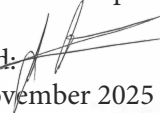


I, Kevin Lee Christensen, solicitor on record for the Applicants,
hereby certify that the Applicants written submissions are suitable
for publication pursuant to paragraph 27 of Practice Note SC CA 01.

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

FILED

- 1 OCT 2025



Vulpes Distressed Fund (Cayman Islands Company No. 330197)

Third Respondent

APPLICANTS' APPEAL SUBMISSIONS

1. Legislative reforms which commenced in 2017 conferred on the general body of creditors of a company under external administration a power to resolve to remove and replace the external administrator. The same reforms conferred a power on creditors to direct the external administrator to convene a meeting. Can the external administrator refuse to convene a meeting as directed by the creditors (at which resolutions for the removal and replacement of the external administrator will be proposed) because the external administrator is of the opinion that his or her removal would be unreasonable? That is the question at the core of this appeal.
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 convene 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) 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].¹ The Liquidators refused to convene the meeting in compliance with the Direction on the basis that the Direction was not reasonable: J[10].²
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.³ In turn, the Directing Creditors applied for an order under s 90-15 of the IPS that the Liquidators convene the meeting. The two applications were heard concurrently on 21 May and 5 June 2025. His Honour gave the direction sought by the Liquidators and dismissed the Directing Creditors' Application: *In the matter of Balamara Resources Limited (in liquidation)* [2025] NSWSC 618 (Black J) (**J**).⁴
6. The Directing Creditors submit that the primary judge misconstrued the requirements of r 75-250(2) and, having done so, arrived at the wrong conclusions. That error was compounded by errors regarding the admission of further evidence after the Liquidators had closed their case and the assessment of that late evidence.

A. The questions involved

7. The grounds of appeal are set out in the amended draft notice of appeal accompanying these submissions.⁵

8. The issues of statutory construction are:

Issue 1: whether the Liquidators asked themselves the **wrong question** when

¹ Amended White Book (**AWB**) 3/21.

² AWB 3/22.

³ AWB 3/22.

⁴ AWB 3/18 - 52.

⁵ Supplementary White Book (**SWB**) 7-15.

considering whether to comply with the creditors' direction to convene a meeting by considering the prejudice that might be caused by their removal as liquidators rather than the prejudice of convening the meeting as directed (**Ground 16**);

Issue 2: whether there is an implicit requirement in s 75-15 of the IPS or r 75-250(2) of the Insolvency Practice Rules that creditors identify in the direction to a liquidator the benefits of convening the meeting or provide justification for their wish to have the meeting convened (**Grounds 8, 9 and 12**); and

Issue 3: whether the requirement in r 75-250 that a liquidator form the requisite opinion in **good faith** requires that the opinion be reasonable or not unreasonable (**Grounds 5 and 6**).

9. Issue 4 is whether the Liquidators formed the opinion required by r 75-250(2)(a) in circumstances where there was little or no evidence that they had performed the **balancing exercise** required by that sub-section or were even aware that they were required to do so (**Grounds 10 and 11**).
10. The applicants also challenge the primary judge's erroneous findings as to the benefits of convening the meeting, the likely outcome of the balancing exercise, and whether the Direction was vexatious, which flowed from the wrong statutory construction (**Grounds 7 and 13 to 15**).
11. There is an additional **evidentiary issue**, namely whether the primary judge erred in granting leave to the Liquidators to re-open their case during the Liquidators' closing submissions in reply and, when the hearing recommenced two weeks later, admitting parts of that evidence over objection (**Grounds 1 to 4**).
12. Ultimately, the primary judge erred in making the direction sought by the Liquidators (**Ground 17**) and in refusing the Directing Creditors' application (**Grounds 18 to 20**).

B. Factual background

The appointment, the Direction and the refusal

13. The company was wound up by the Court on the just and equitable ground on 17 October 2024 and the Liquidators were appointed: J[5].

14. On 9 December 2024, the Directing Creditors issued a direction to the Liquidators requiring the Liquidators to convene a meeting of the creditors of the Company (**Direction**): J[1].⁶ As stated in the Direction, the purpose of the meeting was to allow the creditors to resolve, if they saw fit, the following resolutions:
1. Pursuant to section 90-35(1)(a) of the IPSC each of [the Liquidators] be removed forthwith as the liquidators of the Company.
 2. Pursuant to section 90-35(1)(b) of the Schedule, each of [nominated persons] be appointed as joint and several liquidators of the Company in the stead of [the Liquidators].
15. On 11 December 2024, the Liquidators' solicitors confirmed that the Direction had been received and was being considered.⁷
16. On the same day, the Liquidators engaged English law firm Candey to assist the Company in taking preparatory steps concerning an arbitration with the Republic of Poland (**Poland Claim**).⁸ On 16 December 2024, Candey sent an amended notice of dispute to the Republic of Poland on behalf of the company: J[9].
17. On 17 December 2024, the Liquidators notified the Directing Creditors by letter that they declined to comply with the Direction (**Refusal Letter**): J[10].⁹ As required by r 75-255(2)(a) of the Insolvency Practice Rules, the Refusal Letter set out the Liquidators' reasons for the refusal. The Liquidators also prepared a File Note setting out substantially the same reasons, as required by r 75-255(2)(b) of the Insolvency Practice Rules.¹⁰
18. Under the heading "the request is unreasonable", the Refusal Letter referred to three matters in support of the Liquidators' opinion that the Direction was unreasonable "within the meaning sections [sic] 75-250(2)(a) and/or (d) of the IPR". *First*, the Liquidator's opinion that Bright Agile was attempting to bypass the Court's orders appointing the Liquidators. The rationale for that contention appears to be that Bright Agile was present at the hearing of the winding up petition but had not opposed the appointment of the Liquidators. *Secondly*, the Liquidators' concern:

