ON THE BEAM

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FORENSIC INSOLVENCY TURNAROUND
ASSOCIATES

Volume 5, Issue 1, February 2011

Wishes, Resolutions, Dreams and the Future

By Schon G Condon RFD

The noughties decade is now behind us and I know that many others like myself were very happy to see the end of 2010. It is hard to believe that the decade evaporated so quickly.

As I write this we are seeing the beginning of the clean up in Queensland, the middle of the flooding in Victoria and the realities of New South Wales Power sell-off.

Regardless of how much everyone was happy to see the end of the last decade, I'm sure that they did not ask for this. It is a time that we must genuinely consider those that have suffered and will go on to suffer not only financially but most importantly those that lost relatives and friends. Certainly the thoughts and prayers of all of us here at Condon Associates are with them.

But on the positive side it is again very comforting to see how we as a nation can pitch in when the going really gets tough. The situation of the area flooded was quoted on American TV as an area larger than France and Germany together.

In order to genuinely grow from such catastrophes, we must make sure we learn from the experience and what we do next must be a combination of the past as well as the lessons learnt. The creation of new or higher levies, prevention of construction in permanently unsafe areas, clearing up confusing terminology in common contracts, designing systems to more efficiently deal with catastrophe and so forth.

One of the biggest issues that must be confronted is the damage to infrastructure and this will clearly eat into the funds that would have been available for future national enhancements. This is a reality, but the underlying issue must be from where the funds are cut. Will they come from the funds usually dedicated to planning and presenting dreams or will it come from that component that is actually allocated to "production"? What is clearly needed is more "will do" and less waffle, let's hope that that's what we get.

On a more positive note, there is generally an upbeat in overall sentiment and this must be positive. It is even pleasing that there is a greater acceptance of the existence of potential future risks. Why is this positive? Because you can actually avoid what you see coming, you can't avoid what you can't or won't see. Ask the people of Toowoomba! American economists are now widely accepting the death of the US$ supremacy and (their prediction) the rise of the Chinese Yuan as the future world currency, their prediction is within twenty years. We can be potentially well placed if this is a reality and this should be part of businesses long term strategies now.

Similarly some retailers vocally departed the last decade uttering that there needed to be legislation to level the playing field for much of the Internet sales. Similar cries could be heard over prior years as corner stores disappeared, petrol stations changed, and strip shopping was consumed. It is the comfortable incumbent that barks the loudest, seeking to avoid the omnipresent change. Change is occurring and we all must move with it, profitability's will change and there is even the potential that the outright lust for profit alone may wane, but there are some underlying fundamentals that remain consistent:-

- supply what people want
- be equitable in what you do
- provide a genuine service
- relate to the environment around you
- be willing to adapt
- but maintain a fundamental ethic, and
- ask to be paid fairly.

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Wishes, Resolutions, Dreams and the Future cont.

The last is often lost, I remember early training where you pushed the price to the point that the market would bear. Latest technology was one example; it would arrive expensively and remain so for some time, today you can watch the price drop in a matter of weeks. People remember when they have been gouged and as a consequence keep vigilant for alternatives, whilst others will repeatedly go back to the same supplier because they "always feel I was treated fairly."

These points become a key to business survival.

So in reality we enter a decade of opportunity, as it started it is going to be full of pain, joy, growth, experience, lessons and most importantly opportunity. What is important is how we approach it.

I am looking forward to the experience; most importantly I look forward to sharing it with colleagues and friends, so let's start the trip. It's all about what we are brave enough to wish for, dream about, resolve and make HAPPEN.

Please enjoy the read. I look forward to catching up soon.

ATO Raising The Stakes in The Crack Down on Self Managed Super Funds

By Alex Frazer

There has been an increase in media attention surrounding the ATO's toughened stance on prosecuting non compliant self managed super funds ("SMSF's") in the last 18 months. This article seeks to explain the reasons behind the Australian Taxation Office's ("ATO") crackdown on non complying SMSF's, the penalties which are imposed on a non-compliant fund and the most common reasons why a SMSF is marked non-compliant by the ATO.

In 2009, 160 SMSF's were declared as non-compliant compared to 24 in 2008 and only 7 in 2007. Justification of these figures showing a marked rise in non-compliance is recognised as a tougher stance by the ATO in prosecuting these funds rather than there being a noticeable increase in non-compliant behaviour. Such is the determination of the ATO to prosecute non-complying funds that "the ATO has thrown a lot of resources at it with 120 call centre staff dedicated just to phone late lodgers" according to Assistant Commissioner Forsyth from the ATO.

