ON THE BEAM

CONDON
FORENSIC INSOLVENCY TURNAROUND
ASSOCIATES

Volume 13, Issue 2, June 2019

TIME TO TREAD WEARILY

By Schon G Condon RFD

The first months of 2019 have been somewhat of a roller coaster for business with issues coming left, right and centre and no real clear and singular path forward. Certainly, we have been operating now for some time in a world of rapid and escalating change, but the issues now are differing. Similarly some of these issues are also beginning to question the rights of some to control what they have controlled in the past.

The Report on the Banking, Finance and Superannuation industry in February dropped, for many, some amazing bombshells. For others it was anticipated; why, because they had experienced the intransigent stance of such institutions in the past, and normally lost. With arrogance comes a confidence in a reduced level of supervision, which in turn breeds a lack of (appropriate) control and review. Both the industry and the regulators were pinged on this point but, as yet, their advisors and guides have walked scot-free.

Other industries that have built significant returns into their systems are too facing increasing scrutiny and commercial damage. One of the most visible is the taxi industry. The plate licences were once upon a time intended to be the owner/drivers retirement nest egg but many, if not most, were sold off and landed in the hands of investors, and ultimately investment institutions. Once there, the ability to improve returns became opportune with the investor-owners demanding greater and greater weekly returns; at one stage you got a better weekly return for a Sydney taxi plate than a Sydney residence! Two groups have traditionally paid for this, drivers with lower earnings and passengers with rapidly escalating fares.

With such a large gap between real cost (vehicle, driver and network) and the actual cost (investor, vehicle, driver and network), then just like on a football field it became too easy for someone to run through the gap; and they did. Along came Uber and stepped straight through, with an immediate acceptance by the public who had grown tired of being screwed. In fact, the competitors are now on the increase with no doubt some interesting observations that will unfold.

The industry created a new income stream from the basic necessity to have a plate to operate, capitalised them, and then sold them off to investors. Alas the longevity of the investment is now in doubt, and as such, a class action has been launched to seek to rectify this dilemma.

The cash disposal of income streams has become the investment of the future with governments regularly creating them and then selling them off (think toll roads). All are based on the public's long-term need to use the fundamental service to thus generate the return; coupled with an automatic increase that is ignorant of what is happening around it at the time the automatic increase occurs.

These income streams are becoming the investment of choice. In fact many businesses are reviewing their operations to see what of their operations they can convert into an income stream, an example of this is Apple with its decision to cut iTunes. I'm sure its replacement will be even more profitable.

But one must wonder what the real value of these investments will be when the returns drop. I know the last taxi driver I spoke to who still owned his plate basically said he can't give it away. So some of these investments need some real long term thought, I do hope someone is doing it properly!

Bankruptcy and the family home – Part 2

By Gavin King

This is the second part of an article in relation to how a trustee in Bankruptcy will deal with real property of a bankrupt, specifically the residential property owned by the bankrupt and a co-owner. If you missed the first part, please give the team at Condon Associates a call and we can provide you with a copy.

The bankrupt's property is jointly owned and the co-owner is also bankrupt

The Bankrupt co-owners may either have the same trustee or a different trustee. If they both have the same trustee, the trustee effectively owns 100% of the property given that 50% vests with The Bankrupt Estate of X and 50% vests with The Bankrupt Estate of Y. As such any third party wanting to obtain the relative bankrupts estates share will be required to fund a purchase of all the equity available.
If the third party makes an offer to the Trustee to purchase both Estate's equitable interest in the property 50% of the funds would be payable to The Bankrupt Estate of X and the other 50% would be payable to The Bankrupt Estate of Y.

In the event there is no third party wishing to purchase the relevant estates interests, the bankrupt's respective trustees can come to a mutually beneficial agreement as to selling the property on the open market.

Property owned by bankrupt with little/no net realisable equity

Trustee should lodge caveat against the title of the property to protect the Estate's interest in the property. The trustee is not liable for rates and charges levied on the property.

Given the time limits the trustee has to deal with the property, the trustee will re-assess the equity of the property as the bankrupt reduces the mortgage balance or the property increases in value. A trustee would generally re-assess the equity of the property yearly.

It is important for the bankrupt to maintain their mortgage repayments. If the bankrupt falls behind on their mortgage repayments, the secured creditor can repossess and sell the bankrupt's property even if there is no equity.

Once the property has been realised, the trustee should do the following:

- Lodge a Withdrawal of Caveat; and
- Issue a letter to the discharged bankrupt that "The Trustee makes no further claim to the property" if the bankrupt pays the agreed-upon current value of the net equity in the property.
- In addition to the "no further claim" letter, a Deed can be prepared to formalise the transfer. The deed of transfer is not mandatory; if the bankrupt requests one, one can be prepared.

If there is sufficient net realisable equity in the property to warrant a sale

- Before the property is being sold: no need for the trustee to be listed on the Title of the bankrupt's property.
- As the property is being sold by the trustee the Trustee is to be listed on the Title in their capacity as trustee.
- If selling the property on the open market prepare a Contract for the Sale of Land.