about the impact of convening the meeting on the creditors of the Company as a whole. In particular, the attempt by your clients to remove the Liquidators will cause a significant increase

⁶ AWB 12/337- 338.

⁷ AWB 12/364.

⁸ AWB 12/311.

⁹ The Refusal Letter is at AWB 12/365 - 369.

¹⁰ The File Note is at AWB 16/654 - 655.

in the costs of the liquidation and result in delays in the Company's prosecution of its claims against the Republic of Poland.

19. The Liquidators went on to describe having done "substantial work" in securing the Company's assets in Poland and preparing the updated notice of dispute. *Thirdly*, the Liquidators perceived the interests of Ample Skill to "compete" with those of the Company's creditors and shareholders as a whole.

The first day of hearing

20. The applications came on for hearing on 21 May 2025. A full day of argument followed on the issue of whether the Liquidators' refusal to convene the meeting was justified. Mr Barnden was present in court from at least midday of that day.¹¹
21. The Liquidators read two affidavits of Mr Barnden, affirmed on 20 December 2024 (**Barnden 1**)¹² and 26 February 2025 (**Barnden 2**) respectively.¹³
22. In his affidavits Mr Barnden explained that he considered the Direction was unreasonable because:
- (a) no Directing Creditor had made any complaint about the Liquidators' conduct;¹⁴
 - (b) some of the Directing Creditors were former directors of the Company and he had formed the preliminary view that there were corporate governance failures in the company's board;¹⁵
 - (c) one of the Directing Creditors (Bright Agile) attended the winding up hearing and did not at that time oppose his appointment as liquidator;¹⁶
 - (d) one of the Directing Creditors (Mr Yaw Chee Siew) also had a claim against the Republic of Poland which might compete with the Company's Poland Claim;¹⁷ and
 - (e) the Liquidators had done "significant work" to progress the Poland Claim, including instructing overseas counsel, liaising with the Company's Polish

¹¹ Transcript, 5 June 2025, at 6.9-15 (AWB18/725).

¹² AWB 12/106 - 388.

¹³ AWB 13/389 - 630.

¹⁴ Barnden 1 at [31] (AWB 12/111).

¹⁵ Barnden 1 at [34] (AWB 12/112).

¹⁶ Barnden 1 at [35] (AWB 12/112).

¹⁷ Barnden 1 at [37] (AWB 12/112).

subsidiaries, attempting to secure the Company's books and records and dealing with foreign legal proceedings.¹⁸

23. None of those matters went to the question in issue, namely why he considered it “unreasonable” to convene the meeting, as opposed to why he thought it would be prejudicial to creditors if he and his colleagues were removed as liquidators of the Company.
24. In both written and oral submissions, counsel for the Directing Creditors submitted that the Liquidators had asked themselves the wrong question, that the Liquidators' reasons both in the Refusal Letter and in Mr Barnden's evidence went to the removal of the Liquidators and not the convening of the meeting, and that there was no evidence that the Liquidators had undertaken the balancing exercise required by r 75-250(2)(a) of the Insolvency Practice Rules in forming the opinion that the Direction was unreasonable.
25. During Senior Counsel's closing submissions in reply, the primary judge invited the Liquidators to apply to re-open their case and seek leave to call further evidence.¹⁹ In explaining that invitation, the primary judge observed that Mr Barnden was:²⁰

exposed to the risk that if he has not explained his reasoning process in a way that I can see a rational connection between the factors to which he refers and the conclusions that he draws from them, without imagining it for myself, then he may fail and he may fail simply because he does not have the evidence to succeed[.]

26. The Liquidators took up the invitation.²¹ Counsel for the Directing Creditors opposed the grant of leave.²² Leave was nonetheless granted to the Liquidators to file and serve “a further affidavit limited to addressing the immediate [*scil.* intermediate] steps of his reasoning process between the facts to which he refers and the conclusions which he has reached, in determining not to convene a meeting of creditors of Balamara Resources Ltd”. The hearing was adjourned to 5 June 2025.
27. The crux of the primary judge's reasoning, as stated in his *ex tempore* judgment on the application to re-open and call further evidence was:²³

it seems to me, here, that it is plain that the just, quick and cheap resolution of the real issues in dispute in the proceedings would not be promoted by determining the proceedings on the basis

¹⁸ Barnden 1 at [38] and [39] (AWB 12/112).

