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Legislative change and the future

By Schon G Condon RFD

It would certainly be fair to say that at the time of writing this that the profession is probably in frustrated agreement that the 'Great Insolvency Boom of 2009' has not yet occurred. While many in the community seem to think that the insolvency profession is flat out, the reality is that while there has been an increase in activity, it is nowhere near the levels that some pundits both predicted and desired.

In February of this year during a presentation for the Commonwealth Bank I predicted that the economy would click into recovery mode by the middle of the 2010. A point that was hotly contested by some members of the audience who believed we were only at the beginning of a very long haul.

While that remains my view I do acknowledge the feedback from many that have travelled overseas and have returned to report significant states of despair in both Europe and North America.

If I believe those who are more qualified than me, then it appears some are predicting another correction in the market before the end of this year, probably around October. Albeit this view is shared by myself, I must acknowledge that there is however great debate about the magnitude of such a correction. Notwithstanding this, my belief is still that the economy will be far more confident by the middle of next year and we will be seeing genuine light at the end of the tunnel. I do however think that it will be a slow and steady improvement rather than a radical change overnight.

With this in mind, I have been very interested in the recent announcement by the Attorney General regarding proposed changes to the Bankruptcy Act. The detail of these changes are dealt with in greater detail later in this issue, but one of the positive considerations is that there appears to be an attempt to relate the costs of the process with ability for the process to be employed.

Whether this is simply being done to manage statistics or with a genuine interest in the process it will have the same effect and will assist with future modifications to the whole of the insolvency processes.

At a recent Hills Chamber Function, Schon caught up with Bob Ansett and major sponsor John Glover.

There needs to be a focus on the recovery of assets, claims and value, and an adequate investigation for the benefit of public interest where action will actually result in the ultimate preservation of value for all of the stakeholders involved.

There has obviously been genuine concern raised at various levels as to the extent that costs have risen to on a number of matters and this alone has also been suggested to be one of the reasons that appointments are not at the anticipated height.

As we leave the GFC we must not simply rejoice in the renewed levels of confidence and prosperity as we enter the "F.E.B". We need to take the time to analyse what worked and what didn't and promote legislative change. Change that will genuinely assist in the preservation of stakeholder values and the prompt and cost efficient method of returning businesses and individuals to prosperity - for the overall benefit of the community as a whole.

Inside this issue:

Are all animals created equally – Revisited

By Robert Kite

Readers will recall from my previous article "Are All Animals Created Equally", I discussed the benefit enjoyed by the Australian Taxation Office ("ATO") in relation to notices issued under Section 260-5 of the Taxation Administration Act ("TAA").

In essence, this section allowed for the ATO issue a notice to a debtor of an entity who was behind on their remittances (which I shall refer to as the insolvent entity) to the ATO which effectively serves as a garnishee notice. The serving of this notice required the debtor to pay any amounts due and payable to the insolvent entity, to the ATO after having received any such notice in a reduction of the debt to the ATO.

The debate of whether the ATO should continue to enjoy such benefits post the Liquidation of a company has received much Court time of late, and the matter now appears to have been resolved by the High Court.

Before we discuss what the decision was, we need to consider the context of the Court proceedings.

The matter before the High Court was Bruton Holdings Pty Limited (In Liquidation) v Commissioner of Taxation {2009} HCA 32.

The history of the matter (very briefly) is that a Firm of solicitors ("the Solicitors") were holding a significant level of funds (approximately $450,000) in their trust account for Bruton (in its capacity as Trustee of a Trust). The ATO contended that the funds in the Solicitors Trust Account represented a debtor, for which the ATO sought to recover the funds after having issued a notice under section 260-5 of the TAA. The notice was issued to the Solicitors after Bruton had been placed into Liquidation.

This matter was first considered by the Federal Court, in which the Liquidator sought orders that the notice be declared void, for which the Liquidator was successful.

The ATO sought to appeal the Orders referred to above, for which they were successful.

