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CONDON
FORENSIC INSOLVENCY TURNAROUND
ASSOCIATES

ON THE BEAM

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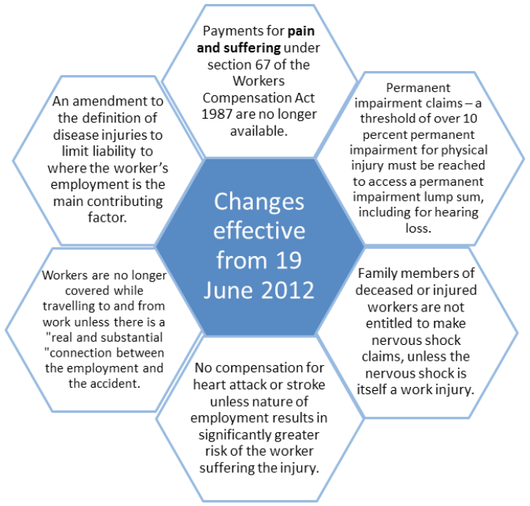
Changes which are already in effect include the following:



Further changes will be introduced in stages in the next 12 to 18 months:

- The most seriously injured employees (with greater than 30 percent permanent impairment) will receive their new benefits from 17 September 2012, irrespective of when they were injured.
- Workers injured at work on or after 1 October 2012 will receive benefits based on their actual pre-injury earnings under the new legislation from then.
- All other injured workers will be transitioned to the new legislative requirements from 1 January 2013 and their claims will be processed under existing legislation prior to that time.
- A new weekly benefits scale will change the way weekly incapacity payments are calculated, including:
  - Higher benefits in the early stages of a claim.
  - A cap on benefits in the long term.
- Injured workers required to undergo work capacity assessments at specified points throughout the life of their claim, and at least once every two years.
- Payment for medical and related treatment will end at 12 months after the claim for compensation is made, or 12 months after the last payment of weekly benefits (whichever occurs last).

The changes are said to be focused on encouraging and assisting early return to work, and providing better financial support for seriously injured workers. The new legislation requires employers to find suitable work for injured workers who have a capacity to work. Those employers who do not will face improvement notices or fines.

The new laws have dismayed workers and unions, and particularly those workers whose existing claims have been affected due to the cuts to benefits being applied retrospectively.

For further information, please visit www.workcover.nsw.gov.au or contact WorkCover NSW directly on 13 10 50.

Condon Update

Condon Associates celebrated its 6th birthday this October with an amazing Birthday Balcony Bash with a maritime theme at our offices in Parramatta. Thank you to all who attended and we hope to see more of you at our future functions!

Guest Ghania Dib and Simon Mouatt with Schon at the Birthday Bash.

Members of the Condon Associates Team all ready for the Birthday Bash.

Last but not least, a well-deserved thank you to the Social Club Committee for organising the Scavenger Hunt. It was a competitive and fun afternoon and we certainly do have many photos that captured the fun moments.

"We have muscles!" photos of the four teams for the Social Club Scavenger Hunt Competition.

Many Thanks, One and All!!

By Schon G Condon RFD

October has certainly turned out to be one spectacular month, and certainly one that we as a Firm must say a formal *"Thank you"* for.

We again hosted our annual celebration on the office balcony in Parramatta, an event that essentially dates back to late last century (sounds cool, no!), even though we title it in more recent terms. It was clear from the comments and the camaraderie on the night that a fantastic time was had by all at our recent *"Condon Associates Annual Balcony Bash"*.

The evening was held under a spectacular ceiling of azure blue, with a spectacular rainbow to our east, and fine music emanating from the balcony whilst much of the other areas around us were buried beneath ominous black clouds. Its aim is to provide us with an opportunity to say thank you to all who have supported us over the past year and to showcase the Group, as well as meet with our friendly staff. The spirit that was shared that night was second to none, and we again say ***thank you*** to all who made it so. It was an honour to share the evening with you.

The Condon Group has been growing steadily in recent times and we are looking forward to another exciting year as we also welcome, among other aspects, additional support services within the Business Turnaround component of EBIT Management Services, to be more commonly referred to as EBIT MS in the future.

To cap what was a truly extraordinary night, we were subsequently made aware that we had been named the Winner of the *'Excellence in Finance and Insurance Products and Services Award'* and finalist for *'Excellence in Professional Services'* at the Western Sydney Awards for Business Excellence, colloquially referred to as the *'WSABE's'*.

