

I.T.: Going forward, going backward? Going round in circles!

By Schon G Condon RFD

Whilst much of what we read in the press these days is often puffed up and sensationalised, there is often a real and genuine issue lurking under the hype.

This is no more so evident than with all the recent press and notoriety that our friends from LulzSec have gained from their various net-based activities. However, at the same time we have also seen some other recent internet based announcements, such as the 4,800 Australian websites that were recently lost, that really indicates that it is time for all business owners and their advisors to give serious thought to the real safety and security of their data.

Much of the recent dilemma appears to have arisen as a result of the use of what has become referred to as 'cloud based' technology which effectively moves data off site and is admittedly more readily available from a wider variety of devices and locations. Whilst this form of internet usage clearly has a number of significant advantages it also enables the more unscrupulous amongst us to more readily access anyone's data they wish. Even the old adage that the larger organisations amongst us were at least safe because they can afford the necessary levels of security was dispelled when Sony's database was essentially laid bare.

I certainly do not suggest that business operators should ignore advancements in technology but rather than just accepting the advice of IT specialists they should seriously review their needs, opportunities and risks on a full business basis. Just because an element of your business can benefit from the new technology does not mean that you have to make an across the board decision. For example if sales staff need access to product details, price lists and stock levels as well as customer data you could maintain your own core secure system, place the appropriate customer information on each relevant sales persons machine and make the less critical data on a cloud based system. Such a process provides for the maximum use of technology whilst retaining appropriate levels of security over the relevant company information.

The IT expense of a business is undoubtedly increasing, but notwithstanding this, the overall hardware, software and security expense must be kept in balance; and security doesn't just mean stopping hackers, its backups, long term accessibility, Privacy Act responsibilities and so on. Therefore, the degree with which emerging technologies are embraced must be balanced off if not in fact driven by the level of overall security that an organisation can afford.

Interestingly this also brings us to another moot point that is of particular relevance to us as insolvency practitioners, and should be relevant to all business owners and operators. That is the need for a business to be able to readily access its information years after it was created and even potentially well after it has ceased to operate.

So what does providing the records mean. Well it does not merely mean the provision of raw data, but also requires one to ensure that the data medium, i.e. disk, memory stick, tape, etc is not corrupted, that the information is complete, and that the relevant software required to read the data is available to enable it to be read and adequately understood.

I have occasionally come across individuals that mistakenly believe that provided you hand over a suite of disks and odd papers you have complied with the legislation. One should remember that it is a director's responsibility to maintain adequate records to reasonably explain the activities and operations of the business, and that means translating the information into a readable and usable fashion, whether it be from another language or binary code.

A failure to appreciate this could result in the records being declared non-existent and thereby the directors personally liable for the debts of the company. Remember, the lack of books and records is prima-facie evidence of insolvent trading. An experience that could be both costly and embarrassing.

Enjoy the read.

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When are secured creditors considered shadow directors?

By Maggie Lau

In the recent case of *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd [2011] NSWCA 109*, the issue of whether a secured creditor may be exposed to director's risks as a shadow director by exerting influence over a company was considered amongst other interesting topics.

In the aforementioned case, Buzzle was created by the merger of six Apple retailers. Apple held a charge over Buzzle's assets. Apple demonstrated a significant level of influence over the affairs of Buzzle, including giving Buzzle advice regarding its structure, management requirements, financial systems, trade terms and so forth. Buzzle heeded to Apple and its financial officer's advice. Buzzle went into Liquidation within months of its establishment.

One of the issues which arose in the Buzzle and Apple case was whether Apple, a secured lender acting in its own interests exercises influence on the directors of a borrower, being Buzzle, should be considered a **shadow director** and be answerable to insolvent trading allegations. According to Section 9 of the Corporations Act, a person is a "shadow director" when the directors of the company are 'accustomed to act in accordance with the person's instructions or wishes'.

On 9 May 2011 in the New South Wales Court of Appeal, Hodgson JA, Young JA and Whealy JA found that neither Apple nor its representative was a shadow director. The court analysed the individual components of the definition of a "shadow director". The court's interpretation provides useful guidance on how to determine shadow directorship:-

- "in accordance with" suggests a causal connection, that is, the wishes or instructions given by the alleged shadow director must *cause* the relevant decision to be taken by the company.
- "the directors" are the governing majority or real decision makers.
- "accustomed" infers a habitual compliance over a period of time- that is, a history of the directors acting in accordance with the alleged shadow director's instructions or wishes.

In addition to the above, the instructions or wishes of the alleged shadow director must be with regards to board

decisions, not managerial activities, to be made by the directors in their capacity as directors, as opposed to their capacity as shareholders or employees etc.

The court stated that, "the directors of the company with whom it deals might feel they have no choice but to comply with the conditions imposed... this is not sufficient to make the third party who exercises such powers in his dealings with the company a shadow director".

Conditions imposed by a third party such as a secured lender do not amount to 'instructions or wishes' because "...the directors are free and would be expected to exercise their own judgment as to whether it is in the interests of the company to comply with the terms upon which the third party insists, or to reject those terms."

The decision would provide secured lenders, suppliers and other third parties some comfort in that they are not necessarily considered shadow directors when they exercise influence on the directors of a debtor company to protect their own interests.

