



So, what is an FEB?

By Schon G Condon RFD

Just prior to the penning last article I was listening to one of the business radio programmes when the guest raised the issue of how well prepared people were for the forthcoming return to more affluent times which was then suddenly defined as the "Future Economic Boom" or, as we are prone to do these days, the FEB.

It was an interesting question because many business people when questioned about how they have been travelling and what they see as the future rectifier it will normally be a simple reference to the reversal of the current economic crisis. If only it were that simple. As I indicated last month the great surge of insolvency work has not yet really surfaced and could well actually be hidden in the FEB.

We have already seen two interest rate increases in October and November and there are many pundits that are actually very desirous of continuing increases because it will be reflective of a strong and growing economy. But this begs the question, are businesses truly prepared for the changing market. Those businesses that have not been actively reducing debt, particularly those where there are limitations on their ability to pass on additional cost increases, will find that the downturn is actually hidden inside the upturn.

Realistic planning is now required based on the predicted worst case scenario because if you plan to survive the worst possible situation then you should be well placed if things don't get that bad.

As interest rates increase with the aim to reduce inflation it will have an impact on spending habits. Consequently it is quite possible that some businesses will be struck at

both ends with both increasing costs (interest) as well as falling sales as consumers change their spending habits.

As always, it's not the market that causes the failure, even though it is often that that is blamed, but rather it is ones failure to prepare for the change that ultimately brings about the grief and financial distress. There is still time for review and rectification but don't let the opportunity slip by.

On a different tangent but remaining with the topic at hand one thing that struck me with our new TLA (three letter acronym) was its relationship to the one it replaced i.e. the GFC. Just as in the novel "2001: A Space Odyssey" where the computer at the centre of the story was named HAL, purportedly having derived by being one letter earlier in the alphabet than the then major computer organisation IBM. Here we are as we approach 2010 with for all intents and purposes the same relationship, GFC leading to the FEB. No doubt its possible to see symbolism in almost anything!!!

Finally, with this being our last "On The Beam" before the Festive Season may I take this opportunity to wish everyone all the best for Christmas and a Happy, Healthy and Safe New Year.

Enjoy the read.

Inside this issue:

ASIC Prosecutes Legal Representative for Phoenix Activity
Salary sacrificing superannuation contributions
Fines in respect of Disciplinary Action - Provable Debts in Bankruptcy

ASIC Prosecutes Legal Representative for Phoenix Activity

By Hiteshi Dekhtawala

PHOENIX activity is typically associated with Directors of Companies in financial distress who transfer the assets of an insolvent Company to a new Company controlled by the same Directors for negligible consideration. The Director then places the initial Company into Administration or Liquidation with no assets to pay Creditors, meanwhile continuing the business using the new Company structure.

It is remarkable to know that the Australian Securities and Investments Commission has issued a warning to legal advisers following the landmark prosecution of a legal adviser and eight Company Directors over illegal 'phoenix' activity.

The warning comes as the New South Wales Supreme Court declared that Mr Timothy Donald Somerville, of North Sydney firm Somerville & Co Solicitors, had acted in breach of the Corporations Act by engaging in illegal phoenix activity.

The proceedings found that Mr Somerville advised Directors on eight occasions, who sought advice from Mr Somerville in circumstances where their Company was insolvent or nearing insolvency, to take assets out of their Companies and out of the reach of Creditors.

The findings made by the Court against Mr Somerville was sought to clearly mark the line across which legal and other professional advisers should not step. It was found that the transactions would not have taken place but for Somerville's involvement.

By his advice and conduct, Somerville had facilitated his clients breaching their Directors' duties and as a consequence he was found to have aided and abetted illegal phoenix activity.

Following from the successful prosecution in this matter, ASIC is also seeking to disqualify the Directors involved in these matters and Mr Somerville from managing any Companies in the future.

This is an important step. To date, ASIC has prosecuted many Companies for phoenix related activity. However, ASIC has not successfully prosecuted those that advise

the Companies to take such actions. This is the first time ASIC has successfully taken action against an adviser for involvement in facilitating illegal phoenix activity.

This represents a new direction – rather than trying to catch phoenix activities after the fact, ASIC is trying to cut off the professional services that support them.

Salary sacrificing superannuation contributions

By Joseph Russo

A superannuation salary sacrifice arrangement works by reducing your gross salary in return for your employer making additional contributions to superannuation on your behalf.

