CONDON
FORENSIC INSOLVENCY TURNAROUND
ASSOCIATES

Volume 6, Issue 2, April 2012

1. Businesses can no longer rely solely on retaining title to their goods to reclaim them if they supply to customers who become insolvent or bankrupt – they need to register on the PPS Register. For a continuous supply of goods situations, the supplier needs only to register once for each customer – not for every supply.
2. Lessors/Finance Companies can no longer rely only on ownership to ensure they can reclaim their goods if the lessee/customer becomes insolvent or bankrupt – they need to register on the PPS Register.

As a result of above, Consumers are able to search the Register to check for any encumbrances or security interests that an asset may have at the time of them looking into buying a certain asset.

In addition to the setup of a PPS Register, the following are some of the important provisions of the reform:

1. Determining the priority between competing securities - The reform provides new rules about what is regarded as a security interest, and introduces a priority order when a number of security interests are registered against the same personal property. To take advantage of the new rules, security interests must be registered within the required timeframes.
2. Application of civil penalties - Certain civil penalties will be applicable for some breaches under the new legislation. This includes, but is not limited to registering a financing statement without believing on reasonable grounds that the collateral will secure an obligation owed by a debtor. These are detailed in Part 6.3 of the PPS Act.

It must be understood from this brief discussion that the introduction of the regime aims at benefiting Secured Creditors and Prospective Buyers if, and only if they are well aware of the reforms. It is thus essential that proper guidance is sought at the right time in order to avoid losing interest in a Secured Asset.

Condemning the Appointment of an Administrator

By Padmini Saheb

It has been decided that it is an abuse of the Voluntary Administration Process when an Administrator is appointed just before a Winding up Application is to be heard and the Administrator is not able to convince the Court that the administration would be in the Creditors' best interest. It is not adequate that a Proposal for a Deed of Company Arrangement would satisfy the Court to terminate the Winding up Application for the mere reason that it would yield a better return to Creditors.

In the Case *Gorst Rural Supplies Pty Limited v Glenrot (Lake Bolac) Pty Limited (2012)* the Winding up Application had been on foot for three and a half months and, on the day before the hearing, the Defendant appointed an Administrator. The Court decided against further adjournment. If decided that appointment of an Administrator yesterday amounted to an abuse of the processes of Part 5.3A of the Corporations Act, in this case, it is noted that the history of events, which had occurred since the beginning of the hearing and in the absence of any explanation as to why the Administrator was appointed so late, were key reasons the Court went ahead with the Winding up of the Company.

The general belief cited by the Court is that the Administrator needs to satisfy the Court that an adjournment will be in the Creditors' best interest, and is done at the commencement of the Winding up process not at the end.

Changes to Bankruptcy Act – Debtor's Petition Form

By Hiteshi Dekhtawala

The Bankruptcy governing Body ("ITSA") has recently advised that there will be a change to the Debtor's Petition Form and associated instructions. The change will be that while making a petition with ITSA, the Debtor will be required to furnish details and evidence to support their identification prior to signing the Petition. The documents are the same as required by financial institutions and the like such as Driver's Licence, Passport, government ID, etc.

This process is about bringing an identification check into the process at the very start of a Petition being made by a Debtor in declaring themself Bankrupt.

The date from when the change will be implemented is yet to be announced but the forms have already been changed.

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ON THE BEAM

UP THE WINDSOR ROAD!!!! or IS IT A SMOKE SCREEN?

By Schon G Condon RFD

I'm sure that everyone very quickly relates or remembers this famous 80's slogan from that memorable car dealer in the Hills district of Sydney, Tony Packard who was also member for the Hills from 1990 to 1993. So what is the relevance you say?

Over recent months there have been a growing number of professional people that this Firm deals with raising comment about the level of checking and checking upon checking that is being built into society these days. The driving force can come from a wide variety of sources, be it evidentiary, technical compliance, Occupational Health and Safety, statutory compliance, industry or professional compliance, audit trail, insurance protection, or quality control they are all relevant and all, in different ways and extents necessary.

However, what is now causing some people to draw breath is the amount of time and number of people that are involved in these activities either full time or part time, or how much of one's day is spent proving what you did, that is if you actually did something!