Sources:

1. Quinlan, M. and Spira, A., 12 May 2011, "Focus: Good news for lenders – shadow directorship risks clarified", website: <http://www.aar.com.au/pubs/insol/foinsolmay11_01.htm> accessed 15 May 2011
2. Clemmett, S., 15 June 2010, "Are you a de facto director or a shadow director", website: <http://www.sparke.com.au/sparke/news/publications/insolvency_news_june_2010/are_you_a_de_facto_director_or_shadow_director.jsp> accessed 4 June 2011
3. Section 9 of the Corporations Act 2001
4. *Buzzle Operations Pty Ltd (In Liquidation) v Apple Computer Australia Pty Ltd [2011] NSWCA 109*, website: <<http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NSWCA/2011/109.html?stem=0&synonyms=0&q=uary=buzzle%20apple>> Austlii, accessed 5 June 2011

Insolvency Regulation Reform

By Alexander Frazer

In September 2010, the Senate Committee produced a report titled "The regulation, registration and remuneration of insolvency practitioners in Australia: the case for a new framework". The Committee published this report as part of an inquiry into insolvency practitioners and regulation within Australia. The inquiry was specifically established "in response to concerns raised about the effectiveness

and timeliness of the operation of the regulatory regime for corporate insolvency.” This Report put forward a number of proposals to address issues which the Senate Committee believes required reform.

One of the major issues put forward in the Senate, is the recommendation that the corporate insolvency arm of ASIC be transferred to ITSA to form a new personal and corporate insolvency regulator.

In response to this Report, The Attorney-General and the Parliamentary Secretary to the Treasurer have released an options paper in June 2011 titled **“A Modernisation and Harmonisation of the Regulatory Framework Applying to Insolvency Practitioners in Australia”** which seeks views on various proposals for significant regulatory reform of Australia’s insolvency industry.

The response paper noted that *“there are benefits to be gained from removing unnecessary divergence between the two regimes, including reducing legal complexity, risk, and costs for insolvency practitioners, creditors, shareholders, regulators and other stakeholders.”* However, ultimately the government has decided not to consider merging both ASIC and ITSA into a new insolvency regulation as there are *“differences reflecting the reality that a one-size-fits-all approach to insolvency is not appropriate and will not deliver suitably tailored outcomes for both companies and individuals.”*

Although the response paper does not approve the proposal for a common insolvency regulator, it does set about addressing other issues which require *“exploring holistic and coordinated solutions to common problems facing both corporate and personal insolvency regulation.”* Such issues which require further attention include:

- A more effective insolvency framework which will have a positive impact on stakeholders such as Businesses, Creditors and insolvency practitioners;
- Monitoring and removal of insolvency practitioners who do not minimise the risks to various stakeholders in course of their operation through misconduct; and
- Improving the value for money for recipients of insolvency services through professionalism and competency, competition on price and quality, the efficiency of practitioners and communication and transparency between various stakeholders.

Article reference –

http://www.langes.com.au/australian_regulatory_compliance/2011/06/06/insolvency-regulation-reform

Firm News



It is with great excitement and pride that we congratulate our own Hayley Condon on receiving a recognition award for her efforts from the Order of Saint John at the Parliament House in Sydney on Friday, 15th April. The effort she increasingly contributes to her work has been greatly acknowledged and Hayley was quite taken by the gesture.

Hayley has also recently been recognised as a Film Composer on the esteemed website www.imdb.com.au, due to her work on a film during her time at University studying a Bachelor of Music.



In other news, our own Maggie Lau attended a Western Sydney Business Connection team-building event and thoroughly enjoyed herself. Networking with a variety of individuals and businesses, she gained some great new knowledge on team effectiveness and managed to have a little fun as well.

A Rewarding Read

By John Chand

I recently read a great book on what motivates us in the workforce and teaches us as employees how we can get the most out of our workday, not by simply increasing productivity but by creating a fun atmosphere to work in.

The book does this by telling the story of Mary-Jane Ramirez, a fictional manager, who is faced with the task of transforming her unhelpful depressing department into an effective team.

Mary-Jane finds the solution to transforming her workplace at the very real Pike Place Fish Market in Seattle, where she learns the four elements to a successful fun and enjoyable work environment. Using what she has learnt, Mary-Jane transforms her depressing department into a team of enthusiastic go getters who get things done.

These principles are so simple, yet so effective in building a fun workplace they should be incorporated in all organisations as they would not only produce happier employees but also improve results and productivity in the workplace.

Though the book is often described as a management book, the actual target audience is the team, not the manager. The team members are the ones who deal with the customers face to face and have the ability to make them laugh or frown.

This book is for everyone who works and I encourage everyone to go grab a copy. As simply put in the foreword "People spend about 75% of our adult wake time doing work related activities, getting ready for work, travelling to work, working, contemplating work and decompressing after work".

For those who wish to read the book, it is called 'Fish – A Remarkable Way to Boost Morale and Improve Results' by Stephen C. Lundin Ph.D, Harry Paul and John Christensen.

Trivia Corner

"In 1626, the Dutch purchased "New Amsterdam" from the Native Americans, and soon tensions began to mount. In 1653, Dutch Governor Peter Stuyvesant ordered walls to

be erected between the Hudson and East River to protect the town from marauding Indians. In 1669, the British tore down the walls after having taken over New Amsterdam five years earlier, and they renamed it New York. The walls are gone, but they live on in the name given to the street that ran alongside them – Wall Street."

Condon Associates Functions

It has been a busy but entertaining couple of months! Condon Associates held a "Biggest Morning Tea" on our very own balcony on Thursday 26th May to support and raise money for the Cancer Council. It was a successful event of which showed many friendly faces helping us in the endeavour.

Condon Associates was lucky enough to be the host of the recent NSW Enterprise Workshop's 'A Taste of the Workshop' Forum which was held on Thursday 23rd June. The forum was very informative and even seen to have created a few entrants into the worthwhile workshop. If you are interested in finding out more about the Enterprise Workshop, please contact Hayley Condon at hayley.condon@condon.com.au or on (02) 9893 9499.



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