¹⁹ Transcript, 21 May 2025, at 60.30-49 (AWB 17/715).

²⁰ Transcript, 21 May 2025, at 57.18-22 (AWB 17/712).

²¹ Transcript, 21 May 2025, at 61.32-36 (AWB 17/716).

²² Transcript, 21 May 2025, at 62.1-11 (AWB 17/717).

²³ AWB 19/761.

that there is a gap in the evidence, where that gap could potentially have been filled.

The third affidavit of Mr Barnden

28. The Liquidators filed the third affidavit of Mr Barnden on 27 May 2025 (**Barnden 3**).²⁴

There, Mr Barnden deposed that he:²⁵

considered the creditors and shareholders of the Company as a whole would have been substantially prejudiced by the costs and delays associated with the convening of the meeting (irrespective of the outcome of the proposed resolution), as set out above, as well as by the further costs and delay associated with replacement liquidators (if the proposed motion was successful) ...

Despite having said that his reasons “set out above” went to the convening of a meeting, only one in fact did. That was a new reason (**Work Minimisation Reason**) which Mr Barnden described as follows:²⁶

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 ...

29. Mr Barnden also further developed some reasons previously given but did not identify how they went to the prejudice of convening a meeting, as opposed to his perception of prejudice if the creditors resolved to remove the Liquidators.
30. The Directing Creditors objected to parts of Barnden 3 as being outside of the scope of the grant of leave, including relevantly the evidence as to the new Work Minimisation Reason.²⁷ Each of the objections was overruled.²⁸
31. Mr Barnden gave evidence in cross-examination that the Refusal Letter and the File Note set out the final reasons that the Liquidators decided upon to say that the Direction was unreasonable.²⁹ He also accepted that the Work Minimisation Reason did not form part of those final reasons.³⁰

C. Grounds 1 and 1A: the evidentiary issue

32. The primary judge’s exercise of discretion in permitting the Liquidators to re-open their

²⁴ AWB 16/640 - 655.

²⁵ Barnden 3 at [33] (emphasis added) (AWB 16/648).

²⁶ Barnden 3 at [26] (AWB 16/647).

²⁷ Transcript, 5 June 2025, at 2.32-35 (AWB 18/721).

²⁸ Transcript, 5 June 2025, at 3.5-30, 43-44 (AWB 18/722).

²⁹ Transcript, 5 June 2025, at 8.19-27 (AWB 18/727).

³⁰ Transcript, 5 June 2025, at 8.29-31 (AWB 18/727).

case and call further evidence was, contrary to the primary judge's invocation of the overriding purpose, not consistent with the "just, quick and cheap" resolution of the real issues in the proceedings (s 56, *Civil Procedure Act 2005* (NSW)). Instead, the grant of leave was contrary to each element of the overriding purpose.

33. The erroneous exercise of the discretion involved error in the *House v The King* (1936) 55 CLR 499 at 505 sense because the primary judge failed to take into account the prejudice to the Directing Creditors in having to meet new evidence as to Mr Barnden's reasoning after the Directing Creditors had made comprehensive submissions, in the presence of Mr Barnden, as to the defects in Mr Barnden's reasoning. The grant of leave to re-open and call further evidence invited retrospective justifications shaped to remedy the defects in the Liquidators' reasons that had been exposed by the Directing Creditors' submissions. Allowing the Liquidators to re-open and call further evidence in those circumstances caused serious prejudice to the Directing Creditors' case.
34. The prejudice was compounded by the primary judge admitting, over the Directing Creditors' objection, evidence of the Work Minimisation Reason that fell outside the scope of the leave granted. The Work Minimisation Reason was the only evidence that went to any perceived prejudice in convening the meeting as opposed to the perceived prejudice if the Liquidators were removed. It appeared for the first time in Barnden 3. It was not an intermediate step in Mr Barnden's reasoning, it was a new justification for the refusal.
35. By reason of the foregoing matters, the primary judge erred in granting leave to the Liquidators to re-open their case and call further evidence (**Ground 1**) and in admitting evidence of the Work Minimisation Reason (Barnden 3 at [25], [26] and the opening words of [27]) over the Directing Creditors' objection (**Ground 1A**).

D. The primary judge's reasons for judgment

36. On the issues of statutory construction of s 75-15 of the IPS and r 75-250 of the Insolvency Practice Rules, the primary judge reached the following conclusions:
 - (a) the determination of whether a direction to convene 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 their removal might be vexatious or seriously prejudicial and whether the convening the meeting would be vexatious or seriously prejudicial: J[73]; and
- (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].

