

Accountants, Business Advisors and the like will need to be extremely vigilant when a director approaches them to ask for assistance in determining the solvency of their business as they may well quickly find themselves held liable for any errors that appear later. This is due to the fact that they could inadvertently become the one who is required to make a value judgement in difficult circumstances; if the plan goes well all is OK but if it fails then the adviser may well end up in the firing line. Extra care and vigilance is required and remember it may be better and safer to get a second opinion from someone with proper insolvency training and expertise.

Condon Update

By Lyn Dong

The **Condon Forum - "A Tax Smorgasbord"** was held at our offices on Wednesday, 18 May 2016. **Morris Maroon** (Head of Tax, Argyle Lawyers), **Brett Young** (Barrister, State Chambers) and **Schon Condon** (Managing Principal, Condon Associates Group) shared their insight on different areas related to tax.

Our next **Condon Forum** will be held on Wednesday, 24 August 2016 at our offices, and we will be discussing **"The Right Way to Restructure"**. We are very proud to have two highly qualified speakers joining us on the day – **James Meli**, Director of Tax from Economos and **Jeremy Carter**, Managing Director of Rapport Leadership Australia.

Together with **Schon**, the three speakers will share their experience and professional knowledge on issues relating to restructuring. They will be discussing the following topics: *Restructuring – rollover and reliefs for small business; Leadership in Changing Times; and To Find a Balance in Restructure Space – key components for good restructuring.*

To register for the Forum, call Lyn or Madysson on 9893 9499 or email events@condon.com.au with your details.

Have you registered for the **2016 RAA Association and Condon Associates Group Charity Golf Day?** The event will be held on Thursday, 4th August 2016 at Rosnay Golf Club Auburn.

This charity Golf Day is in aid of **Legacy**, a great cause supporting Australian Families who have suffered from an injury or the death of a parent or spouse whilst they were serving their country.

Condon Associates Group has been involved with this day for over 10 years raising thousands of dollars and would like to invite you to come along to support this amazing charity.

Why not join a worthy cause and make a donation to the charity? Any donation would be welcome, including any prizes that you feel would make a worthy contribution to the day.

If you have any questions please feel free to contact Jason or Lyn on 9893 9499 or via email at events@condon.com.au.

The next **Parramatta Accountants Discussion Group** ("PADG") will be on Monday, 8 August 2016. To register and for more information, please contact Lyn on 9893 9499 or email padg@condon.com.au.

Here are some Kodak Moments...



Richard, Schon, Brett and Morris happily posed for a photo after a successful Condon Forum.



Our team at Condon Associates Group are looking forward to welcoming you to our Golf Day this year!

ON THE BEAM

Independence? But Who's Asking!

By Schon G Condon RFD

Over the years I have been very proud to be a member of a profession, essentially the accounting profession, that prided itself on focusing on taking an independent stance in respect to dealing with and for its clients. It was something that was driven in from the day you started and as a school leaver you were somewhat even younger and impressionable. It was in those early days that I remember seeing a client come in with a request that was declined by the Partner simply because it would compromise his position and potentially leave him exposed. The client marched on took his business elsewhere and no doubt got the answer he wanted; ... for a fee.

Interestingly though some time later that client was to reappear on the door step seeking assistance. This time, the circumstances were different. The client was in the process of making an acquisition and it was now critical to him to have an advisor that would not waver and would call it as it was seen. It's all in the perspective really, but what is even more concerning is that even the staunchest of clients will often go for what is good, regrettably rather than not necessarily what is right.

The insolvency profession over the years has been at the centre of some of the ugliest stoushes relating to independence which has ultimately resulted in the great statement of Independence, the DIRRI, i.e. the Declaration of Independence, Relevant Relationships and Indemnities.

Some time ago, well before these were an issue I remember a practitioner who took on an appointment to a hospitality business with no visible connection to the organisation prior to the appointment. Alas, the same person was a paid advisor to a significant local competitor, and as such his involvement to close down the operations of his appointee, would, to the reasonably minded have beggared the question as to whether it was the right thing for the appointee or the right thing for the competitor?

In essence ASIC's and theoretically ARITA's stance is that ANY involvement with a future appointment prior to that appointment is taboo. Regardless as to whether such an involvement is advantageous to creditors or not.