Once a fund has been deemed as non-compliant it loses the ability to obtain discounted tax benefits, is hit with penalty interest charges such as retrospective full marginal interest rates (currently 45 percent) which may go back many years depending on the age of the fund and the date at which the initial breach of the law occurred.

The two most common reasons for a SMSF to be marked as non-compliant are because of loans to a related party of the fund or due to late or non lodgements of SMSF returns. Related party loans are a very common temptation for a number of SMSF's. A family SMSF may have Mum and Dad also running a small business separate from the fund. If the business runs into trouble, there is a significant temptation to draw funds from the SMSF to assist with the small business liquidity. When the SMSF's financial reports are prepared and subsequently audited, the funds which have been removed are usually disclosed as a loan to related parties, a contravention report is lodged with the ATO.

There is still a long way to go with respect to the increased regulation and enforcement of SMSF's within Australia. SPAA Chief Executive Andrea Slattery has quoted statistics that "about 9000 SMSF's were tagged by auditors last year". Given that ATO records reveal that there are 411,000 self managed super funds in Australia, which hold a combined value of $37 billion dollars in assets, the ATO will no doubt need to broaden its audit oversight relating to SMSF's and increase the number of employees who are dedicated to the enforcing compliance of SMSF's with respect to lodgement. If the ATO can continue its toughened stance on SMSF's, it will be able to work towards a SMSF system where the funds which are meant to be distributed at the appropriate time will stay in that fund until the correct withdrawal period, rather than at the discretion of fund members who may loan fund monies to related parties.

[1] Cashdata Newsletter , 2010, www.cashdata.com.au
[2] Barrymore, K., Feb 28 2010, ATO crackdown on DIY super funds, News Limited Newspapers

Condon Associates Update

By Hayley Condon

It is with great pleasure and joy that I announce that the new Condon Associates website is now live!!! Visit www.condon.com.au and have a look at our new branding, our new look, and what I like to call our new beginning into Condon Associate's future. Our website designer and myself have been working hard together to create this website and we are both quite proud of its arrival. Please stay tuned as websites for EBIT Management Services and FIT Practitioners will also be coming soon within the next few months and we are looking forward to helping more people around Australia with our vast array of services.

Employees' Entitlements in a Receivership

By Maggie Lau

You may recall from one of our recent newsletters about concurrent appointments and when a receiver may be appointed by a secured Creditor or the court to take control of some or all of the Company's assets. A recent Federal Court decision has clarified some previous inconsistencies in the application of Section 433 of the Corporations Act 2001 (Cth) ("the Act") in respect of employee entitlements for a company in receivership.

When it comes to employee entitlements, there are a few sections of the Act that apply, including Section 419, 443, 556 and 558. The table below outlines the relevance of the above sections regarding employee entitlements:-

Section	Importance
419	a receiver is personally liable for debts incurred by the receiver for services rendered in the course of the receivership
433 and 556	wages, superannuation and leave entitlements that accrue before the date of the appointment of a receiver are to be given priority over debts owed to a secured creditor under a floating charge
558	in a winding up, an employee is entitled to the payments they would have received had their employment been terminated at the commencement of the winding up

Unfortunately, the application of the above sections is not clear cut. There were two important but conflicting Court decisions prior to the recent Federal Court decision.

In *Re Office-Co Furniture Pty Ltd*, employees who had been retained in the employment of the companies during a receivership compared their situation to employees of a company being wound up. They argued that, like employees in the case of a winding up, their services are deemed as having been terminated by the company on the appointment of a receiver pursuant to Section 558. Therefore, the receiver ought to pay them annual leave, long service leave and retrenchment entitlements in accordance with Section 433, since employees' entitlements that accrue before the date of the appointment of a receiver are to be given priority over debts owed to a secured creditor under a floating charge.

In the employees' favour, the Judge held that section 558 did apply to a receivership. As a result, employees whose employment continued during the course of a receivership were entitled to priority payment for entitlements due to them, regardless of when those entitlements accrued.

