o'neill partners commercial lawyers

Legal Alert

March 2011

Circular Resolutions Unlawful - serious implications for insolvency practitioners

Key Summary

The passing of resolutions of a committee of inspection by means of a circular resolution outside a formal meeting is not uncommon. This article discusses two recent judgments which have determined that such a circular resolution is unlawful, bringing into play the provisions of the IPA Code which requires remuneration drawn inappropriately to be immediately repaid into the administration account.

Liquidators on occasions find themselves dealing with a committee which prefers to avoid the cost and inconvenience of attending formal committee meetings. On other occasions, a committee will discuss its business at a formal meeting, and request further information be prepared and sent to them before voting on a resolution.

In these circumstances, practitioners have often proposed to a committee, or agreed with a committee's request, to deal with the business of the meeting by way of email or facsimile circular resolution.

The primary statutory function of a committee involves the consideration and approval of the remuneration claims of the administrator or liquidator. It is not uncommon for these fees resolutions to be passed by way of email or facsimile circular resolution.

In the recent decision of Justice Barrett in Onefone Australia Pty Ltd v One.Tel Ltd [2010] NSWSC 401, which involved the special purpose liquidator's application for approval of remuneration, it was held that an interim payment made to a liquidator pursuant to an email circular resolution was unlawfully received by him.

This email circular resolution was passed following a properly convened committee meeting, at the specific request of committee members present at the meeting, so as to permit committee members who are not present at the meeting have the opportunity of voting on the interim fees resolution.

His Honour considered that, so far as a committee was concerned, due to the absence of an equivalent to Section 248A in the Corporations Act (which permits directors to pass circular resolutions without a directors meeting being held), Parliament had not intended the committee to so act.

This decision has serious practical implications for all liquidators who have received remuneration pursuant to circular resolutions, whether passed by email, facsimile or post. In short, he or she will have "drawn" remuneration inappropriately, within the meaning of Part 16.3 of the IPA Code of Professional Practice, which is in the following terms:

> "16.3 Remuneration drawn inappropriately
>
> If a Practitioner becomes aware that fees have been improperly taken, because, for example, the correct process has not been followed, the Practitioner must immediately repay the amount in question into the Administration account.
>
> Remuneration may then only be redrawn on approval being obtained and an explanation as to why the fees were improperly taken must be provided to creditors at that time.
>
> Fees and expenses incurred in rectifying inappropriately drawn fees must be borne by the Practitioner."

Level 17, 55 Hunter Street, Sydney NSW 2000
Ph (02) 9232 1244 | **Fax** (02) 9232 1266| **Email** info@oplegal.com.au | **Web** oplegal.com.au

Circular Resolutions unlawful – serious implications for insolvency practitioners

What should a practitioner do in these circumstances?

In the One.Tel matter, the special purpose liquidator determined to make a further application in those same remuneration proceedings for an order pursuant to Section 1322(2) of the Corporations Act which deals with "procedural irregularities". In his subsequent judgment dated 1 October 2010 (Onefone Australia Pty Ltd v One.Tel Ltd [2010] NSWSC 1120) his Honour held that Section 1322 was not available to cure any invalidity of the circular resolution, as the circular resolution involved substantive, not procedural irregularity.

Following the later judgment, the special purpose liquidator repaid the remuneration into the liquidation bank account. The special purpose liquidator also had the benefit of considering the views of ASIC, who appeared in the remuneration application as an amicus curiae (friend of the Court). It was ASIC's view that the IPA Code obliged the liquidator to repay the remuneration received by means of the unlawful email circular resolution.

Thus, liquidators ought now give serious consideration to reviewing their administrations, to determine whether or not any unlawful resolutions have been passed by a committee. In particular, they ought determine whether they have received remuneration by means of circular resolutions of a committee, whether passed by email, facsimile or post.

In such circumstances, liquidators should give serious consideration to repaying such remuneration into the administration or liquidation bank account, pending the convening of a further meeting of the committee for the purpose of reconsidering its earlier unlawful fees resolution. This will necessarily involve substantial inconvenience to all stakeholders in an administration or a liquidation, and significant additional cost to the liquidator.

Such a requirement raises an interesting question: what if the unlawful fees resolution was passed by a committee of a company where the liquidation has been finalised, and the company deregistered? Presumably, practitioners will be required to make the repayment to ASIC, pending the making of an application to either ASIC or the Court for reinstatement of the registration of the company and thereafter the convening of a further meeting of the committee for the purpose of reconsidering the earlier unlawful resolutions.

The judgments of Justice Barrett dated 7 May 2010 and 1 October 2010, concerning the circular resolution/section 1322 issues, are currently the subject of an appeal by the special purpose liquidator.

The special purpose liquidator has advised the IPA of these important industry developments. The IPA awaits the outcome of the special purpose liquidator's appeals, with interest.

After discussion with the IPA, we intend to provide written submissions to government, with a view to appropriate amendments being made to the Corporations Act and its Regulations.

In our view, the Corporations Act 2001 should not differentiate between circular resolutions passed by a board of directors or a committee of inspection. A similar provision to Section 248A concerning directors meetings should be included in the Corporations Act 2001 or its Regulations to permit a committee to pass circular resolutions without a formal committee meeting.

This article was written by Michael O'Neill, a partner in our insolvency and reconstruction team. We invite you to contact Michael or Colin Brown, should you have any questions or require any further information about the matters discussed in this article.

Contacts

Colin Brown
Partner
colinb@oplegal.com.au
(02) 8046 4902

Michael O'Neill
Snr Partner & Chairman
michaelo@oplegal.com.au
(02) 8046 4905