

Administrators' Remuneration. Is it Fixed?

On 16 February 2006 Justice Gyles of the Federal Court of Australia found that an administrators remuneration had been properly "fixed" for the purposes of section 439E(1)(a) of the Corporations Act 2001 (Act) in circumstances where creditors had resolved to approve that remuneration prospectively on a time basis.

The decision in *Gidley, in the matter of Alliance Motor Body Pty Limited (Subject to Deed of Company Arrangement)(ACN 109 860 899)* [2006] FCA 102 (Alliance), should provide administrators with some long overdue assurance in respect of their ability to have their remuneration fixed prospectively, as well as the means by which it should be fixed.

The case was brought with the support of the Insolvency Practitioners Association of Australia to test the extent of the findings of the Honourable Justice Finkelstein arising from the decision of *Re Korda, in the matter of Stockford Ltd* (2004) 140 FCR 424.

Fixing Remuneration

Section 449E of the Act provides the mechanism by which an administrator or a deed administrator may have their remuneration fixed, in particular it can be fixed:

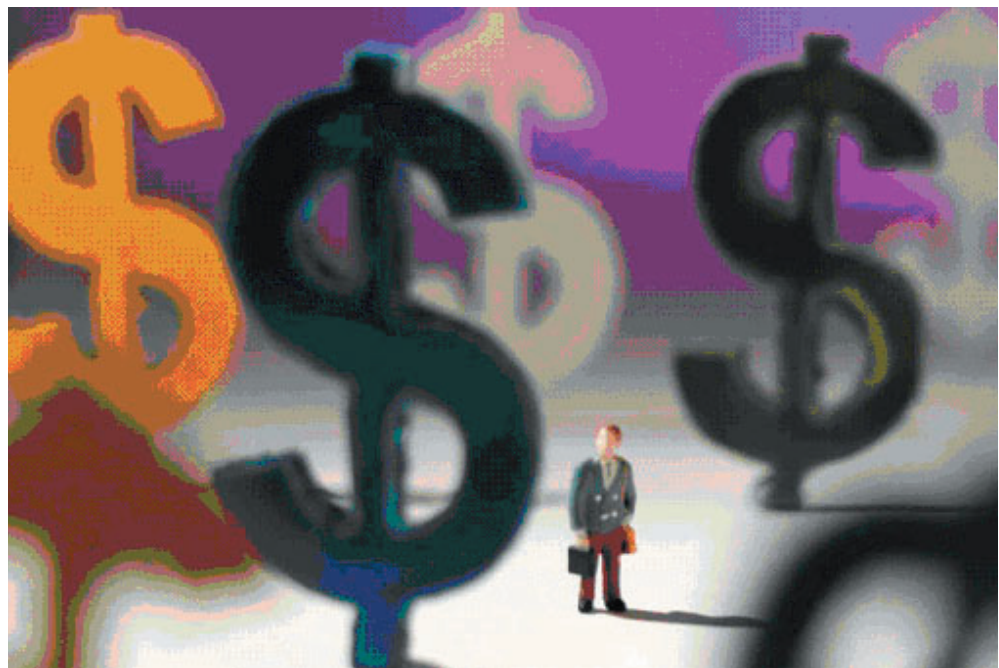
- (a) by a resolution of the company's creditor passed at a meeting convened under section 439A, or 439A or 445F as the case may be (449E(1)(a) of the Act); or
- (b) by the Court on the application of an administrator (section 449E(1)(b) of the Act).

The vexing question has been, what is in fact necessary to ensure that remuneration is "fixed" for the purposes of section 449E(1)(a).

Application in Alliance

In the *Alliance* case, an administrator sought directions pursuant to section 447D of the Act as to whether he was justified in acting on the basis that his remuneration as administrator and as deed administrator had been property fixed by a resolution of creditors made at a meeting convened pursuant to section 439A of the Act.

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The relevant resolutions were as follows:

“Remuneration of Administrators (until Deed executed)”

That the remuneration of the Joint and Several Administrators their partners and staff be approved for the period Friday 15 July 2005 to the date the Deed of Company Arrangement is executed on a time basis as hourly rates outlined in Lawler Partners guide to hourly rates and that the Administrators be authorised to make periodic payments on account of such accruing remuneration to a limit of \$5,000 plus GST in the amount of \$500.

