paragraph 27 of Practice Note SC CA 01.

Signed: 
20 November 2025

**IN THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL
SYDNEY REGISTRY**

No. 2021/00192250

B E T W E E N

Ample Skill Limited & others
First to Tenth Applicants

**Geoffrey Reidy, Andrew Barnden and Paula Smith as liquidators of Balamara
Resources Limited (in liq) (ACN 016 219 985)**
First Respondents

Balamara Resources Limited (in liq) (ACN 016 219 985)
Second Respondent

Vulpes Distressed Fund (Cayman Islands Company No. 330197)
Third Respondent

APPLICANTS' SUMMARY OF ARGUMENT

A. The nature of the applicant's case

1. The applicants seek leave to appeal from the decision of Black J in *In the matter of Balamara Resources Limited (in liquidation)* [2025] NSWSC 618 (Black J) (**J**): WB Tab [3].
2. Under s 75-15(1) of the Insolvency Practice Schedule (Corporations), being Schedule 2 to the *Corporations Act 2001* (Cth) (**IPS**), the creditors of a company have the power to direct a liquidator to call a meeting of creditors. A liquidator must convene the meeting if directed to do so by creditors meeting certain value thresholds (s 75-15(3)) (which thresholds it is not disputed were satisfied in this case). However, the liquidator need not comply with the direction if the direction is not reasonable (s 75-15(3)).
3. The Insolvency Practice Rules (Corporations) 2016 (Cth) (**IPR**) then define in r 75-250(2) when a direction to convene a meeting will be “unreasonable”:
 - (1) A direction to the external administrator of a company to convene a meeting of the creditors is not reasonable if the external administrator, acting in good faith, is of the opinion that:
 - (a) complying with the direction would substantially prejudice the interests of one or more creditors or a third party and that prejudice outweighs the benefits of complying with

the direction; or

...

(d) the direction for the meeting is vexatious.

4. On 9 December 2024, the First to Tenth Applicants (**Directing Creditors**) in their capacities as creditors of the Second Respondent (**Company**), directed the First Respondents as **Liquidators** of the Company to convene a meeting of creditors (**Direction**): J[7]. The Liquidators refused to convene the meeting on the basis that the Direction was not reasonable: J[10].
5. After refusing to comply with the Direction, the Liquidators applied to the Court for a judicial direction that they were justified in having so refused (**Liquidators' Application**): J[10]. The Directing Creditors applied for an order under s 90-15 IPS that the Liquidators hold the meeting (**DC Application**). The two applications came before the primary judge on 21 May and 5 June 2025. His Honour gave the direction sought by the Liquidators and dismissed the DC Application.
6. The primary judge erred in giving the direction sought by the Liquidators and in dismissing the Directing Creditors' application for the reasons set out in the Draft Notice of Appeal [WB Tab 4].

B. The questions involved

7. The issues to be determined by this Court on appeal are primarily matters of statutory construction. If the Applicants' contended construction is correct, then the appeal must be upheld. The primary issues for determination are:
 - (a) **Issue 1:** whether the Liquidators asked themselves the **wrong question**, in that the opinion to be reached by the liquidator is as to the whether the direction is unreasonable, not as to whether their removal would be unreasonable;
 - (b) **Issue 2:** what must the liquidator do to fulfill his obligation to perform the **balancing exercise** required by r 75-250(2)(a)? Namely, how must he go about assessing whether a direction would substantially prejudice a creditor or third party and then weighing that prejudice against the benefits of complying with the direction; and
 - (c) **Issue 3:** whether the requirement in r 75-250 that a liquidator form the requisite opinion in **good faith** requires that the opinion have a reasonable basis.

C. The primary judge's reasons

8. His Honour reached the following conclusions regarding r 75-250 of the IPR:
- (a) the determination of whether a direction to call a meeting is unreasonable must depend on what the meeting was intended to do: J[26];
 - (b) the good faith requirement in r 75-250 does not require that the liquidator had a reasonable basis on which to form an opinion, just that they genuinely held the opinion, that they tried to inform themselves about matters relevant to forming the opinion and that they made a genuine attempt to assess the weight of those matters prior to reaching the opinion: J[42], [78];
 - (c) that it was artificial to require the liquidators to draw a distinction between whether the resolutions proposed at the meeting might be vexatious or prejudicial (to them or others) and whether the calling of the meeting itself was unfairly prejudicial to creditors or vexatious: J[73];
 - (d) that by identifying the prejudice that might result in the passing of the resolutions at the meeting (namely, that they would be replaced and the delay and cost that might flow from that) the liquidators had done enough to discharge their obligation under r 75-250(2) and that the liquidators could not have been expected to look for the benefits of the resolution in circumstances where the directing creditors did not explain those benefits: J[75], [76].
9. Having interpreted r 75-250 in this way, the primary judge went on to find that:
- (a) the Liquidators held an opinion in good faith that the Direction was unreasonable under r 75-250(2)(a) (J[78]); and
 - (b) he did not need to reach a concluded view as to whether the Liquidators held an opinion in good faith that the Direction was vexatious (J[79]).