Recently we have seen the issues relating to the goings on in South Australia regarding the appointments there too. It became clear that certain funding Creditors had had one organisation involved for some time and in the event that there was to be an appointment then they were the anointed ones. Any concept of a conflict resulting from a, potentially significant, prior involvement was not even worth considering,

Inside this issue:

- Fair Work Ombudsman's Concern about the Key Advisors' Role
- Understanding Phoenixing
- Superannuation Streaming (SuperStream)
- ATO, Accountants and Directors Beware Preferential Payments

and interestingly has not even been commented formally on by any regulatory or professional body.

The Board then appeared to decide that they were more comfortable with a more 'independent' organisation. Whilst it is noted that this team were independent of the funders they did do significant funded preparatory work prior to their appointment. Regardless, the regulators and the professional bodies remained silent.

Notwithstanding that issue, before the Meeting to consider whether they were replaced or not was convened the issue was already in the hands of lawyers and those that could be exerting an influence that may not necessarily succeed at a meeting of Creditors. Ultimately the prevailing wind won the day and the new alternate Team made it to the table. Again there remained a deathly silence from the regulators and the professional bodies.

It is now a known fact within the industry that the firm at the core of this that in some way considered themselves to adopt an independent stance has paid dearly. The regulators and the professional bodies remain silent.

Level 6, 87 Marsden Street, Parramatta, NSW 2150
PO Box 1418 Parramatta, NSW 2124
Email: enquiries@condon.com.au
Phone: 1300 939 129

Sydney CBD | Bankstown | Liverpool | Wollongong | Newcastle



Once upon a time, there were purportedly two types of practitioners; Creditor based or in the alternate Debtor based, and you were branded as such. Maybe one day we just may well get a profession that is actually, and truly independent.

Fair Work Ombudsman's Concern about the Key Advisors' Role

By Padmini Saheb

In a recent media release statement, the Fair Work Ombudsman ("FWO") advised that they had concerns with the role of the key advisors such as accountants and HR professionals in respect of serious and deliberate contraventions. The Fair Work Act 2009-Section 550 ("FWO Act") generally describes that Involvement in Contravention to be treated in the same way as Actual Contravention. In accordance with the FWO Act, the FWO has broad powers to pursue and prosecute both Individuals and Companies if they become aware of wrong doings and the provider does not take immediate steps to rectify the wrong doings or cease its involvement in the contravention. Each breach of the FWO Act results in penalties for both Individuals and Companies service providers. The key providers should ensure that they have sufficient covers for such prosecutions with their professional indemnity insurance.

In this respect the key advisors should get legal advice prior to their appointment, as service providers and their contacts should consider obligations and limitations of the business to which it relates.

Understanding Phoenixing

By Ashley

Condon Associates are frequently requested to offer their professional opinion on a wide variety of complex corporate situations. One frequently requested area is their opinion of Phoenixing Activities. It is quite apparent that there is a lot of confusion around this activity so allow us to dispel some of the confusion.

When dealing with many unsecured Creditors in a Liquidation, from time to time we are told "the Directors of the Liquidated Company have started another business with a similar name doing the same thing as the Liquidated Company, is this legal?" well the short answer is possibly.

Put simply, phoenixing is generally where assets are transferred from one company to another company in order to avoid paying creditors, tax or employee entitlements. Whilst this is a simple definition, identification of Phoenix Activities goes far beyond this.

Deep analysis of the situation is required and in particular, the following items need to be reviewed in order to draw a conclusion. Key areas that need to be reviewed include:

- Asset movements and their respective value to ensure they have been acquired by the new entity at market rates.
- Ensuring that all liabilities of the old company have been transferred over to the new company in full.
- Ensuring that consideration has actually been paid.
- Ensuring that the Directors of the Liquidated Company have not intentionally increased the debts of the Company before Liquidation.
- Ensuring that no corporate structuring has taken place that would allow any of the above to occur.

It is vital for an individual who wishes to assess if phoenixing has occurred, that they attempt to gain an expert opinion on the value of the assets that they are investigating, for example, use of websites or price guides can be helpful, however, the written opinion of an expert in the relevant field is highly recommended. Furthermore, it is vital that independent documentation is also sighted and collected from independent sources to evaluate the potential for phoenixing, for example bank statements (which will detail if consideration has actually been paid for any assets), financial statements prepared by an external Accountant and copies of ATO running balance accounts (if available).