Such an accolade came as a welcomed surprise in what has been a successful year and we are looking forward to continuing to support clients in either Business Turnaround, Forensic, Finance or Insolvency matters in the future. So thank you to all those that in one way or another contributed to this success, whether it be by direct input or merely speaking positively of your experiences in dealing with our organisation.

In closing, I must also thank our staff and consultants that have significantly helped the Firm in achieving the level that it has achieved and am looking forward to even greater heights in the future.

We thank you all, and please enjoy the read.

Inside this issue:

Directors and "Directors" – Part 3 Duty to Prevent Insolvent Trading

By Brandon Lee

In today's modern world of business, individuals constantly face ethical dilemmas; Directors in a Company have to make daily decisions which might result in the Company performing corporate misconduct which will harm certain individuals or parties. As mentioned in the instalment of **Directors and "Directors"** in our September 2012 issue of *On The Beam*, every Director or individual who is considered a "Director" of a Company under the *Corporations Act 2001 ("the Act")* owes a responsibility to the Company to act with skill, care and diligence in the best interest of the Company. However, there are many ways for Directors to manipulate the Company with the knowledge they possess or due to arising opportunity that entices them to commit an

Level 6, 87 Marsden Street, Parramatta
Level 6, 321 Pitt Street, Sydney
443 High Street Penrith
PO Box 1418 Parramatta 2124
Email: enquiries@condon.com.au

City/Parramatta (02) 9893 9499
Bankstown (02) 9708 6622
Liverpool (02) 9602 7889
Penrith (02) 4722 9699

offence that is detrimental to the Company. This is where the importance of understanding the Directors' duties come into play, and principally for the purpose of this article, the duty to prevent Insolvent Trading pursuant to Section 588G of the Act.

First, what is Insolvency? Insolvency is the inability of a Company to pay its debts as and when they become due and payable. Having said this, Insolvent Trading claims can only be made when a Company is in Liquidation and are normally brought by the Liquidator on behalf of all Creditors. However, individual Creditors are allowed to make their own claim if the Liquidator fails to or chooses not to make one.

Directors have a duty to prevent Insolvent Trading by a Company and the trading whilst insolvent provisions of the Act apply when [1]:

- a person is a Director of a Company at the time when the Company incurs a debt; and
- the Company is insolvent at that time, or becomes insolvent by incurring that debt, or by incurring at that time debts including that debt; and
- at that time, there are reasonable grounds for suspecting that the Company is insolvent, or would become insolvent, as the case may be.

As mentioned previously, Directors or individuals who are considered "Directors" of a Company under the Act have a duty to prevent Insolvent Trading. They can be proved to have contravened Section 588G if it can be proved that they failed to prevent the Company from incurring the debt in situations whereby [2]:

- The person was aware that there are such grounds for so suspecting; or
- A reasonable person in a like position in a Company in the Company's circumstances would be so aware.

Evident from the provisions stated above, the Act has been designed to prevent Directors from irresponsibly incurring debts that cannot be paid and avoiding personal liability by hiding behind the Corporate veil. The Court will consider the facts known by the Directors or "Directors" and judge according to the provision in Section 588G(3) whether a competent and reasonable person in that position should know about or would have suspected that the Company would be insolvent at the time the debts were incurred. Another factor that will be considered would be whether the Director's failure to prevent the Company from incurring the debt was dishonest.

If a Liquidator or the Court can prove that a Director has breached his or her duty to prevent the Company from incurring debts whilst insolvent or has reasonable grounds to believe that the Company could be insolvent by incurring debts, the Director can be sued and be personally liable for an amount equal to the amount of the debts incurred. ASIC might also prosecute the Director for Insolvent Trading offences and seek orders that the Directors pay a pecuniary penalty or disqualify them from holding any office within an Australian Company for a period of time.

In conclusion, it is clear that the position of Director carries great responsibilities including the duty to keep the Stakeholders and Creditors informed about the Company's solvency and the debts being incurred. Directors must therefore act upon their responsibilities or be prepared to face possible liabilities and penalties arising from a breach of their duties.

For support on understanding your duties as Directors, Contact Cathy Wagner in our training department.

Corporations Act 2001 – Sect 588G (1); http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s588g.html
Corporations Act 2001 – Sect 588G (2); http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s588g.html

The Federal Court of Australia Denies Litigation Funding

By Hiteshi Dekhtawala

As most of us may be aware, Litigation Funding (LF) allows Insolvency Practitioners (IP) to obtain funds from Litigation Funders to pursue actions that they would otherwise be unable to pursue due to a lack of funds. Litigation Funders are organisations that provide funds to meet the costs of legal actions including the costs of Solicitors, Barristers and IP as well as providing an indemnity for any adverse costs order, should the legal action prove to be unsuccessful.