37. Having interpreted s 75-15 and r 75-250 in this way, the primary judge turned to assess the Liquidator's opinions, finding 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]).

E. Section 75-15 of the IPS in its legislative context

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

39. In this case, the Direction to convene the meeting was for the purposes of putting to the creditors a resolution to remove and replace the liquidators. The ability of a creditor or group of creditors to direct the convening 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 convening 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.

40. That the opinion to be formed is as to substantial prejudice and benefits of *complying with the direction* (as opposed to the possible consequences of the vote at the meeting) 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 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.
41. 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.³¹ 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 convene a meeting, that the court (and not the liquidator) is to consider the propriety of the removal of the liquidator.

F. Issue 1 – the wrong question

42. The Liquidators asked themselves the wrong question. They asked whether their

³¹ *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).

removal as liquidators would be prejudicial to creditors if the resolution were to pass (and it was not possible to know whether it would pass), not whether complying with the Direction by convening the meeting would be substantially prejudicial.

43. As required by r 75-255(2) of the Insolvency Practice Rules, the Liquidators' reasons for declining to convene the meeting were set out in the **Refusal Letter**³² and in a **File Note**.³³ The Liquidators gave further detail regarding their reasons in Mr Barnden's two affidavits filed in advance of the hearing on 20 December 2024 and 26 February 2025 respectively. The prejudice that the Liquidators identified in the Refusal Letter, the File Note and Mr Barnden's two affidavits was prejudice consequent on their removal as liquidators, not prejudice consequent on complying with the Direction by convening the meeting as directed.
44. We have already explained why the evidence as to the Work Minimisation Reason ought not to have been admitted. Even if, contrary to Ground 1, the primary judge correctly admitted that evidence, it ought to have been rejected as a retrospective justification and not genuinely one of the Liquidators' reasons for refusing to convene the meeting as directed. Appeal grounds 2 and 3 go to this point. It was only in Mr Barnden's third affidavit that the Work Minimisation Reason emerged as a justification for the refusal. If the Work Minimisation Reason had been one of the Liquidators' reasons for refusing to comply with the Direction, it would have been included in the Refusal Letter and the File Note (as required by 75-255(2) of the Insolvency Practice Rules) and in Mr Barnden's first two affidavits. That the Work Minimisation Reason was a retrospective justification which emerged only after the Directing Creditors had identified in written and oral submissions that the Liquidators had directed themselves to the wrong question (their removal, instead of the convening of a meeting) is more likely than the Liquidators opinion having been based on the Work Minimisation Reason which they nonetheless chose not to refer to in the Refusal Letter, the File Note or either of Mr Barnden's first two affidavits.
45. **Ground 4(b)** identifies a further reason why the Work Minimisation Reason did not support an opinion formed by the Liquidators that the Direction was unreasonable because it would cause substantial prejudice to creditors which outweighed the benefits of convening the meeting: the cross-examination of Mr Barnden exposed that the

³² AWB 12/365-369.

³³ AWB 16/654-655.

Liquidators minimised their work anyway (and must have intended to do so) despite having refused to comply with the Direction, until the Court had determined whether the refusal was justified.³⁴ Accordingly, the Work Minimisation Reason was a neutral factor in whether or not to comply with the Direction because either way, the interests of creditors were to be prejudiced by the Liquidators' intended minimisation of their work.

46. Even if the Work Minimisation Reason had been a reason for the Liquidators' opinion that the Direction was unreasonable, the primary judge should have concluded that it was not a reason that could rationally support the opinion (**Ground 4(a)**). 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, the Liquidators held the view that the minimisation of work would be prejudicial to creditors.³⁵ The opinion, if based on the Work Minimisation Reason, was unreasonable and capricious, not an opinion formed in good faith. No real prejudice would have resulted from the convening of the meeting because the eight week delay in convening the meeting coincided with the Christmas holiday period.
47. The primary judge ought to have found that, having regard to the Liquidators' reasons which concerned their removal and not the convening of the meeting as directed, the Liquidators did not form the opinion that the Direction was unreasonable, rather they formed the opinion that their removal would be unreasonable. His Honour erred by failing to so find (**Ground 16**).

G. Issues 2 and 4 – the balancing exercise

48. 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 (i.e. convening 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. Only if, in the Liquidators' good faith opinion, the substantial prejudice of

³⁴ Transcript, 5 June 2025, at 15.38-43 (AWB 18/734).

³⁵ Barnden 3 at [26] (AWB 16/647); Transcript, 5 June 2025, at 15.45-47 (AWB 18/734).

complying with the Direction outweighed the benefits of complying with the Direction would the Direction be unreasonable. Those are the express requirements of r 75-250(2)(a).

