

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Inquiry into corporate insolvency in Australia

2022 - 2023

Division: Market Conduct Division
Topic: Bryant v Badenoch impacts
Reference: Spoken (p. 61)
Senator: Deborah O'Neill

Question:

CHAIR: Just for the record, lots of heads nodded and one person said no; they were all noes. Can you take this on notice then? The High Court recently handed down the decision in Bryant v Badenoch logging which has implications for the calculation of peak indebtedness in unfair preference claims. In your view, what impact will this decision have on the unfair preference regime?

Mr Dickson: I'm happy to take that on notice.

Answer:

Due to the recency of the decision, Treasury has not considered the practical implications of *Bryant v Badenoch Integrated Logging Pty Ltd* [2023] HCA 2 (Badenoch).

A transaction between a company and a creditor will be a voidable unfair preference in certain circumstances. It must be an insolvent transaction which results in the creditor receiving more from the company than it would have received if it proved for the debt in the liquidation.

There are defences available to a creditor who a liquidator alleges received an unfair preference payment. They are available for transactions in good faith, where there was no reasonable suspicion of insolvency, or transactions which form part of a continuing business relationship.

Prior to Badenoch, the 'peak indebtedness rule' had been used to allow the liquidator to choose the highest point of indebtedness in a running account during the relevant period as the starting point when proving an unfair preference payment.

In Badenoch, the High Court unanimously held that the 'peak indebtedness rule' in respect of unfair preference claims is not incorporated into the continuous business relationship defence (section 588FA(3) of the *Corporations Act 2001*). The decision means that liquidators can no longer rely on the rule to choose this potentially high point of indebtedness. The case provides clarity for both liquidators and creditors around unfair preference claims.