The appeal of the ATO ultimately led to the matter being considered before the High Court.

Whilst there were many issues raised in the preceding matters before the Federal Court, the issue before the High Court placed a focus on a number of sections of the Corporations Act, including sections 501 and 555. Readers will recall from my previous article in which I referred to the concept of a fair and equal distribution of assets to all Creditors. The following are but two of the sections in the Corporations Act which assist in providing for same.

Section 501 of the Corporations Act provides that:-

> "Subject to the provisions of this Act as to preferential payments, the property of a company must, on its winding up, be applied in satisfaction of its liabilities equally and, subject to that application, must, unless the company's constitution provides, be distributed among the members according to their rights and interests in the company."

Section 555 of the Corporations Act provides that:-

> "Except as otherwise provided by this Act, all debts and claims provided in a winding up rank equally and, if the property of the company is insufficient to meet them in full, they must be paid proportionately."

As can be seen from the readings of Sections 501 and 555, if the ATO were able to recoup the funds in the Solicitors Trust Account, it certainly would not have resulted in the claims of creditors being paid proportionately, as the ATO would have received the benefit of the entirety of the funds.

In addition to the above, the High Court also considered Sections 500(1) and (2) of the Corporations Act which provide:-

(1) "Any attachment, sequestration, distress or execution put in force against the property of the company after the passing of the resolution for voluntary winding up is void"

(2) "After the passing of the resolution for voluntary winding up, no action or other civil proceedings is to be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court imposes."

In considering the proceedings the High Court sought to establish if the notice issued under Section 260-5 was "attachment" and therefore, rendered it void per Section 500(1) above.

The High Court held that the notice was considered an attachment in accordance with Section 500(1) of the Corporations Act and was void, therefore overturning

the appeal of the Federal Court which was previously determined in favour of the ATO. When the High Court handed down its decision, they found in favour of Bruton 5 – 0.

In light of the above, the advantage (which was previously afforded to the ATO in relation to Section 260-5 notices issued under the Taxation Administration Act) appears now to have been lost when it comes to company's which have been placed into Liquidation.

It is worthy to note that the decision of the High Court was handed down within a week of the previous issue of "On the Beam" having been printed and dispatched to our valued readers.

Bankruptcy Legislation Amendment Bill 2009

By John Chand

The Government is well aware that the "2008 to 2009 financial year produced the highest ever level of personal insolvency activity (36,479) representing an increase of 11 percent on the 2007 to 2008 financial year level of personal insolvency activity with the vast majority of these being non-business bankruptcies principally involving consumer debts"

Whether it was in response to the increase in consumer debt or just coincidence, the Attorney-General Robert McClelland released an Explanatory Memorandum on 25 August 2009 of the Government's proposed reforms to Australia's personal Bankruptcy laws.

The Amendments aim to modernise the National Personal Insolvency Scheme by giving those in financial difficulties additional protection against unscrupulous Creditors and an opportunity to evaluate and consider their options prior to entering into a Debtor's Petition while in turn strengthening penalties for Bankrupts not complying with the Bankruptcy Act ("the Act") by:

A. Increasing the threshold amount for which a creditor may petition for bankruptcy from $2,000 to $10,000 in an attempt to reduce the opportunity for creditors to use bankruptcy procedures as a means of debt collection.

B. Increasing the stay period from when a debtor files his/her intent to file bankruptcy from 7 to 28 days to give persons in financial distress more time to assess their options and to prevent them from acting precipitously.

C. Increasing the income, assets and debt thresholds used in assessing persons' eligibility for debt agreements in recognition of the increases in debt, wealth and available income to allow more people in financial distress to enter into debt agreements with their creditors and forego bankruptcy.

D. Increasing penalties in relation to actions that hinder the administration of insolvent estates in an attempt to further promote increased compliance by the bankrupt with his/her obligations under the Act to protect creditors from behaviour that may expose them to debtors that don't pay, or behaviour that will impact on the likelihood of a dividend being received from an insolvent Estate.