49. Despite three detailed affidavits from Mr Barnden, there was no evidence that the Liquidators considered the benefits of convening the meeting. There was also no evidence that the Liquidators conducted the balancing exercise or were even aware of the need to conduct the balancing exercise (other than a bare reference to “sections 75-250(2)(a) and/or (d)” in the Refusal Letter).
50. 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 so found (**Ground 10**).
51. Alternatively, if the Liquidators did form the opinion required by r 75-250(2)(a), they did so capriciously without regard to the statutory requirements and therefore not in good faith (**Ground 11**).
52. As to the benefits of complying with the Direction, it is wrong to suggest, as the Liquidators did and as the primary judge found, that the Directing Creditors were somehow to blame for not advocating for the benefits of convening the meeting (J[15], [18], [75]-[76]) (**Ground 12**). 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]) (**Ground 15**). The statutory task was to evaluate what was required by the Direction (the convening of a meeting) and to assess the benefits of convening the meeting against any substantial prejudice that convening the meeting would cause.
53. There is no requirement in the statutory regime for the Directing Creditors to explain or justify why they wish to put resolutions to a meeting of creditors. Likewise, on an application for an order that the Liquidators complete their statutory duty, the Directing Creditors were not required to supply reasons for why the Liquidators ought be removed.
54. At J[18], the primary judge purported to draw an adverse inference from the fact that no reasons were stated in the evidence supporting the creditors’ interlocutory process.³⁶

³⁶

AWB 3/25.

He erred in doing so (**Grounds 8 and 9**). An adverse inference may be drawn in circumstances of an *unexplained failure* to lead certain evidence if that evidence would have assisted the party's case: *Jones v Dunkel* (1959) 101 CLR 298 at 308, 312 and 320–1; and *Commercial Union Assurance Co of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389 at 418–419. The absence of such evidence is explained, plainly, by the fact that it was not relevant, certainly on the Directing Creditors' case, to the issue in dispute. The question in dispute was whether the Liquidators had failed to perform their statutory duty, not why the creditors had asked for that duty to be performed. The rule in *Jones v Dunkel* as developed in *Ferrcom* therefore had no application. The primary judge obviously placed substantial weight on that inference, finding that it explained the absence of evidence that the Liquidators performed the statutorily required balancing exercise: J[75]–[76]. The primary judge erred in overlooking the Liquidators' failure to identify the benefits of complying with the Direction and then to balance those benefits against any substantial prejudice (**Grounds 12 to 15**).

55. The primary judge erred in imposing his own opinion as to the benefits of complying with the Direction and as to the outcome of the balancing exercise: J[76]. His task was confined, on the Liquidators' application, to considering the opinions formed by the Liquidators. As to the role of the primary judge's own opinions on the Directing Creditors' application, that is considered at paragraphs **Error! Reference source not found.** to **Error! Reference source not found.** below. In any case, once the absence of substantial prejudice in convening the meeting had been identified, the benefits of complying with the Direction by convening the meeting outweighed any substantial prejudice (**Grounds 13 and 14**).

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

56. In addition to having asked themselves the wrong question and having not formed the requisite opinion, the Liquidators did not discharge their burden to satisfy the Court that they formed the opinion in good faith.
57. What amounts to good faith is context and fact dependent.³⁷ The concept of “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. A decision made

³⁷ *Gillespie v Gillespie* (2025) 172 ACSR 183; [2025] NSWCA 24 at [29].

capriciously is not a decision made in good faith.³⁸

58. 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.³⁹ In all aspects of the role, the liquidator is required to act in the interests of creditors. The expression “good faith” appears in r 75-250(2)(a) in the context of a power being conferred on an external administrator who is likely to have a personal interest in not being removed from their position. The good faith requirement ought be rigorous enough to protect against the unreasonable exercise of that power, which may be tacitly motivated by the external administrator’s personal interest in not being removed.
59. Within the Insolvency Practice Rules, the concept of good faith appears in rr 70-10, 70-15, 70-20, 70-25, 75-195, 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 scope of the rights of creditors in that given context.
60. A handful of corporations law cases have (to various degrees) considered that formulation.⁴⁰ 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 e.g. *Re Pacific Biotechnologies* [2020] VSC 636. That case concerned the right of creditors to seek production of documents under r 70-15(2)(c) of the Insolvency Practice Rules. 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

³⁸ *Spalla v St George Motor Finance Ltd (No 7)* [2006] FCA 1177 at [168].

³⁹ *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.

⁴⁰ *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 Casponey, in the matter of ACN 122 909 040 Pty Ltd (in liq) (formerly Modscape Pty Ltd)* [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.

wrongly) that the file note was subject to legal professional privilege. That is, there was a reasonable basis for the liquidator's belief.

