

# **Legal and other professional fees – clawing them back as preferences**

Foleys List

Presenter:

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# Unfair preferences

Available to both liquidators and  
bankruptcy trustees:

*Bankruptcy Act 1966, s. 122*

*Corporations Act 2001, section 588FA*

Applies to payments made by  
insolvent entity

# Unfair preferences

3 further elements:

- (1) transaction (payment or something more?);
- (2) debtor-creditor relationship;
- (3) ultimate effect: “unfair”.

# Unfair preferences

Monies in trust before work  
performed:

*VR Dye & Co. v Peninsula Hotels*

[1999] 3 VR 201

## Unfair preferences

Nexus between performance of work and time of payment? – “transaction”:  
*Beveridge v Whitton* [2001] NSWCA 6;  
*Mann v Sangria* (2001) 38 ACSR 307.

# Unfair preferences

Attempts to recover existing debt  
through future work:

*Re Employ (No. 96) Pty Ltd (in liq)*

(2013) 93 ACSR 48

Risks of an uncommercial  
transaction under s. 588FB

# **Commerciality of recovery of preferences**

Costs to estate/company of proceeding in smaller claims.

*Insolvency Practice Schedules, section 100-5:* power of external administrators to assign preference claims