The salary sacrificed amount of superannuation together with superannuation guarantee contributions by the employer form part of the concessional contributions to the fund.

From 1 July 2009, the cap on concessional superannuation contributions (includes salary sacrifice contributions, 9% superannuation guarantee contributions, any other employer contributions or any contributions where a tax deduction is received) has decreased to:

- \$25,000 for people aged under 50
- \$50,000 for people aged 50 and over

Should you have more than one superannuation fund, all concessional contributions made to all funds are added together for purposes of the cap. Please note this also includes insurance written under your superannuation. If you make super contributions through a salary sacrifice agreement, these contributions are taxed in the super fund at a maximum rate of 15%. However, additional tax will be payable if your contributions exceed the relevant cap amount.

Benefits of salary sacrificing:

- Effective way to build up your superfund balance prior to retirement.
- For those over 55 and still working, effective strategy to gain access to their superfund via a transition to retirement pension.
- Reduces your assessable income – sacrificed amount is not subject to pay as you go withholding.

Fines in respect of Disciplinary Action - Provable Debts in Bankruptcy

By Padmini Saheb

Pursuant to Section 82(3) of the Bankruptcy Act penalties and fines imposed by a Court in respect of an offence against a law are generally not provable. Upon discharge, a bankrupt is released from all of his or her provable debts. Unlike fines and penalties, these claims are not provable and are not released from Bankruptcy and therefore can be pursued post Bankruptcy.

Fines in regards to the "Disciplinary Action." of a compensatory nature are provable. On an application heard before Deputy President, Judge Eckert and Senior Sessional Member Mr Ledger and Sessional Member Mr Druitt on 12 April 2006, after inquiry and having found that there is cause for disciplinary action against Mr Low under s103 (1) of the Real Estate and Business Agents Act 1978, the State Administrative Tribunal orders that:

- 1) from 12 April 2006, the respondent's licence and triennial certificate is cancelled and the respondent is permanently disqualified from holding a licence and a triennial certificate under the Real Estate Business Agents Act 1978;
- 2) the respondent is fined \$10,000, payable to the applicant within 28 days; and
- 3) the respondent is to pay the applicant's costs fixed at \$65,000 within 28 days.

The WA Real Estate & Business Agents Supervisory Board then applied to make Mr Low bankrupt. Monies ordered to be paid under the Tribunal's orders were in relation to a disciplinary action of compensatory nature under the relevant WA legislation, hence the court concluded that the fine of \$10,000 was not imposed in respect of an offence for the purposes of s82(3). The Costs order of \$65,000 was also of a compensatory nature and not a penalty.

Both \$10,000 and the \$65,000 were both provable debts in Mr Low's bankruptcy and upon discharge, would be released from these provable debts.

Defence Force Reservist

On 23 October 2009 our Administrative Assistant, Nathan Barnstable put down his hole-punch, picked up his rifle and headed off to Butterworth in Malaysia with over 90 other Defence Force Reservists ranging in age from 18 to 58. On arrival they commenced some basic courses to enhance their skills, and some language and culture training prior to moving into the jungle. During the next weeks they will head to Pulada (in Johore state, near Singapore) to commence their Junior Leader Course which will qualify them as future Corporals.

We are all looking forward to Nathan's return in January 2010 when he will commence studying for his accounting degree.



Nathan & Scott

Some events to watch out for in 2010

Feb - Presentation by Robert Kite at the 10th Annual Insolvency Practice Symposium

April - Professional Forum in Parramatta

July - Argent Dinner (Black Tie Event)

August - Professional Forum in Parramatta

October - Condon Associates 4th Birthday

Condon Associates 3rd Birthday Celebration

On the 1st October we celebrated 3 years as Condon Associates, it was pleasing to share this event with so many friends both old and new. We look forward to continuing to provide our professional services to you during 2010.



Gold Award



Back – Julie-Anne Wuttke (Chair of Outback NSW Tourism), Wincen Cuy (Silver City Tours) and Lori Modde (Managing Director Lorick Management)

It is with pleasure that we congratulate Lori Modde of Lorick Management Pty Ltd, one of our consultants who specialises in the field of hospitality and tourism management on her recent Gold Award for "Tourism Marketing" at this years NSW Tourism Awards that were announced in November. We are very lucky to be able to call on the skills of specialists of this calibre to assist with the various matters that we deal with from time to time.

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

CONDON
Forensic Insolvency Turnaround
ASSOCIATES



Liability limited by a scheme approved under Professional Standards Legislation