61. 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 (**Ground 5**). The primary judge ought to have found that good faith requires there to be a reasonable basis for the opinion (**Ground 6**). As in the administrative law context, so in this context: parliament should be taken to intend that a statutory power will be exercised reasonably by a decision-maker.⁴¹ Even where a decision depends on the opinion of the decision-maker, the decision is reviewable and is required not to be unreasonable.⁴² In this context, the same requirement might be described as an absence of capriciousness. The primary judge was also wrong to find that this good faith standard submitted by the Directing Creditors constituted “merits review” (J[42]), rather it is a standard aspect of judicial review. The question is whether the result was unreasonable, not whether the Court would have reached the same opinion that the liquidator reached.
62. A requirement of good faith also arises in the context of leave to bring derivative actions under s 237 of the *Corporations Act 2001* (Cth).⁴³ The primary judge was wrong to find that the standard for a liquidator faced with a direction to convene a meeting ought be a lower standard than is required of a creditor wishing to bring a claim in the name of the company (J[42]).
63. 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.⁴⁴ 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”.⁴⁵ The reforms conferred

⁴¹ *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at [80] (Nettle and Gordon JJ).

⁴² *Avon Downs Pty Ltd v Commissioner of Taxation (Cth)* (1949) 78 CLR 353 at 360.

⁴³ *Swansson v Pratt Properties Pty Ltd* (2002) 42 ACSR 313; [2002] NSWSC 583 and *Gillespie v Gillespie* (2025) 172 ACSR 183, [2025] NSWCA 24.

⁴⁴ *Thiele v Commonwealth* (1990) 22 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.

⁴⁵ **Explanatory Memorandum** to the Insolvency Law Reform Bill 2015 at [9.75] (SWB 72).

an important power on creditors to vote to remove a liquidator, the exercise of which power requires the convening of a meeting. The Insolvency Practice Rules should be construed consistently with the legislative purpose of enhancing creditor participation. As the Explanatory Memorandum that introduced the 2017 reforms explained regarding the creditors' right to direct the liquidator to convene a meeting:⁴⁶

To ensure that creditors are able to call meetings when they desire it, 25 percent of creditors by value will be able to call meetings and have the cost treated as an administration cost. **Removing any ability for creditors to call meetings would limit their ability** to monitor the administration through face-to-face questioning of the practitioner, or **to effectively and efficiently make decisions as a whole.**

64. As submitted at paragraph 51 above, if this Court finds that contrary to the applicants' submissions at paragraphs 48 to 50, the Liquidators did form the opinion required by r 75-250(2)(a), this Court should nonetheless find that in the absence of evidence that the Liquidators performed or were even aware of the balancing exercise, that the Liquidators did not form that opinion in good faith because it was formed capriciously or unreasonably without regard to the statutory requirements (**Ground 11**).
65. As to the Liquidators' opinion that the Direction was vexatious, the primary judge found that it was not necessary to reach any final view as to those matters: J[79]. The primary judge ought to have held that the opinion was not held in good faith because it was capricious or unreasonable (**Ground 7**). The primary judge observed that the matters identified by the Liquidators rose no higher than the possibility of misuse of the relevant powers. It was capricious or unreasonable to jump from those suspicions to an opinion that the Direction to convene the meeting was vexatious. There can be nothing vexatious in creditors, whatever their personal motivations, wishing to have a meeting convened so that they may put a resolution to the general body of creditors. As the Explanatory Memorandum recognised, creditors might even remove a liquidator where it is not actually in their best interests to do so.⁴⁷ The Explanatory Memorandum went on to observe that the safeguard against this was the simultaneous introduction of a creditors' power to "more easily obtain information regarding the conduct of the administration". There is no suggestion that the safeguard should be a liquidator refusing to convene a meeting unless the creditors directing the convening of the

⁴⁶ *Ibid* at [9.268] (SWB 73).

⁴⁷ *Ibid* at [9.287] (SWB 77).

meeting satisfy the liquidator that they have good reasons for wishing to put a resolution seeking the replacement of the liquidator.

66. Nor is there any proper basis for an opinion that the Direction was vexatious because Bright Agile appeared as an interested person at the winding up application and did not then oppose the appointment of the Liquidators. As the Explanatory Memorandum recognised, the 2017 reforms would confer a new power on creditors to replace a Liquidator appointed by the Court which had previously not existed.⁴⁸ On a winding up application, the petitioning creditor's nominee will ordinarily be appointed unless some good reason is shown why that person should not be appointed.⁴⁹ By contrast, creditors exercising their statutory power to replace a liquidator may vote as they see fit without having to satisfy anyone of their reasons in advance. The safeguard against improper use of the creditors' powers is the 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 application that the Court will itself consider the propriety of the removal of the liquidator (as discussed at 40 above).
67. Three situations were identified in the Court below that might constitute a vexatious direction to convene a meeting. The first appears in r 75-250(3): where a direction is given within 20 business days after a similar direction was given. The second and third were identified in the Liquidators' written submissions: where the resolution⁵⁰ proposed to be put at the meeting is beyond the authority of the meeting to resolve or where the resolution would be otherwise incapable of having legal effect.⁵⁰ A liquidator considering the reasonableness of a direction to convene a meeting may, of course, have regard to the resolutions proposed to be put at the meeting in considering whether it is futile to convene the meeting and so the Direction unreasonable. What the liquidator may not do is assume the outcome of a vote on the proposed resolution and then determine the reasonableness of the direction to convene the meeting based on whether the liquidator considers the consequences of the passing of the resolution to be

⁴⁸ *Ibid* at 171 (SWB 71).