D. The Applicant's argument

The Corporations Act confers on creditors power to direct the external administrators

10. Properly construed, a liquidator must call a meeting as directed unless the thing required by the direction, that is calling the meeting, is not reasonable (s 75-15(2) of the IPS). The question is not whether the passing of any resolutions to be put at the meeting would have consequences that are reasonable or unreasonable.

11. In this case, the Direction to call the meeting was for the purposes of putting to the creditors a resolutions to remove and replace the liquidators. The ability of a creditor or group of creditors to direct the calling of a meeting (IPS, s 75-15) is separate and distinct from the power of the creditors as a whole to pass a resolution for the removal and replacement of a liquidator (IPS, s 90-35). That is reflected in the structure of the IPS. Division 75 confers a power on creditors to direct the calling of a meeting, which can only be refused if the direction itself is unreasonable. Division 90 confers on the general body of creditors a power to resolve to remove a liquidator. In considering whether a direction made under s 75-15 is unreasonable, the consequences of the exercise of the creditors power under s 90-35 to remove a liquidator ought not be taken into account. To conflate the two is to give the liquidator a “backdoor” into defeating the creditors’ exercise of their rights under s 90-35 to remove a liquidator by the simple expedient of denying them a meeting.

Issue 1 – the wrong question

12. The Liquidators asked themselves the wrong question. They asked whether their removal as liquidators would be prejudicial to creditors if the resolution passed (and it was not possible to know whether it would pass), not whether complying with the Direction by calling the meeting would be substantially prejudicial.
13. The Liquidators’ reasons for declining to convene the meeting were set out in a letter that the Liquidators sent to the Directing Creditors (**Refusal Letter**)¹ and in a **File Note**² expressing the same reasons, both of which were required to set out their reasons by virtue of r 75-255(2) of the IPR. The Liquidators gave further detail regarding their reasons in two affidavits filed in advance of the hearing (on 20 December 2024 and 26 February 2025). The prejudice that the Liquidators identified in the Refusal Letter, the File Note and Mr Barden’s first two affidavits was prejudice consequent on their removal as liquidators, not prejudice consequent on complying with the Direction.
14. The hearing took place on 21 May 2025 with a one-day estimate. At the end of that day, while Senior Counsel for the Liquidators was presenting his closing submissions in reply, the primary judge invited the Liquidators to seek leave to lead further evidence

¹ Exhibit AB-11 to the Affidavit of Andrew Barnden affirmed 20 December 2024, pp 252-256. WB Tab [12].

² Annexure C to the Affidavit of Andrew Barnden affirmed 27 May 2025 (WB Tab [16], pp 15 - 16).

regarding their reasoning process.³ The primary judge granted that leave and adjourned the hearing to 5 June 2025.⁴ The primary judge ought not have granted the Liquidators leave to call further evidence.

15. In the further evidence filed pursuant to that grant of leave, Mr Barnden expressed a new reason (the **Work Minimisation Reason**) as follows:⁵

Allowing for requisite notice to creditors and taking into account the time of year, it would have been approximately eight (8) weeks before the meeting could be held, during which time the Liquidators would be required to minimise their work, including on the Poland Claim, so as not to incur unnecessary costs. I considered that such a delay in work would be prejudicial to creditors and shareholders of the Company ...

16. Even if leave were properly granted, that evidence ought to have been rejected as recent invention. Further, even if the Work Minimisation Reason were accepted, it did not indicate prejudice in calling the meeting because, as Mr Barden indicated in cross-examination, despite having refused to call the meeting, the Liquidators nonetheless chose to minimise their work apparently pending the hearing of their application.⁶ The prejudice that Mr Barden identified of complying with the Direction was to be suffered by creditors regardless of whether the Liquidators complied or did not comply with the Direction. There is no case law to support the proposition that a liquidator should minimise work where an attempt to remove them has been foreshadowed, particularly not where as here, a liquidator holds the view that the minimisation of work will be prejudicial to creditors.
17. The primary judge ought to have found that the Liquidators' opinion was not formed in good faith because the Work Minimisation Reason did not provide a reasonable basis to refuse to comply with the Direction and the rest of the Liquidators' reasons as to prejudice concerned the prejudice of their removal, not the prejudice of calling the meeting.
18. That the opinion to be formed is as to substantial prejudice and benefits of *complying with the direction* is clear from the text of r 75-250. It is also consistent with the existence of the separate remedy in s 90-35(4) of the IPS under which a liquidator may apply to be reinstated and the Court may reinstate them if the Court is satisfied that their removal was "an improper use of the powers of one or more creditors". It is on that

³ Transcript, 21 May 2025, page 60, line 48 to page 61, line 15.