Although the scenarios above are by no means exhaustive it is apparent that bankruptcy does have a large impact on the family home and it is important to carefully consider all the options before dealing with the property.

ELIGIBILITY OF CLAIMING DEDUCTIONS FOR PAYG

By Padmini Saheb

Small business owners should be aware of changes to compliance obligations for claiming deductions for PAYG. From 1 July 2019, businesses will be prevented from claiming deductions for payments to employees and certain contractors if they fail to comply. Payments include the following:

1. Salaries;
2. Wages;
3. Commissions;
4. Bonuses or Allowances to an Employee;
5. Payments under a Labour-Hire Arrangement;
6. Payments to a Religious Practitioner; and
7. Payments for a Supply of Service.

The new laws commencing 1 July 2019 will prevent an employer from claiming a deduction for payments to employees if they fail to withhold an amount as required under PAYG withholding rules or report a withholding amount to the ATO.

The claiming of deductions for payments to employees also includes the necessity to understand the importance of lodging your business activity statement on-time, as a failure to do so may result in a business permanently losing its tax deduction for wages paid under the new law.

Businesses will also have to ensure they obtain a valid ABN from their suppliers and withhold at the top marginal rate if an ABN is not provided.

Any business that fails to comply with these rules will be denied a deduction if the payment relates to a contract for the supply of services. Contracts for goods and property are excluded from the operation of these new laws.

Voluntarily disclosing mistakes to the ATO before an audit or other compliance activity in regards to your tax affairs can allow your business to retain their deduction.

Ensuring your business is compliant to these updated PAYG withholding laws will make a difference to whether you remain eligible for deductions.

Effect of Insolvency on ATO's Garnishee Power

By Brad Vos

With the recent spotlight on the alleged overzealous use of debt recovery tactics such as s260-5 Garnishee Notices by the Australian Taxation Office ("ATO") to recover taxation liabilities, it is worthwhile to examine the legislation surrounding and impact of these notices on individuals, businesses and the effect of an insolvency appointment.

The Legislation

Section 260-5 of Schedule 1 of the Taxation Administration Act 1953 ("The Tax Act") gives the ATO the power to recover taxation debts owed by a Debtor from funds owing to, or funds held by a third party, most commonly, Financial Institutions and Employers.

This is further explained in the Commissioners Law Administration Practice Statement ("PS-LA") 2011/18 at paragraph 104:-

104. Where a person (third party) owes money to or holds money for a tax debtor, section 260-5 of Schedule 1 to the TAA empowers the Commissioner to require the third party to pay that money to the Commissioner rather than paying it to, or continuing to hold it for, the tax debtor. This power is commonly referred to as a 'garnishee power' and a written notice issued by the Commissioner under subsection 260-5(2) of Schedule 1 to the TAA is referred to as a 'garnishee notice'.

The main difference between the ATO's 'garnishee power' and any other Creditor is the ability to bypass the need for a Garnishee Order being obtained in Court.

Further, the ATO's debt collection ability extends beyond the normal reaches of other creditors with the ability to collect money not yet due. In Dinning vs FCT 1999 42 ATR 299, the Court upheld the ATO's Garnishee Notice to the third party employer for future salary payments not yet payable to a debtor.

However, as with other unsecured debts, it would be assumed that any actions to enforce a debtor to pay an outstanding debt would be stayed on the appointment of an External Administrator such as a Bankruptcy Trustee, Administrator or Liquidator. Section 58 (3) of the Bankruptcy Act serves to protect the debtor from Creditor debt enforcement as follows:-

(3) Except as provided by this Act, after a debtor has become a bankrupt, it is not competent for a creditor:

(a) to enforce any remedy against the person or the property of the bankrupt in respect of a provable debt; or

(b) except with the leave of the Court and on such terms as the Court thinks fit, to commence any legal proceeding in respect of a provable debt or take any fresh step in such a proceeding.

Effect of Insolvency

Despite the above, the Commissioner states in Law Administration Practice Statement ("PS-LA") 2011/18 at paragraph 130:-

130. Where, subsequent to the issue of a garnishee notice, the tax debtor:

- appoints a controlling trustee
- is subject to a personal insolvency agreement
- has given a debt agreement proposal to the Official Receiver
- is subject to a debt agreement
- is bankrupt
- is subject to the control of a voluntary administrator
- is subject to a deed of company arrangement
- is under the control of a receiver or receiver and manager
- is subject to the control of a provisional liquidator, or
- is in liquidation

the Commissioner will not ordinarily withdraw that notice. In such circumstances, the notice will continue to operate on the relevant amounts. For example, a notice served prior to the tax debtor's bankruptcy would continue to operate on amounts that were due to the bankrupt prior to the date of bankruptcy even if they remain unpaid at that date

This means that any Garnishee Notices issued prior to the appointment of a Trustee, Liquidator or Administrator still apply even after their appointment.