⁴⁹ As recently summarised by McGrath J in *Re Bosnian Islamic Council of Australia* [2024] NSWSC 247 at [19]-[20].

⁵⁰ Transcript, 5 June 2025, at 29.28-42 (AWB 18/748), referring to the Liquidators' Additional Written Submissions at [4] (AWB 10/96).

reasonable. That is to usurp the role of the Court on any future application under s 90-35(4) of the IPS for the liquidator to be reinstated.

68. It follows from all of those matters that the primary judge erred in declining to make an order under s 90-15 of the IPS, directing the Liquidators to convene a meeting: J[91] (**Ground 18**).

I. The Directing Creditors' application

69. The Directing Creditors' application was brought in response to the Liquidators' criticism that the Directing Creditors had not sought any relief in respect of the Liquidators' refusal to convene the meeting and that it was for "any disgruntled parties can take whatever action they deem appropriate".⁵¹
70. The application called on the Court to make its own assessment, in all the circumstances, of whether the meeting should be convened. Instead, the primary judge decided the application by deferring to the Liquidators' opinion as to the reasonableness of the Direction: J[91]. That was an erroneous abdication of the Court's power to determine an application on the evidence before it under s 90-15 of the IPS (**Ground 19**). The Directing Creditors did not seek an order under s 90-15 that the Direction should be taken to be reasonable under r 75-250(2) of the Insolvency Practice Rules. They sought an order that the Court direct the Liquidators to convene a meeting under the Court's broad power to in s 90-15 to make orders in relation to the external administration of a company, in circumstances where the Directing Creditors were being prevented by the Liquidators' opinion from exercising their statutory right to vote on a resolution to remove the Liquidators.
71. The primary judge went on to find that, if it were appropriate for the Court to itself decide whether the meeting should be called, "the decision was properly reached" (J[91]), apparently meaning that the primary judge considered that the meeting should not be called. Although the primary judge did not state his reasons for that conclusion, it was presumably based on his view that the Direction was unreasonable because the substantial prejudice of complying with the Direction outweighed the benefits of complying with the Direction. For the reasons set out at 4848 to 55 above, that conclusion was erroneous (**Ground 20**). The primary judge ought to have exercised his

⁵¹ Liquidators' Written Submissions at [16] and [26] (AWB 7/75 and 77).

discretion under s 90-15 to direct that the Liquidators to convene the meeting (**Ground 18**).

72. If on appeal this Court finds that the Liquidators held a good faith but erroneous opinion that the Direction was unreasonable, the Court should exercise the discretion in s 90-15 to direct the Liquidators to convene the meeting. Otherwise, the Liquidators' erroneous opinion will continue to prevent the creditors from exercising their statutory right to vote on a resolution to remove the Liquidators.

J. Leave to appeal

73. On the question of leave to appeal, the Directing Creditors rely on the Applicant's Summary of Argument filed on 11 July 2025.
74. Leave is also required to appeal from the primary judge's evidentiary rulings, being the grant of leave to re-open and call further evidence (**Ground 1**) and the admission of the evidence as to the Work Minimisation Reason in Barnden 3 at [25], [26] and the opening words of [27] (**Ground 1A**). Leave should be granted in respect of both grounds because the errors had a material bearing on the outcome of the case: they introduced the only asserted reason of the Liquidators that was not directed to the wrong question of whether the removal of the Liquidators would be vexatious or seriously prejudicial.

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1 October 2025

Signed: 
21 November 2025

IN THE MATTER OF BALAMARA RESOURCES LIMITED (IN LIQUIDATION)

COURT OF APPEAL, PROCEEDING NO. 2025/267011

APPLICANTS' STATEMENT OF FACTUAL CHALLENGES

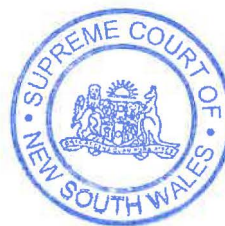
Filed pursuant to Order 2 made on 17 November 2025 in compliance with UCPR, r 51.36(2).

