As I stood in the function room with a coffee in my hand I felt a twinge of nervousness with nobody to talk to. I looked to my master networking manager for guidance and he spotted someone interesting and said we should go say hello. It was one of the highlights of the event. I got to meet the greatest try-scorer in Parramatta history and one of my favourite players at the club, Luke Burt. It was great to see how down-to-earth he was and how he was enjoying his retirement. The conversation made me feel more relaxed and I started talking to a few people at my table during breakfast.

After a filling breakfast which included sausages, hash browns, bacon and eggs, it was time for the main event. I enjoyed how Ricky Stuart talked about the plans he had for the Leagues Club and how he was targeting recruits. It left me feeling more hopeful for the future of my Club. With my first networking event over I knew I still had a lot to learn and it was only the start of trying to build a network.

An entertaining morning and work day was followed by my second networking event of the day, a Young Parramatta Professionals Networking event brilliantly organised by Darren from Champion Legal at the Parramatta Riverside Theatre.

After a good learning experience in the morning I was able to get straight into networking with my fellow professionals. I had a wide range of topics to discuss and it amazed me how easy it was to talk to complete strangers. I was also able to give out some of my business cards! An excellent piece of advice I received from one lady I talked to during the event was that the secret to networking was to just relax and be fearless.

After completing my networking, I preceded to the main event of the night a musical of the Wizard of Oz. The musical is directed by Neil Gooding and is faithfully adapted from the 1939 movie of the same name.

A fantastic production awaited and took me back to my childhood and reminded me why I enjoyed the movie so much. A packed out Riverside theatre was laughing and sharing Dorothy's emotions as she journeyed through the Land of Oz to find the Wizard.

A large cast from seasoned actors to primary school aged children danced and sang through colourful sets which were used to great effect. The atmosphere of the show was accompanied by music from a live orchestra and the sound effects were terrific.

As I left the theatre after a long but enjoyable day, still humming the tunes to the Wizard of Oz, I reflected that there really is no place like home, and that is what Parramatta will always be to me. (Go the EELS!)

## *Condon Update*

The Condon Forum on Employment Law and Work Health and Safety Updates was a great success. Our thanks to Anna Ford from Coleman Greig, Pauline Knox from Impact Executive Solutions and Schon Condon for their informative and entertaining presentations.

The first Hawkesbury Business Connection (HBC) meeting of 2013 took place in March. Cathy Wagner's engaging presentation on Survival of the Fittest, encouraged the audience to look at their business from inside out AND outside in.

Last but not least, the Condon Associates Annual Golf Day is coming up! This year's major sponsor is Ricoh Australia. All profits from the day will be donated to the Legacy Foundation. Please contact Lyn at lyn.dong@condon.com.au or call 9893 9499 for more information.

Here are some Kodak Moments ...


The speakers at the Condon Forum: Schon, Anna Ford and Pauline Knox with Hakki Hassan.


Cathy Wagner and Jon Gillingham representing EBIT Management Services at the HBC meeting.

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ON THE BEAM

CONDON
FORENSIC INSOLVENCY TURNAROUND
ASSOCIATES

**Volume 7, Issue 2, April 2013**

## *Carbon Tax Beats GFC in AUS!!!*

By Schon G Condon RFD

It's (at the time of writing) the latest news, the Carbon Tax is responsible for more business failures in Australia than the GFC. Fearfully, it would be almost impossible to find a more purely politically focused statement.

It's recently been reported that there have been more than 10,500 corporate failures in Australia in the last twelve months, "one every hour" quotes a sensationalist news bulletin wanting to maintain the rage.

In reality small business in this country has now been suffering for some considerable time as it has coped with a continually dwindling real or second economy buried under the avalanche that is known as the 'mining boom.' Small business has seen its profit margins erode under the weight of increased competitive pressure, cheap imports, high Australian Dollar, unscrupulous business operators, increasing Government bureaucracy, significant and catastrophic natural disasters, increasing labour costs and so forth.