It is also important to remember that the term "creditor" does not just mean priority creditors. Many people become preoccupied with secured creditors but even unsecured creditors need to be considered in this process and must be transferred over for their full value in any sale. It is also important to understand that the term "asset" does not just relate to a physical asset, the asset may also be a contract or supply agreement that has been transferred.

This article is only a brief summary of phoenixing and every situation is different. Should you require assistance in the area of Phoenix Activity identification the experts at Condon Associates are here to help with over 30 years of experience in this area. Feel free to contact our office for more information.

Superannuation Streaming (SuperStream)

By July Arguijo

SuperStream is part of the government's 'Stronger Super' reforms. It came into effect in 2013 and is a standard way to process superannuation data and payments electronically. It must be used by employers, self-managed super funds and APRA regulated funds. SuperStream data is in a standard format so it can be transmitted consistently across the super system – between employers, funds, service providers and the ATO. The data is linked to the payment by a unique payment reference number. This means you can make all your contributions in a single transaction, even if they're going to multiple super funds. Small employers (less than 20 employees) must meet the SuperStream standard by 30 June 2016. SuperStream is mandatory for all, failure to comply may give rise to penalties by the ATO.

For employers under SuperStream, superannuation contributions are paid for their employees electronically (EFT or BPAY) and associated data is sent similarly. Tax file number, ABN of Superfund, BSB and account number and the Electronic service address must be provided in order for superannuation contributions to be processed accurately.

SuperStream Advantages: -

- Employers can make all their contributions in a single transaction, even if they're going to multiple super funds.
- Contributions and rollovers can be processed faster, more efficiently and with fewer errors.
- People can be more reliably linked to their super, reducing lost accounts and unclaimed monies.
- The processing of contributions and payments will be more automated.
- Employers will save time and money in meeting superannuation contributions.
- Compliance with ATO data and payment standards.

SuperStream is compulsory for employers making superannuation contributions. This includes Super Guarantee Charge, additional employers, member's voluntary and salary sacrifice contributions. It gives employers greater efficiency and accuracy when meeting their super obligations. The benefits to use one channel to make contributions on behalf of all employees, regardless of how many super funds are recorded would mean that it saves us time dealing with the accuracy of employee details and data, plus the automatic reporting and processing of contributions and payments made.

At this stage, it is the final countdown to get ready for SuperStream and the ATO urges small business to implement SuperStream and act now. It will be mandatory from 1 July 2016 and more than 65% of all Australia's small businesses are already on board. It has been reported by

those who started using SuperStream that on time spent on superannuation processing has been cut by around 70% each cycle. To find out more about SuperStream visit the ATO website or contact a superannuation provider.

ATO, Accountants and Directors Beware Preferential Payments

By Damian Shuttleworth

The ATO is quite often subject to unfair preference claims made by Liquidators who are seeking to recover funds for creditors generally. Traditionally this would involve lawyers and possibly Courts but in recent times the ATO has sought to settle unfair preference claims without the need for a Court order under s588FF of the Corporations Act 2001. This now occurs where the ATO:

- Is satisfied that an unfair preference or uncommercial transaction has been received;
- The amount repaid is for full and final satisfaction of the claim; and
- It does not intend to defend the claim or seek indemnity against the directors of the company under s588FGA of the Act.

The process for settling claims under \$25,000 is reasonably simple and expedient and does not require much authority to be settled. However, claims ranging from \$25,000 to \$500,000 can only be settled if the ATO receives written advice from an external legal provider evidencing the validity of the claim and stating that the settlement would be in accordance with legal principle and practice.

It should be noted that under s588FGA of the Act, a director(s) may be liable to indemnify the ATO against any loss or damage resulting from an order under s588FF of the Act after repayment of a preference claim has been made. The need for indemnification of the ATO by the directors would also need to be decided by the Court and included in its decision. It should be noted however that the ATO does not pursue the director(s) for indemnification in every case and the ultimate decision rests with the ATO.

The ATO has now indicated, quite rightly I think, that they are concerned with the growing amount being paid out in preference claims. Thus they are seeking to ensure that Directors will need to declare that their business is solvent and will remain solvent when making a lump sum payments to the ATO or when entering into a payment plan with the ATO. This will often require judicious consideration and assessment, thus it will be common for the director to seek the assistance of their accountant or tax agent in doing so.