1. **Grounds 2 and 3:** The applicants challenge the primary judge's finding at J[69] that the Liquidators' reasons for refusing to comply with the Direction included the matters set out in Barnden 3 at [26] (**Work Minimisation Reason**). Instead, the primary judge should have found that the Work Minimisation Reason did not form part of the Liquidators' reasons at the time of the refusal to comply with the Direction. There was no evidence of the Work Minimisation Reason in the Refusal Letter,¹ the File Note,² Barnden 1³ (see especially [31]-[39] under the heading "Unreasonableness")⁴ or Barnden 2⁵ (see especially [51]-[63] under the heading "Potential for duplication of work/Delaying the winding"),⁶ despite the fact that each addressed the reasons for the refusal. Mr Barnden accepted in cross-examination that the Refusal Letter contained a fair and accurate statement of his reasons for finding that the Direction was unreasonable,⁷ that it was important not to omit any of his reasons from the written record,⁸ that the File Note together with the Refusal Letter provided a fair and reasonable statement of his reasons,⁹ and that they set out the final version of the reasons.¹⁰ He also accepted that he did not put the Work Minimisation Reason into the Refusal Letter, but he contended that "[i]t's there saying that it'll result in unnecessary delay and additional costs if I'm replaced".¹¹ Of course, the Work Minimisation Reason was not about unnecessary cost and delay *if the Liquidators were replaced*. The primary judge should have found that the Work Minimisation Reason did not form part of the Liquidators' reasons at the time of the refusal to comply with the Direction and was instead a retrospective justification.
2. **Ground 4:** In the alternative, to the extent the reasons included the Work Minimisation Reason, the primary judge ought to have found that the opinion was not reasonable, or was an opinion that no reasonable person in the Liquidators' position could hold because:
 - (a) Mr Barnden's evidence was that he knew that minimising their work would be prejudicial to creditors;¹² and/or

¹ AWB 12/365-369.
² AWB 16/654-655.
³ AWB 12/106-113.
⁴ AWB 12/111-112.
⁵ AWB 13/389-433.
⁶ AWB 13/401-404.
⁷ Transcript, 5 June 2025, at 7.5-8 (AWB 18/726).
⁸ Transcript, 5 June 2025, at 6.31-33 (AWB 18/725).
⁹ Transcript, 5 June 2025, at 8.5-11 (AWB 18/727).
¹⁰ Transcript, 5 June 2025, at 8.17-31 (AWB 18/727).
¹¹ Transcript, 5 June 2025, at 9.46-49 (AWB 18/728).
¹² Barnden 3 at [26] (AWB 16/647).

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- (b) the Liquidators intended to minimise their work regardless of whether they complied with the Direction, which was the natural inference arising from the evidence,¹³ such that the Work Minimisation Reason was not a factor in favour of the refusal.
3. **Ground 7:** The primary judge was wrong to find that the Liquidators held, in good faith, the opinion that the Direction was vexatious: J[79]. He should have held that the opinion that the Direction “is vexatious” was either unreasonably held, or not held in good faith in circumstances where:
- (a) as correctly found by the primary judge at J[58], the Liquidators’ reasons regarding vexatiousness rose no higher than a possibility of misuse of the relevant powers; and
- (b) there was nothing in the matters identified in the Refusal Letter, the File Note or Mr Barnden’s evidence which established that the Direction to convene the meeting was vexatious.¹⁴
4. **Ground 10:** The applicants challenge the primary judge’s finding at J[78] that the Liquidators formed the opinion required by r 75-250(2)(a). The primary judge should have found that the Liquidators did not form that opinion because the evidence did not indicate that the Liquidators ever turned their minds to whether there would be *substantial* prejudice to creditors if the Direction were complied with, nor to whether there were any *benefits* of doing so, and they did not weigh up those matters against one another to find that the substantial prejudice outweighed the benefits.
5. **Ground 11:** In the alternative to ground 10, if the Liquidators did in fact hold the r 75-250(2)(a) opinion, the applicants challenge the primary judge’s finding that the Liquidators held that opinion in good faith: J[78]. Instead, to the extent that the Liquidators did hold that view, it was either not held in good faith, or was formed unreasonably, for the reasons identified in [4] above.
6. **Ground 13 and 14:** The applicants challenge the primary judge’s finding that there were no benefits of complying with the Direction, and that, if there were any such benefits, they were likely substantially outweighed by the Liquidators’ opinion as to the disadvantages of compliance: J[76]. The primary judge should not have engaged in that assessment. To the extent it was proper for the primary judge to form views as to benefit and the balancing exercise, the primary judge should have found that the benefits included allowing creditors an opportunity to consider exercising their power to remove a liquidator and quelling the controversy, and that those benefits were not outweighed by any substantial prejudice.
7. **Ground 20:** The applicants challenge the primary judge’s finding, made in the context of dismissing the Directing Creditors’ application, that the Direction was unreasonable: J[91]. That finding was wrong for the reasons set out above and in the applicants’ submissions.

¹³ Transcript, 5 June 2025, at 15.38-43 (AWB 18/734).

¹⁴ Refusal Letter [27]-[31], [34]-[35] (AWB 12/368-369); File Note (AWB 16/654-655); Barnden 1 [31]-[37] (AWB 12/111-112; Barnden 2 [64]-[65], [177]-[178] (AWB 13/404-405, 432-433); Barnden 3 [10]-[12], [28]-[29], [30]-[32] (AWB 16/643, 647-648).