

News Update - EBIT MS

The National Shadow Minister for Small Business, Mr Bruce Billison (MP) recently suggested that there are several challenges for small business owners including regulations ruling the business owner's time and difficulty in getting a business loan. With the changes to funding for Government Business Advisory Services (BAS's) this also means that owners and managers who need assistance with growth or general strategy advice now have reduced agencies to support them. *Or do they?*

The Condon Group has been expanding their staff, service models and credibility with their business EBIT Management Services. The addition of expert and highly qualified staff Kerry Oldfield and Cathy Wagner (MAIPM CPPD) now means that they are ready to launch their exciting *Growth Management Strategy Model* for SME's looking for an edge over their competitors.

EBIT Management Services P/L (EBIT MS) is a professional consultancy practice offering their SME clients, affordable options and solutions to their business management requirements and objectives. Through their new *Business Growth Management Strategy*, they will assist businesses to outsmart their competitors and give them the advantage through enhanced stakeholder value, credibility and reputation.

Expert Growth Management Strategist, Kerry Oldfield suggests that the EBIT MS new Business Model has proven results which will allow businesses to grow with a competitive edge. He guarantees that through EBIT MS' *Business Growth Management Strategy*, the financial, marketing and growth strategies used, will excite even the most disillusioned business manager and prove that the strategy can deliver significant growth in business turnover.

EBIT MS has also just opened in the Illawarra which means that along with their familiar services, The Condon Group can assist their colleagues in business with even more support services including:

Analysis - Cash flow and financial management analysis;

business planning; business and asset due diligence, valuation and sale.

Financing and Refinancing - Property and non-property assets including debtors, inventories, plant and equipment; debtor analysis and recovery; creditor analysis and liability restructuring to better match business assets with cash flow; introduction of private equity or venture capital.

Support - Board attendance and/or representation; facilitation of meetings; stakeholder dispute resolution; project management solutions.

Growth & Review - Growth management strategy; business growth planning.

Training - Management and staff training including nationally recognised qualifications in management; project management; business and governance for board members.

Register now for the Diploma in Management courses which will be held at the Condon Group Offices in Parramatta. Attendees will obtain a qualification through 2-3 hours per fortnight over a 3 months period without disrupting their business. Training can also be provided at your own premises. Inquire now for dates between September and December 2012.

Contact The Condon Group TODAY to gain your competitive edge through our Growth Management Strategy by calling us on (02) 9893 9499.



Jason Greasby, Hiteshi Dekhtawala and Daniel Kwan at the Condon Forum enjoying some casual drinks and good conversation on our balcony.

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ON THE BEAM

Human Capital

By Schon G. Condon RFD

We often consider the value of a business based on its hard assets or its ability to generate money. In doing the relevant calculations we acknowledge the existence of employees, we sometimes even identify key employees, but rarely do we properly analyse their true value. Everyone is replaceable, the magic question however is how quickly, and at what cost?

Following on from this, the reference to human capital is certainly meant to imply a value, worth or an asset, however this may not always be the case and some staff can obviously be a detriment or liability. Of course it is hoped that in such circumstances that appropriate action is taken early to remove or manage the liability, alas however in the real world this is not always possible or practical, and it is critical that the business identifies a way in which it can march forward whilst under the impediment of the detrimental member (or members) of staff. Not desirable but unfortunately necessary in reality.

One of the key elements that relate to valuing the human asset is adequately knowing what the real trigger points of change are within the individual. By way of example a senior employee who has been loyal, dedicated, hardworking and productive can reverse overnight simply because they have been overlooked in a promotion or possibly not offered equity in the business. Given the potential longevity of such a person when this change event occurs their cost can grow exponentially on two fronts. Firstly, in payout terms, because the potential liability for such a person's redundancy is most likely to be significant, and secondly, from a risk potential, they are likely to be in a role that will exert significant influence on others.