In *McEvoy v Incat Tasmania Pty Ltd* (hereafter "McEvoy case"), on the other hand, it was held that section 558 did not apply in the case of a receivership and that a receiver only had an obligation under section 433 to pay entitlements to employees whose employment was terminated before the appointment of receivers. Justice Finkelstein believed that it would be unfair to put employees of a company in receivership who retain their job in the same boat as employees of a company which has been wound up, because the employees of a company in receivership will keep their jobs as well as be paid out as if they had lost them. Further, Justice Finkelstein's detailed analysis of the history of the relevant statutory provisions did not reveal any indications that Section 558 was intended to apply in the case of a receivership.

The judiciary's application of the relevant statutory provisions of the Act in the abovementioned cases was clearly inconsistent. However, the Federal Court's recent decision in *Challenge Australian Dairy Pty Ltd (Administrators Appointed) (Receivers & Managers Appointed)* (hereafter "CAD case") has provided some guidance to clarify the ambiguity.

The Federal Court's decision in the CAD case adhered to the rationale applied in the McEvoy case. Justice Barker agreed with Justice Finkelstein that section 558 does not apply in a receivership, as Section 558 refers to 'winding up' and not receivership, which is a different type of administration. Justice Barker declared that section 433 does not oblige the receivers to pay entitlements that were not due to employees who remained employed after the receivers' appointment. This allows the receivers to have sufficient funds to satisfy the secured creditor's debt. Nor does section 433 oblige the receivers to pay superannuation contributions that became due and payable during the receivership.

Where employees remain employed after the appointment of a receiver, they will retain their entitlements. Alternatively, should the company subsequently fall into liquidation, employees will be paid in accordance with the pecking order under section 556 of the Act. In the case of insufficient funds in a winding up, employees may be able to recover their entitlements through the government's General Employee Entitlements and Redundancy Scheme.

Pooling of Companies Assets and Liabilities

By Hakki Hassan

Background

On 31 December 2007 updated pooling provisions were introduced as part of a range of amendments to the Corporations Act 2001 ("the Act").

The relevant provisions in regard to pooling are Sections 571 to 579Q of the Act.

Broadly speaking, under Section 571 of the Act, the Liquidator of one or more companies, may make a "pooling determination" if:

a) there is a group of two or more companies
b) each of the companies are being wound up
c) each company is a related body corporate of the other
d) one or more companies own property that was used by any of the companies in connection with a business carried on jointly by companies in the group

Application of Pooling

The pooling of assets and liabilities is designed to overcome the situation in a group scenario where all the assets are held in the name of one company, but the administrative activities, including the incurring of liabilities, are conducted in another company within the group. A good example of "group activities" is the construction industry where construction staff and administrative staff are usually employed by different companies within the group to avoid complete shutdown of business because of a union dispute, and the trading/operating assets of the group held in the name of another company.

In the above construction industry case, in the event of a winding up of two or more companies in the group, the funds realised from the sale of assets in the "asset rich" company would not usually be available for distribution amongst **all** the creditors of the group unless all inter-company transactions (including loans) were properly recorded in the books of account and records of each company within the group.

The wording of the determination is quite simply words to the effect that "In accordance with Section 571 of the Corporations Act 2001, I (or, we, if joint appointees) am satisfied that each of the companies in the Group is being wound up and that one or more companies in the Group own particular property that is or was used by any or all of the companies in the Group in connection with a business, or an undertaking, carried on jointly by the companies in the Group."

To give effect to a pooling determination, the Liquidator must lodge a copy of the pooling determination with the Australian Securities and Investments Commission within 7 days of it being made (Section 573 (1) of the Act) and, within 5 business days of the determination, convene **separate** meetings of the eligible unsecured creditors of each company in the Group. However, the Act allows consolidated meetings to be held of the companies within the Group.

At these separate meetings, the eligible unsecured creditors may resolve to approve (or vary) the Liquidator's determination. The resolution must be agreed by **a majority in the number and 75% in value of eligible unsecured creditors entitled to vote and who are present in person or by proxy.**

If the resolution is not passed at the separate meeting of the creditors of any member of the Group, the determination is cancelled.

The determination comes into force immediately after the passing of the resolution of the last meeting of creditors of the companies in the Group.

Consequences of a Pooling Determination

If a pooling determination comes into effect, each company in the Group is taken to be jointly and severally liable for each debt payable by and claim against each other company in the Group irrespective of whether the claim is present, future, certain, contingent, ascertained or sounding in damages only;

Each claim that a company in the Group has against any other company in the Group is extinguished (includes present, future, certain, contingent, ascertained or sounding in damages only);

The priorities afforded by Sections 556, 560 and 561 of the Act are not altered.

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