I can think back to my earlier days as a burgeoning accountant and my own personal tax return; a four page printed document completed manually, with a not unreasonable number of pages of additional data that was either hand written or typed, along with a number of other attachments, group certificates, statements of reserve service, etc.

Once complete it was submitted to the tax office and then a real person would take the document, review it in its entirety consider all the submissions and make a decision, (more often than not, on their own!), prepare the necessary feedback and send it to the taxpayer. Then with the advent of computers the system went hay-wire, four pages became six and can now blossom out to potentially twenty. Further, nobody actually looks at it, it is processed and tested and in the main accepted. If the ability to electronically process data was lost it is questionable that we could ever go back to the old ways.

I should note that whilst I have used the Taxation example there are many other processes and systems that could be drafted into the same manner of argument.

So, why the earlier reference to Tony Packard? Well I accept his name is no longer on the dealership, he is not a Member of Parliament and he had a bit of a fall from grace but I do remember during his halcyon days attending a function at which Tony presented. Whilst I do not remember the entirety of his speech his key point has remained ingrained. He was essentially addressing productivity and the opportunity that Australia provided but was concerned about the balance. By his then definition; "there were 25% of the population in retirement, there were 25% of the population at or before school, there was 25% of the population in public service and the remaining 25% were in the productive workforce. That meant that one quarter of the population in the productive workforce were generating the wealth that the supported the whole economy."

Whilst I cannot confirm Tony's percentages it was the overall notion that I took on board. I should point out that Tony did acknowledge that there was some productivity that came from the public sector, and also promptly pointed out that the public service was not "unproductive" in that sense, but merely that it didn't create wealth.

So if we steadily move to a point that we have more people reviewing what fewer people are actually producing it stands to reason that the overall ability to gain and grow will diminish over time.

The focus must be the overall creation and protection of

Inside this issue:

(real) wealth for the nation and its individual constituents.

If not is society these days then nothing more than a giant 'council road works team,' one man digging with twenty onlookers making sure he's doing it right? And we all know how much we respect that don't we.

Enjoy the read!

And You Think That You Have Money Issues!

By Sadia Alam

A very informative ITSA presentation organised by Condon Associates grasped the audience's attention to question the suitability of Regulations & Enforcement and the effectiveness of the procedures in place to manage various matters relating to Bankruptcy.

We all know how important money is in today's unpredictable world, so the first rational question to intrigue the audience was in regards to remuneration. "If the minimum set fee that can be pocketed is $5,420.00 without Creditors approval, then how much exertion should take place in order to earn that amount?"

Cases such as Young, In the matter of Macryannis [2011] dealt with how, or what is considered a reasonable amount of Trustee payments. It was stated that Trustee's waste too much time completing tasks that do not require so much effort.

The regulatory system does not specify exactly how much time is to be spent on a certain task, leaving the duration entirely to the Trustee's judgement. What this system lacks is a set of method(s) which can formulate a consistent approach in determining how remuneration is to originate and how it is to be calculated.

One must understand that at the time when a Trustee is appointed, they are uneducated in regards to the level of work that will come to their attention when dealing with any Bankruptcy case. Every Bankrupt has a substantially different situation. Costs will differ, just as the level of work. The Trustee has the duty in determining what work is to be performed.

Audiences also debated that without seeking Creditors approval for remuneration for the minimum fee, mixed messages were being delivered.

It is vital that some sort of mechanism be put into place to deal with remuneration matters otherwise Insolvency firms will be going Bankrupt instead!

Directors and "Directors"... Part 1.

By Robert Thyer

As we have discussed previously in our Newsletters, when a company is facing difficulty, one of the first places stakeholders look for answers is at the head of the company, the directors. But what happens when the director isn't aware of the affairs of the company and is only a mere figurehead?

Under Section 9 of the Corporations Act 2001 ("the Act"), the definition of a director has been given a broad scope to include anyone who is *"appointed to the position of a director"* or someone who is *"acting in that capacity; regardless of the name that is given to their position"*.

So under the Act, there is **no distinction** for the statutory duties of a director, whether they are validly appointed, acting as a de-facto director or pulling the strings behind the scenes as a shadow director. They all have the same statutory duties.