In many businesses promotion is considered a right based on time served or qualifications gained, but in reality the functions and roles at different levels can in fact be quite

different. In simple terms we can break a business into three components, The Equity Holder, The Director and the Employee. All three have vastly different functions and all three must maintain their independent roles. Equity has the vision, the funding and the desire, Directorial the ability to coordinate, manage and plan whilst the employee must have the capacity and commitment to do. We have seen many examples of where doing brilliantly (as an employee) is later destroyed by the sheer inability to coordinate and manage. Put simply, they bumble their way into insolvency.

The time to begin the analysis is earlier rather than later. You need to see the future potential and build on it. Nurture it, harness it and grow it; because it is this way that its true value will be realised. Unfortunately in business and in other areas the paramount reason for selection will often be mateship or bonding over ability and potential.

As operating a business grows increasingly complex and the rewards become more and more difficult to extract, it will soon become more obvious that the early selection and development of talent will become increasingly paramount. The opposite side will also be the individual's ability to understand their capacity and be willing to work as part of a team rather than simply run off as an egotist.

Enjoy the read.

Inside this issue:

- Directors and "Directors" – Part 2 (Directors' Duties)
- Reward to Administrators Acting In Good Faith!!
- Corporations Amendment (Proxy Voting) Bill 2012
- News Update - EBIT MS



Directors and “Directors” – Part 2 (Directors’ Duties)

By Robert Thyer

In our April 2012 issue of *On The Beam*, I discussed the scope of who is considered a “Director” of a Company under the *Corporations Act 2001* (Cth) (“the Act”). However, this analysis was merely the precursor to a much broader topic, **Directors’ Duties and Insolvent Trading**.

Sadly, all too often the issue of Directors’ duties are only really considered when a Company is, or may be, insolvent. It’s my hope that by addressing the overview of Directors’ duties that you, as a likely Director of a Company, will consider the various duties that you owe the Company and the relevant stakeholders.

Directors’ Duties are broadly summarized into four main categories:-

Contractual Duties – Directors and other officers will often have contractual obligations written into their employment agreement and often stipulate additional duties than those discussed below.

Common Law Duties – Directors are bound to adhere to a number of common law duties, including duty of care, skill and diligence. The primary common law case when discussing Directors’ duties is *Daniels v Anderson (1995)* 37 NSWLR 438, also commonly referred to as the AWA Ltd case.

The aforementioned case was primarily dealing with non-executive Directors and their duties to a Company. Briefly, these duties include, but are not limited to the following:-

- Putting themselves in a position to guide and monitor the management of the business;
- Acquire an understanding of the business and the financial position of same; and
- Attend board meetings when reasonably able to attend.

It should be noted that a Director is not required to have detailed knowledge of the Company’s day-to-day activities, enough to satisfy the above list.

Recently the High Court has provided a number of rulings which have not only reinforced the above list, but added to it. In the High Court’s ruling in the recent James Hardie decision

the Court highlighted Directors’ additional obligations to ensure that the minutes of board meetings are accurately reflective of business transacted at board meetings and that documents presented at the board meetings are carefully reviewed.

Equitable/Fiduciary Duties – Under the principle of equity, there are a number of duties imposed on the Director by virtue of the fiduciary relation that exists between Directors and the Company. The main fiduciary duties are summarised as:-

- Duty to act in good faith for the benefit of the Company as a whole;
- Duty to avoid fettering discretions;
- Duty to exercise powers for a proper purpose;
- Duty to avoid conflicts of interest;

Statutory Duties - There are a number of statutory duties imposed on Directors under various statutory powers, most notably, the *Corporations Act 2001* (Cth):-

- Section 588G of the Act – Duty to prevent insolvent trading;
- *Trade Practices Act 1974* (Cth) – Avoid misleading and deceptive conduct;
- Section 180 of the Act – Duty of care and diligence;
- Section 181 of the Act – Duty of good faith;
- Section 182 of the Act – Use of position;
- Section 183 of the Act – Use of information;
- *Income Tax Assessment Act 1936* (Cth), liability for unpaid taxes and relationship to Section 588FGA of the Act; and
- Sections 189, 190 and 198D of the Act – Delegation and reliance.