The amendments also aim to provide a more efficient approach to settling disputes regarding Trustee remuneration by replacing the old Insolvency Practitioners Association of Australia scale as a basis for default assessment of Trustee remuneration with a fixed minimum fee of $5,000, while also providing Bankrupts and Creditors with a more transparent process for reviewing that remuneration.

The Government has also proposed amendments which aim to maintain a more accurate National Personal Insolvency Index and provide more flexibility in the administration of insolvent Estates, by penalising Trustees for not providing the Official Receiver with relevant and current information regarding the administration of insolvent Estates in a timely manner and removing the outdated concept of bankruptcy districts.

In addition to increasing the penalties imposed by the Act, further powers are given to the Inspector-General in Bankruptcy to investigate possible offences and breaches of the Act.

The amendments address the major changes occurring in today's consumer and financial markets by providing consumers who have fallen on hard times with more protection against unscrupulous creditors and more time to make informed decisions regarding their financial affairs while at the same time increasing penalties for breaches of the Act and simplifying certain aspects of the administration process.

The reforms proposed by the Government show their commitment to "deal with personal insolvency issues quickly and efficiently so that people can get back on their feet as soon as possible."

Concurrent Appointments

By Robert Thyer

We find that many people do not appreciate that it is both legal and not uncommon for more than one appointment to be made to a company or individual at the same time. In fact there have been a number of matters within this Firm where concurrent appointments have been made, and this Firm has acted in all the relevant roles available.

What creditors have to understand is that the different functions have distinctly different roles. Two of the most common are Liquidator, Trustee or Administrator concurrent with a Receiver or Receiver and Manager.

Receivers and Managers are generally appointed by a Secured Creditor, primarily to look after the Secured Creditors interest. Whilst a Receiver and Manager may trade on a business in order realise assets of the business or sell the business as either as a "going concern" or merely as a collection of assets, a Receiver quite commonly only has the power of sale.

Voluntary Administrators on the other hand, are normally appointed by the Directors of the company to help them get the company's affairs under control and open avenues for negations with Creditors, with a view to achieve an amicable and equitable solution for all parties involved. It is interesting to note that the Corporations Act also grants Secured Creditors with the power to appoint a Voluntary Administrator but it appears to be rarely used.

The major distinction between the appointment of an Administrator and the Receiver and Managers in most cases is that the Administrators generally no longer have, or are extremely limited in the opportunity to trade on the business and/or secure and deal with any of the company's assets. These responsibilities, as well as many others, now constitute part of the Receivers and Managers responsibilities.

Further to the above, additional responsibilities that get transferred to the Receivers and Managers upon their appointment include, but are not limited to:

- Control of Company assets, including realisation of same
- Company's debtors
- Any and all trade on issues
- Company's insurance, both property and worker's compensation
- Reporting to ASIC
- Employee claims and trade on wages, and
- Operational Issues.

On the other hand Administrators generally deal with:

- All remaining creditor claims including collection of proofs of debts
- Insolvent trading investigations
- Preferential payment investigations
- Reporting to the Australian Securities and Investment Commission about the directors and the companies activities.

With the above in mind, it makes a clear distinction between the role of an administrator and the role of the Receivers and Managers.

Where there is more than one Secured Creditor it is possible that each such creditor can appoint their own Receiver over the assets that they control, and it's at this time that the fun starts!

As you can imagine, with the increasing number of appointments the costs will no doubt grow exponentially.

Condon Associates
Level 6, 87 Marsden Street,
Parramatta NSW 2150
PO Box 1418,
Parramatta NSW 2124
Ph: 02 9893 9499
Fax: 02 9891 1833
Email: enquiries@condon.com.au

Satellite Offices
Bankstown Ph 02 9708 6622
Liverpool Ph 02 9602 7889
Penrith Ph 02 4722 9699

Associated Firms
Brisbane, Canberra, Melbourne, Perth