So if your company has been structured in a way to appoint someone as a figurehead of a company to avoid some type of responsibility or invalidity (e.g. Bankruptcy), you may still be considered a director of a company irrespective of the title you place upon your position. In future newsletters we will be discussing common law cases where this exact issue has been tested and developed by the Court's interpretation of the issue.

Unfair Preference Claims: Justice is Served!

By Brandon Lee

The Federal Court of Australia has recently handed down a decision in the matter of *Kassem and Secatore v Commissioner of Taxation [2012] FCA 152* to allow the recovery of unfair preference payments under Section 588FA of the Corporations Act ("Act"), by insolvency practitioners from the Australian Taxation Office ("ATO").

It comes as no surprise to many that the largest recipient of unfair preference payments in Australia is the ATO. Whilst it usually behaves reasonably when required to repay the preference payments, there are certain arguments that are sometimes raised by them to stymie recovery action. And in most cases, the mere fact that the arguments are raised is sufficient to dissuade a Liquidator, particularly an unfunded one, from taking any further action to recover the payments, thus resulting in injustice.

The Federal Court's decision in directing the ATO to repay the preferential payments has made this case an authority even for the proposition that the court is not deprived of its power to make that decision despite the fact that no distribution to any class of Creditor is expected.

In conclusion, this case should provide insolvency practitioners greater certainty as to the recoverability of preferential payments from the ATO. Insolvency practitioners should not be dissuaded to take recovery action against the ATO because one day, someone has to take a stand against them and as seen in this case, justice is served!

The Federal Court dealt fairly brutally with the three arguments put forward in this case as discussed in the table below:-

ATO's Arguments	Federal Court's Rebuttal
• The money came from another entity, not the taxpayer company itself. • Therefore under Section 588FA of the Act, the company and the ATO were not *"parties to the transaction."*	• In *Kassem,* the other entity in question offered to lend the taxpayer money to pay the debt, and at the taxpayer's direction, the money was paid to ATO on its behalf. • A payment made with the authority of a taxpayer is considered to be made by them for unfair preference purposes – *Re Emanuel (1997) 147 ALR 28.*
• For the same reason above, the making of the payment did not deplete the company's asset pool. • Therefore, no preference was given to the ATO as no other creditors were deprived of the company's assets that would otherwise be available.	• If assumed that the payment by the related entity was (as alleged) a loan to the taxpayer, then this transaction would in effect replace one debt (to the ATO) with another equal debt (to the related entity) • Consequently, there was no "enlargement or enhancement of the pool of assets available" for eventual distribution to the taxpayer's creditors.
• Since the money was applied to Superannuation Guarantee Charge debt which is a priority payment under Section 556 of the Act, and at the time of payment, there were no other creditors exceeding this priority, thus the payment did not result in "unfair" preference being awarded to the ATO.	• One should look at whether the ATO in fact did better as a result of the payment than it would have done in the actual winding up that occurred. • It doesn't matter the payment resulted in preference being given in a theoretical winding up at the time of the payment.

Familiar Faces - New Horizons

Congratulations to Shine Lawyers on the opening of their new Parramatta office.

Erin Brockovich and Schon Condon at the Shine Lawyers Parramatta office opening on March 21st.

Personal Property Securities Reforms: The Wait is Over!!

By Hiteshi Dekhtawala

Introduction

The long awaited Personal Property Securities regime has now been in operation since 31 January 2012.

The Register has been introduced to replace the varied State legislations across Australia affecting consumer interests in assets with a new National System. The Register will serve to be a one stop shop for the consumers where they can search for any securities in an asset. The Register is computer-based, updated in real time and accessed publicly.

The regime covers all personal properties in any form other than land or buildings and fixtures which form part of that land. It can include tangibles such as cars, boats, machinery, crops, shares; as well as intangibles such as shares, intellectual property and contract rights.

The Insolvency and Trustee Service Australia is the party responsible for maintaining the Register and a contact centre for customers.

Reforms

Under the new rules, for an asset to be secured and claimed under the security, the security needs to be registered by consumers on the PPS Register, examples of which are as follows:-