⁴ Transcript, 21 May 2025, page 63, lines 28-46; page 64, lines 7-8.

⁵ Affidavit of Andrew Barnden affirmed 27 May 2025, [26]. WB Tab [16]

⁶ Transcript, 5 June 2025, page 15, lines 35-43.

application that the propriety of the removal of the liquidator is to be considered. Importantly, in determining any application for reinstatement, the Court is to form its own view as to whether there was an improper use of the creditors' powers. It is not to defer to the good faith opinion of the liquidator on that question. That is a deliberate legislative choice which has been sidestepped by the Liquidators' refusal to convene the meeting.

19. There is a clear analogy with courts declining to injunct the holding of a creditors meeting because the creditors might pass at that meeting a resolution in which related creditor's votes are determinative of the outcome. Instead, the court permits the meeting to be held and, if the resolution passes, the court will hear any application to set aside the resolution.⁷ That approach is informed both by the uncertainty as to whether the resolution will pass and by the legislative change that conferred on the court a power to set aside a resolution passed on related-creditor votes. The same reasoning applies here. The legislature has conferred on the court a power to reinstate a liquidator improperly removed. It is at that stage, and not at the stage of a direction to call a meeting, that the court (and not the liquidator) is to consider the propriety of the removal of the liquidator.

Issue 2 – the balancing exercise

20. When assessing the reasonableness of the Direction under r 75-250(2)(a), the Liquidators were required first to identify whether compliance with the Direction (ie calling the meeting) would “substantially prejudice the interests of one or more creditors or a third party”. If they determined that compliance with the Direction would cause such substantial prejudice, they were then required to identify the benefits of complying with the Direction. Thirdly, they were required to weigh the substantial prejudice of complying with the Direction against the benefits of complying with the Direction. It is only if, in the Liquidators' good faith opinion, the substantial prejudice of complying with the Direction outweighed the benefits of complying with the Direction that the Direction will be unreasonable.
21. Despite detailed affidavits from Mr Barnden, there was no evidence that the Liquidators

⁷ *In the matter of TEN Network Holdings Limited (Admins Apptd) (Recs and Mgrs Apptd)* [2017] NSWSC 1247 at [49]-[51], [127], [136], [163]; *Decon Australia Pty Ltd v TFM Epping Land Pty Ltd* [2020] FCA 1085 at [35]-[40]. See also *Lehman Bros Holdings Inc v City of Swan*; *Lehman Bros Asia Holdings Ltd (in liq) v City of Swan* (2010) 240 CLR 509 at [32] (French CJ, Gummow, Hayne, and Kiefel JJ).

considered the benefits of calling the meeting. There was also no evidence that the Liquidators conducted the balancing exercise or were even aware of the need to conduct a balancing exercise, other than having relied on r 75-250(2)(a) in the Refusal Letter.

22. Having not identified the benefits or weighed those benefits against the substantial prejudice, the Liquidators did not form the opinion required by r 75-250(2)(a). The primary judge should have found as such and declined to give the direction that the Liquidators were justified in refusing to convene the meeting.
23. It is wrong to suggest, as the Liquidators did and as the primary judge found, that the Directors are somehow to blame for not advocating as to the benefits of the meeting (J[15], [18], [75]-[76]). Further, the primary judge engaged in circular reasoning in finding that there were no benefits in complying with the Direction because the Direction was unreasonable (J[76]). The conclusion that the Direction was unreasonable can only be reached *after* an assessment of the benefits of complying with the Direction. The benefits were plain for the Liquidators to see and it was their job to look for them and weigh them. Had they done so, they would have found that the primary benefit of complying with the Direction was giving the creditors the opportunity to decide whether or not to replace them in exercise of the right to do so conferred on creditors by the legislature.

