

To Extend, or Not to Extend: That is the Question

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Part 5.7B of the *Corporations Act 2001* (Cth) (“**the Act**”) contains provisions that allow a liquidator to seek orders that void certain transactions undertaken by a company whilst it is insolvent, or that are not in the company’s interests. The kinds of transactions that will be investigated by a liquidator include:

- Preferential payment - see section [588FA](#) of the Act;
- Uncommercial transactions - see section [588FB](#) of the Act;
- Insolvent transactions - see section [588FC](#) of the Act;
- Insolvent transactions - see section [588FD](#) of the Act;
- Unreasonable director-related transactions - see section [588FDA](#) of the Act; and
- Creditor-defeating dispositions - see section [588FDB](#) of the Act.

The period of scrutiny of the company’s transactions prior to liquidation for each category of voidable transaction is set out in section [588FE](#) of the Act.

Section [588FF\(3\)](#) of the Act stipulates that a voidable transaction action by a liquidator must be commenced within:

- three years beginning on the [relation back day](#), or 12 months from the appointment of a

liquidator (whichever is the later); or

- such longer period as the Court orders.

An application for extension of the time to commence an action **must** be filed within the relevant three year or 12 month period.

The [Court](#) has previously held that any application for an extension of time should include:

- An explanation for the delay;
- A preliminary view on the merits of the claim;
- Consideration of why any prejudice in granting the application is not sufficiently substantial to outweigh the case for granting the extension.

The application is not automatically rubber stamped and the liquidator should satisfy the Court on the points above. Failure to satisfy the Court can result in the extension of time application being rejected.

In a [recent decision](#) of the Federal Court, His Honour Justice Reeves had to consider an extension of time application by a liquidator in respect of the director's brother. The liquidator submitted to the Court that the reasons for the delay were the lack of response of the defendants; the inadequacy of the company's records; and the fact that he had not been funded by the company's creditors and therefore had to meet the costs of the liquidation personally (see [33]).

In response, it was contended by the director's brother that the extension of time should not be granted because of the extent of the liquidator's delay. It was claimed that the delay amounted to the liquidator "resting on his hands" and that throughout the course of the liquidation, he had made "consistent efforts" to communicate with the liquidator, many of which remained "without reply" (see [34]).

His Honour accepted that most of the delay had been occasioned by failures of the proposed respondent (Mr Prince), and the director to respond to the liquidator's queries in a timely fashion. In relation to the merit of the claim, His Honour stated that he was satisfied that the proposed claim was not so devoid of merits that it would be unfair to extend the period of Mr Prince's exposure to it. On the question of prejudice, His Honour stated that Mr Prince would not suffer any relevant prejudice by this extension of time being granted.

The extension of time was therefore granted by the Court allowing the liquidator additional time to bring the voidable transaction application.

The above summary is designed to give practitioners a general idea of the time available to file a voidable transaction claim, something which might impact upon them. Any specific advice on voidable transactions generally can be discussed by contacting the Team at Matthews Folbigg.

If you would like more information or advice in relation to insolvency, restructuring or debt recovery practice and procedure, contact Darrin Mitchell on 02 9806 7428 or



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