It is also worthwhile to note that, as these funds flow from the third party directly to the ATO circumventing the debtor, these payments cannot be clawed back under any preference claims from the Administrator. Macquarie Health Corp Pty Ltd v FCT 2000 ATC 4015 makes it clear that a Garnishee Notice cannot be set aside as an unfair preference as the transaction does not involve the debtor for the purposes of 588FA of the Corporations Act, 2001.

However, the ATO will not issue a Garnishee Notice if the debtor appoints any of the above External Administrators before the ATO issues the Notice. The Commissioner goes on to state at paragraph 132 of the PS-LA:-

132. In accordance with the decision of the High Court in Bruton Holdings Pty Limited (in liquidation) v. Federal Commissioner of Taxation & Anor (2009) 239 CLR 346; 2009 ATC 20-125; (2009) 72 ATR 856, the Commissioner will not issue a garnishee notice in respect of a debt owed to a company after an order has been made, or a resolution has been passed, for the winding up of the company.

The Key Takeaway

The recent criticism aimed at the heavy handedness of the ATO in their debt collection strategies along with the power the ATO possesses with s260-5 Garnishee Notices provides a stark reminder to all of the unquestionable power of the ATO in recovering taxation liabilities.

Often the best advice is the most obvious, which in this case is to ensure that you are up to date with your outstanding tax obligations!

Failing this, it is important to act quickly and proactively if the ATO begins chasing up your tax debt.

Assetless Administration Fund

By Sophie Bai

It is noted that when a company goes into liquidation with few or no assets, a liquidator often performs only a perfunctory investigation, which may result in a failed company not being fully investigated to a deeper level that a creditor or stakeholder wishes. This can happen when a failed company has insufficient realisable assets to enable a liquidator to carry out full investigations into the circumstances of insolvency of a company or prepare reports for ASIC.

Consequently, ASIC and the creditors may not be properly informed of possible offences or other misconduct by

company officers. As such, actions may not be able to be undertaken to recover assets for the benefits of creditors or where company officers have breached their duties.

In such circumstances, a liquidator in a creditors' voluntary winding up or a court-ordered winding up can apply for assistance from the Assetless Administration Fund ("AAF"), which was established by the Australian Government in October 2005, and finances preliminary investigations and reports by liquidators into the failure of companies with few or no assets.
It aims to:-

1. Curb fraudulent or illegal phoenix activity;
2. Help close the regulatory gap that arises when a failed company is not properly investigated; and
3. Help a liquidator to take actions to recover assets where fraudulent or unlawful phoenix activity is suspected.

Types of matters funded
As per Regulatory Guide 109 Asset Administration Fund: Funding criteria and guideline ASIC will consider funding the liquidator from the AAF for the following circumstances:-

1. S206F director banning proceedings may be appropriate;

   A liquidator in these circumstances needs to lodge an initial S533 Report and then apply for funding. If the application is successful, a liquidator will conduct an investigation and prepare the supplementary S533 Report.

2. Court proceedings for serious misconduct under the Corporations Act may be warranted, including matters such as breaches of directors' and officers' duties, insolvent trading, and concealment, misappropriation or removal of company property.

   A liquidator in these circumstances needs to lodge an initial S533 Report and then apply for funding. The liquidator may meet with ASIC to discuss the funding application in detail. If the application is successful, the liquidator will commence investigations and prepare the supplementary S533 Report.

3. Fund a liquidator to commence an action against a company or a company officer to try to recover assets where fraudulent or unlawful phoenix activity is suspected.

   A liquidator in these circumstances needs to lodge an initial S533 Report and then apply for funding. The Liquidator may meet with ASIC to discuss the funding application in detail. If the application is successful, a liquidator will commence actions to recover assets and then provide agreed progress reports to ASIC.

Upcoming Events

July 2019	-	Parramatta Accountants Discussion Group
August 2019	-	Condon Forum
19 September 2019	-	Annual Charity Golf Day

Parramatta Accountants Discussion Group

Are you interested in discussing the industry's hot topics on a monthly basis?

Join us at the Parramatta Accountants Discussion Group every second Monday of the month.

If you are an Accountant, Lawyer or Financier you are very welcome to join us for an informative presentation with your fellow professionals and engaging discussion with a tasty lunch.

For more information please contact us on (02) 9893 9499 or email to padg@condon.com.au
Don't miss out!

Condon Forum

At the next Condon Forum, our three highly qualified speakers will be presenting to us about Crisis Management.

Each speaker will present a differing perspective on this subject which will lead to some interesting discussion.

For more information please contact us on (02) 9893 9499 or email to events@condon.com.au

RAAA and Condon Advisory Group Annual Charity Golf day

SAVE THE DATE!
Our Annual Charity Golf day will be held on 19 September 2019. If you wish to sponsor or donate please contact us on (02) 9893 9499 or email to events@condon.com.au. All proceeds will go to Legacy who supports those families who are facing daily challenges after the death or incapacitation during or after force service.

More information will be released soon.

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