Issue 3: the primary judge erred in his approach to good faith

24. In addition to having not formed the requisite opinion, the Liquidators have not discharged their burden to satisfy the Court that they formed the opinion in good faith. What amounts to good faith is context and fact dependent.⁸ The applicants submit that “good faith” in the present context requires both an assessment of whether the opinion was formed honestly and of whether there was a reasonable basis for the opinion.
25. A liquidator is a hybrid composite with elements of fiduciary trustee, agent, officer of the corporation and (in some instances such as a court-ordered winding up, as in this case) an officer of the court.⁹ In all aspects of the role, the liquidator is required to act in the interests of creditors.
26. Within the IPR, the concept of good faith appears in rr 70-10, 70-15, 70-20, 70-25, 75-

⁸ *Gillespie v Gillespie* (2025) 172 ACSR 183; [2025] NSWCA 24 at [29].

⁹ *Sydlow Pty Ltd (in liq) v TG Kotselas Pty Ltd* (1996) 65 FCR 234; 14 ACLC 846; Goode R, *Principles of Corporate Insolvency Law* (3rd ed, Sweet & Maxwell, London, 2005) at [5-02]; McPhersons on Company Liquidation, [8.400]; *Re PBS Building (Qld) Pty Ltd* [2024] QSC 108

195, 75-250 and 80-15 in a similar formulation, in each case referring to the standard to which an opinion must be held by an external administrator in order for that opinion to determine the rights of creditors in that given context.

27. A handful of corporations law cases have (to various degrees) considered that formulation.¹⁰ Within those cases there is support for the proposition that in order for an external administrator to have reached an opinion in good faith, the opinion must have a reasonable basis, see for eg *Re Pacific Biotechnologies* [2020] VSC 636. That case concerned the right of creditors to seek production of documents under r 70-15(2)(c) IPR. Justice Robson held that:

for an administrator to discharge the onus placed on the administrator by r 70-15 to establish that he or she has acted in good faith, the administrator should establish that his or her opinion was based upon a reasonable basis.

His Honour found that it was reasonable for the administrator to refuse to produce a file note sought by the creditors because the administrator genuinely believed (albeit wrongly) that the file note was subject to legal professional privilege. That is, there was a reasonable basis for the liquidator's belief.

28. In the court below the primary judge addressed *Re Pacific Biotechnologies*, finding that the liquidator did not need to go so far as to establish a reasonable basis, provided the opinion was honestly reached after directing himself to relevant matters. The primary judge erred in so finding. The primary judge ought to have found that good faith requires there to be a reasonable basis for the opinion.
29. As the primary judge acknowledged, any liquidator asked to convene a meeting for his or her removal may have a personal interest in not being removed (J[80]). In that context, good faith ought require that the liquidator's opinion be reasonable.
30. A requirement of good faith also arises in the context of leave to bring derivative actions under s 237 of the *Corporations Act*.¹¹ The primary judge was wrong to find that the standard for a liquidator faced with a direction to call a meeting is a lower standard than is required of a creditor wishing to bring a claim in the name of the company (J[42]).

¹⁰ *Watson & Co Superannuation Pty Ltd v Dixon Advisory and Superannuation Services Ltd* [2022] FCA 1273; *Re Pacific Biotechnologies Ltd* [2020] VSC 636; *AXF Group Pty Ltd (In liquidation)* [2020] VSC 375; *Secatore, in the matter of Last Lap Pty Ltd (in liq)* [2020] FCA 627; *Modscape Holdings Pty Ltd v Caspaney* [2019] FCA 2137; *in the matter of FW Projects Pty Ltd* [2019] NSWSC 892; *IN the matter of 1st Fleet Pty Ltd (in liq)* [2019] NSWSC 6

¹¹ *Swansson v Pratt Properties Pty Ltd* (2002) 42 ACSR 313; [2002] NSWSC 583 and *Gillespie v Gillespie* (2025) 172 ACSR 183, [2025] NSWCA 24

The primary judge was also wrong to find that good faith standard as submitted by the Directing Creditors constituted “merits review” (J[42]). Good faith requires that the opinion be reasonable, not that it be the same opinion that a Court would have reached.

31. Rule 75-250 is delegated legislation made pursuant to delegated rule-making power conferred on the Minister by s 105-1 and s 75-15(4) and of the IPS. It is to be interpreted consistently with the scope and purpose of the enabling Act.¹² Here, the empowering Act is the *Corporations Act*, specifically the IPS. The IPS was introduced in 2017 with an express objective of “empowering stakeholders with an interest in the conduct of an insolvency administration to better protect their own interests”.¹³ The reforms conferred an important power on creditors to vote to remove a liquidator, the exercise of which power requires the convening of a meeting. The IPR should be construed consistently with the legislative purpose of enhancing creditor participation. The narrow view of good faith taken by the primary judge is inconsistent with that legislative purpose.
32. Assessed by reference to the good faith requirement as properly understood, the primary judge ought to have found that the Liquidators’ subjective opinion (if formed at all) was not reasonable because:
 - (a) it focused on the possible prejudice that may be caused if the Liquidators were removed and not on any prejudice of complying with the Direction, ie calling the meeting; or
 - (b) it failed to take into account the benefits of complying with the Direction, ie the benefits of calling the meeting.