Remuneration of Deed Administrator

That the remuneration of the Deed Administrator be approved up to a limit of \$30,000 plus GST in the amount of \$3,000 on a time basis at hourly rates outlined in Lawler Partners guide to hourly rates. Disbursements are additional.”

Justice Gyles found that the resolutions in this form constituted a satisfactory method of “fixing” the remuneration. Lawler Partners were the firm of the applicant administrator, Paul William Gidley (Gidley). The Australian Securities and Investments Commission (ASIC) appeared to assist the Court.

The firms’ guide to hourly rates had been circulated to creditors by Gidley with the section 439A Report. The guide included particulars of the title, experience and hourly rates of the persons who would be assisting with the relevant administration.

Justice Gyles considered that section 449E permitted remuneration to be fixed prospectively. He noted that while it would be usual for an administrator’s remuneration to be fixed substantially retrospectively, it was often that a deed administrator’s remuneration was fixed prospectively, particularly given that the quantum of that remuneration was often something dealt with in the deed itself. Justice Gyles was of the opinion that it followed that remuneration could be “fixed” by reference to an objective formula. He considered that the resolutions in this case identified the necessary elements of objectivity;

“The person doing the work, that person’s category and the period spent are all the elements required. The sum can be calculated or ascertained definitely”.

Importantly, he considered that the cap forming part of the creditor’s resolution was not a necessary element of the formula, given that its imposition provided no added certainty that such a limit would in fact be reached. Justice Gyles noted however, that the cap may be of importance in determining reasonableness should the administrator’s remuneration be subject to challenge.

Justice Gyles observed that in the *Stockford case* Finkelstein J did not determine whether approval of prospective remuneration had been properly “fixed”, but rather considered the reasonableness

of that remuneration. His Honour drew particular attention to the comments of Dixon J in *Fraser Henleins Pty Ltd & Crowther v Cody* (1945) 70 CLR 100 at 128 which was referred to by Finkelstein J in *Re Korda* in support of his decision.

His Honour disagreed with ASIC’s submissions that the method of fixing of remuneration sought to be approved in this case only encouraged abuse. His Honour considered that the Act was well equipped to deal with any misuse through its mechanisms of allowing remuneration only to be approved by creditors or the Court (section 449E(1)), and by allowing any officer, member or creditor to apply to the Court for a review of a resolution made with respect to remuneration (section 449E(2)).

Justice Gyles in his judgment warned that his decision was only binding on the administrator in the *Aliance* case. However, in reality, it may be relied upon generally by administrators. Whilst only a decision of a single judge which might be seen to be in conflict with the decision of Finkelstein J in *Stockford* that earlier decision was primarily concerned with whether the creditors had passed the necessary fee resolution in accordance with section 449E or whether it could be delegated to a committee of creditors.

For administrators seeking to have their remuneration fixed on a time basis, they should ensure that:

- (a) creditors are given a schedule of at least the titles/positions of persons, their experience and chargeable rates, prior to the meeting seeking to approve their remuneration;
- (b) the resolution makes particular reference to that schedule, and
- (c) Sufficient systems are in place for time recording to ensure the administrator will have satisfactory proof of the tasks undertaken and the time spent on such tasks by the respective members of staff.



**Piper Alderman
Lawyers**

Sydney

Level 23
Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000
DX 10216, Sydney Stock Exchange
Phone: + 612 9253 9999
Facsimile: + 612 9253 9900

Melbourne

Level 9
60 Collins Street
Melbourne VIC 3000
DX 30829, Collins Street
Phone: + 613 8665 5555
Facsimile: + 613 8665 5500

Brisbane

Level 9
239 George Street
Brisbane QLD 4000
GPO Box 3134
Brisbane QLD 4001
DX 105, Brisbane
Phone: + 617 3220 7777
Facsimile: + 617 3220 7700

Adelaide

167 Flinders Street
Adelaide SA 5000
GPO Box 65
Adelaide SA 5001
DX 102, Adelaide
Phone: + 618 8205 3333
Facsimile: + 618 8205 3300

Email: enquiries@piper-alderman.com.au
www.piper-alderman.com.au

www.piper-alderman.com.au/CredManInsolvency

**Prepared by:
Kim Dewhurst &
Michael Lhuede**