The categories discussed above should provide a general overview of what is considered to be the base line duties of a Director. However, as businesses become more complex and more demanding, the inherent duties will increase proportionally, so it would be wise to continually assess your position and responsibilities within an organisation to ensure that you are complying with the various duties.

In the next instalment of **Directors and “Directors”**, we will have a look at one specific duty, the duty to prevent Insolvent Trading pursuant to Section 588G of the Act. This is one of the most commonly cited breaches of a Directors’ duty and one that Condon Associates has a great deal of experience in assessing.

Further information available upon request.

Corporations Amendment (Proxy Voting) Bill 2012

By Leonard Khoury

On 18 June 2012, Parliament passed the Corporations Amendment (Proxy Voting) Bill 2012 in relation to Proxy Voting Rules for Director and Executive Remuneration at Annual General Meetings (“AGM”) of Companies.

Pursuant to Section 250N of the *Corporations Act 2001* (“the Act”), a Public Company which has more than one Member must hold an Annual General Meeting of the Members at least once in each calendar year and within five months after the end of its financial year.

The Act requires the AGM agenda to include a resolution that the Director’s Remuneration Report be adopted.

Generally at an AGM, a member of key management personnel of the Company is appointed Chairperson of the Meeting. A resolution is required to be passed for the Director’s Remuneration, however, the Chairperson cannot exercise their proxy votes in regard to the passing of the resolution of Director’s Remuneration.

The Proxy Voting Bill 2012 now clarifies that the Chairperson may exercise the proxy if the Chairperson is appointed as a Proxy and:-

- The vote is directed; or
- The vote is not directed and the appointment of a proxy specifically authorises the Chairperson to exercise the proxy even if the resolution is connected directly or indirectly with Director’s Remuneration.

This means that post this amendment, the Chairperson is allowed to vote as proxy in relation to the remuneration report. Proxy forms will be amended to be easier for Shareholders to understand and complete correctly which will minimise the incidence of proxy votes which must be disregarded.

Reward to Administrators Acting In Good Faith!!

By Hiteshi Dekhtawala

As we all may be aware, Section 181 of the *Corporations Act 2001* (“the Act”) prescribes the Civil Obligations of the Directors and Other Officers of a Company, more specifically imposing upon them the obligation to act in good faith in the best interest of the Corporation and for a proper purpose.

A recent English Decision, *Lictor Anstalt v MIR Steel UK Ltd & Ors* [2011] EWHC 3310 (Ch) confirms that an Administrator, as an Agent of a Company, cannot be held liable for the offence of inducing a breach of contract provided the Administrator has acted in good faith. This decision was more a reminder from the rule in *Said V Butt* that where Administrators act in good faith in carrying out their statutory obligations in administering a Company, they will not be held liable for causing the Company to which they have been appointed, to commit a civil wrong.

The case also considered the merits of the argument that a third party who purchases an asset from a Company in Administration, which asset is subject to Contractual Restrictions, thus inducing a breach of contract by the Company, has a defence to any claim against him for the offence of inducing breach on the ground of justification.

The above decision if applied in Australia will have the effect that the External Administrators will not be held liable for the offence of causing a Company to breach a contract **so long** as they act in good faith and within their authorised powers as prescribed within the *Corporations Act*.

It may be concluded that the Courts are sending a message to all External Administrators that they should always act in good faith and in the best interest of all parties involved. External Administrators should also be mindful that they have been granted extensive powers and afforded many statutory protections and privileges under the Act which are not available to the public at large. Accordingly, it is in their own interests to ensure that such powers and discretions are exercised properly to ensure that their independence, creditability and integrity will be continued to be valued and upheld by the general public.

Source:-<http://www.allens.com.au/pubs/insol/foinsol28jun12.htm?html=true&c=A20007162567>