E. Leave to appeal

33. The applicants accept that leave to appeal is likely to be required because judicial directions issued to a liquidator are not ordinarily thought to be determinative of the rights of the parties, even though the practical effect of the orders in this case was to reject with finality the Directing Creditors’ direction for the calling of a meeting.
34. If leave is required, it should be granted because the interpretation of r 75-250 IPR is an issue of statutory interpretation of daily importance in external administrations

¹² *Thiele v Commonwealth* (1990) FCR 342 at 346; *Commission for the Safety, Rehabilitation and Compensation of Commonwealth Employees v Ticsay* (1992) 38 FCR 181 at 188; *Whittaker v Comcare* (1998) 86 FCR 532 at 545.

¹³ Explanatory Memorandum at [9.75].

generally. There are three relevant first instance decisions, including the present case, and no appellate authority. In the first two cases, the Court did not have the benefit of submissions as to the proper construction of r 75-250: in *In the matter of FW Projects Pty Limited (in liquidation)* [2019] NSWSC 892, the parties did not make submissions regarding r 75-250 at all (at [159]); in *AXF Group Pty Ltd (in liq) v AXF Holdings Pty Ltd* [2020] VSC 375, no party opposed the directions sought so the Court proceeded on the assumption that the matters raised by the liquidator were relevant. This is the first case to squarely raise the interpretation of r 75-250.

35. The cases raises an important point of public policy arising from the 2017 reforms to the conduct of external administrations. The primary judge's construction of r 75-250 undermines the functioning of the powers that the legislature chose to confer on creditors as part of those reforms.
36. The interpretation of r 75-250 is also likely to affect the future interpretation of the same words in rr 70-10, 70-15, 70-20, 70-25, 75-195, 75-250 and 80-15 of the IPR.

F. Costs

37. There is no reason why an order for costs should not be made in favour of the respondent if the application is refused.

G. Hearing of the application

38. The application for leave should be heard together with the appeal because the argument for leave will substantially overlap with the argument as to the merits of the appeal.
39. The Directing Creditors do not consent to the application for leave being dealt with in the absence of the public and without the attendance of any person.

H. List of authorities and legislation

40. See Annexure.

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11 July 2025

Annexure – List of Authorities and Legislation

Authorities

AXF Group Pty Ltd (In liquidation) [2020] VSC 375

Commission for the Safety, Rehabilitation and Compensation of Commonwealth Employees v Ticsay (1992) 38 FCR 181

Decon Australia Pty Ltd v TFM Epping Land Pty Ltd [2020] FCA 1085

Gillespie v Gillespie (2025) 172 ACSR 183, [2025] NSWCA 24

In the matter of 1st Fleet Pty Ltd (in liq) [2019] NSWSC 6

In the matter of FW Projects Pty Ltd [2019] NSWSC 892

In the matter of TEN Network Holdings Limited (Admins Apptd) (Recs and Mgrs Apptd) [2017] NSWSC 1247

Lehman Bros Holdings Inc v City of Swan; Lehman Bros Asia Holdings Ltd (in liq) v City of Swan (2010) 240 CLR 509

Modscape Holdings Pty Ltd v Caspaney [2019] FCA 2137

Re Pacific Biotechnologies Ltd [2020] VSC 636

Re PBS Building (Qld) Pty Ltd [2024] QSC 108

Secatore, in the matter of Last Lap Pty Ltd (in liq) [2020] FCA 627

Swansson v Pratt Properties Pty Ltd (2002) 42 ACSR 313; [2002] NSWSC 583

Sydlow Pty Ltd (in liq) v TG Kotselas Pty Ltd (1996) 65 FCR 234; 14 ACLC 846

Thiele v Commonwealth (1990) FCR 342

Watson & Co Superannuation Pty Ltd v Dixon Advisory and Superannuation Services Ltd [2022] FCA 1273

Whittaker v Comcare (1998) 86 FCR 532

Legislation

Insolvency Practice Schedule (Corporations), being Schedule 2 to the *Corporations Act 2001* (Cth)