In return for the Funder being exposed to the risk of losing the case, a premium is charged upon the successful resolution of the matter. Upon a successful outcome, all the costs which the Funder has paid for are refunded along with an additional 'risk premium'. This premium is usually a percentage of the total amount awarded. Given the risk that the Funder is exposed to, ordinarily, they are only willing to fund actions that have a high probability of success.

It must be noted that pursuant to Section 477(2B) of the Corporations Act, a Liquidator is required to get an approval from the Court, Committee of Inspection or Resolution of Creditors for Litigation Funding Agreements (LFA) of more than 3 months.

In a recent case, *Jones v Great Southern Ltd (in liq) [2012] FCA 807*, the Liquidator was seeking Court approval for LFA. In this case, the Court reiterated the fact that Liquidators seeking such approval must ensure sufficient evidence is gathered and presented to the Court as part of their application.

In the mentioned case, the Liquidator applied to the Court for LF approval to enable him to continue his investigations into potential claims of breach of duties by the Directors of the Company. However, it must be noted that the Liquidator had applied to the Court where the original Litigation Funder denied continuity of any further funding into this aspect. At the time of making the application to the Court, the Liquidator had been in office for 3 years and had applied a significant amount of funds into this aspect.

As would be appreciated, for the Court to approve LF in such circumstances, the Liquidator must have had solid evidence to prove his action in continuing such investigations. The Liquidator was unable to prove to the satisfaction of the Court leading to a denial from the Court in approving such funding. In making the decision, the Court considered numerous factors of which 3 were of significance. The decision was based on the fact that no firm evidence was presented by the Liquidator which could lead the Court to believe in the prospects of success in these investigations. Due to the lack of sufficient evidence, the Court was unable to assess (among other things) the reasonableness of the Funder's premium.

In light of the above, it must be noted by the Insolvency Practitioners that any advice on which they may have relied upon regarding successful funding application must be independently evaluated by them before making such applications.

Value of Technical Knowledge

By Bob Cruickshanks

A recent judgment in the Federal Court (*Michell (Trustee), in the matter of Lee (deceased) [2012] FCA 1046)* demonstrates the value of bankruptcy trustees and their staff having and maintaining technical knowledge. The trustees of a bankrupt estate brought their ill-fated application which involved a legal principle which had been previously decided by the Federal Court and that decision had been relied on in a number of subsequent published judgments.

The case involved rather straight forward technical issue involving the status of income owed to a barrister at the date of bankruptcy of the barrister. In the decided case, *Re Sharpe; Ex parte Donnelly (1998) 80 FCR 536*, Lockhart J held that fees owing to a barrister at the date of his bankruptcy, and paid after that date, belonged to the barrister as income, and not to the trustee in bankruptcy as property of the bankrupt at the date of bankruptcy.

Understandably, the trustees' application *"crashed & burned"* and in addition to having their application dismissed, the Court ordered the trustees to pay the respondent's costs and the trustees were held personally for their costs, and they could not charge the bankrupt estate for any time spent in respect of the legal action.

The judge was quite scathing in his comments about the trustees finding that they had unnecessarily brought their application when the legal issue in question had been previously determined by the Federal Court. Furthermore, the arguments they advanced to overturn the previously decided case were entirely inappropriate and the creditors of the bankrupt estate ought not to have to pay for the trustees' waste of money in making their application.

Accordingly, had the trustees and their staff been aware of this rather basic legal principle relating to bankruptcy administration, they would not have embarked on their ill-fated legal action which proved to be a very expensive plus professionally embarrassing exercise. The case also highlights the danger of trustees relying entirely on the advice of their legal adviser and not challenging such advice and/or seeking a "second opinion" on the issue.

Recent Changes to NSW Workers Compensation

By Maggie Lau and Leonard Khoury

The Minister for Finance and Services, Greg Pearce, made an announcement on 7 August 2012 that the NSW Parliament passed the Workers Compensation Amendment Act 2012 ("the Act") in June 2012. Reforms will be implemented in stages and will affect the way workers compensation benefits are assessed and paid, including existing workers compensation claims.

The changes were brought about to return the NSW Workers Compensation scheme to financial sustainability from its estimated $4 billion deficit.

Only a small group are excluded from the changes.