As an aside, I noted with interest at a recent trade presentation for Turkey that they made the point that wages in Turkey were six times lower than Australian equivalents and on top of that there were significant Government incentives to consider investment. One almost considered oneself to be on another planet!

However, returning to the main point at issue, with declining profitability has come a culture of surviving or 'holding on' for as long as you can, exposing oneself, creditors and customers to the increasing potential of loss. Also now without any genuine level of profitability businesses are no longer capable of riding out even minor catastrophes that would have in the past been within the businesses own resources to recover from. The new 'insurance policy' or 'business strategy' employed is simply that of starting up in a new entity or business under the tutor-ledge of a pre-insolvency adviser or the like. Hence the volume of businesses being wound up.

It is also worthy to note the impact of the recent floods and fires, without (and in many cases even with some) insurance many businesses just disintegrated no doubt being pursued by either the ATO, an insurer or a creditor with a reason to wind it up.

Regular conversations within the industry from most sources indicate that work is patchy and that much of what is out there has little or no funding. So it certainly appears that there are many mixed messages going around.

With this in mind maybe it's time to reconsider what we are trying to do with the process. Once upon a time it was about investigation, reporting and theoretically Government action. With the cost expectations for winding up these days these are in reality dreams at best. Investigation and reporting are about quickly finding assets to be claimed as fees and the provision of statistics to Government, so maybe it's time to rethink the overall approach.

Certainly one way to reduce the number of insolvencies would be to better qualify those that take on directorships prior to doing so, not a degree but at least some basic understanding of duties, responsibilities, corporate and tax law and so forth.

One is not allowed into the community with a (motor) vehicle without appropriate training and licensing because the damage and loss of life is not acceptable, but interestingly one can go into society with a (corporate) vehicle and wreak as much damage as you want!

**Inside this issue:**



## *Directors and "Directors" – Part 5 (Liabilities of Directors)*

By Brandon Lee

In our February 2013 issue of On The Beam, I discussed the Directors' defences for Insolvent Trading pursuant to Sections 588H, 1317S and 1318 of the Corporations Act 2001 (Cth) ("the Act"). However as I have mentioned in the previous newsletter, the defences that I have listed may seem very useful and easily applicable but in reality, the Courts will ultimately look to the legislative intent of the Insolvent Trading Provisions when considering the availability of a defence. Therefore Directors must take the appropriate steps to determine what they can admit as solid evidence should they need to strengthen their defence to Insolvent Trading claims.

If the Courts deem that the defences put forward by Directors are not sufficient to absolve them from their contravention of Section 588G of the Act, it will be considered that it is the Directors' fault that the Company incurred the debt and the Creditor was not paid. The reason for this being that the Directors have a duty to prevent Insolvent Trading by a Company.

Under Section 588G of the Act, Directors or an individual who is considered a "Director" of a Company may be liable for Insolvent Trading claims and be ordered to compensate Creditors for the losses sustained. The compensation order for the losses sustained is potentially unlimited and this may not only lead to the loss of the Directors personal assets, but also to the Personal Bankruptcy of Directors.

If a Director is found by the Court to have contravened the Civil Penalty provision in Section 588G(2), Courts may make one or more of the following orders:-

1. **Compensation Order** – The Court may order that the Director is personally liable to pay compensation to the Company equal to the amount of the loss suffered as a result of the Director failing to prevent the Company from incurring debts while it was Insolvent ; and

2. **Pecuniary Penalty Order** – The Court may order that the Director pay a pecuniary penalty to the Commonwealth of up to $200,000 if the Court finds that the Director's failure to prevent Insolvent Trading is serious or materially prejudices the interest of the Company or the Company's ability to pay its Creditors ; and

3. **Disqualification from Managing a Corporation** – The Court may disqualify the Director from managing a Corporation for a period of time that it considers appropriate, if it is satisfied that the disqualification is justified .

Directors may also face Criminal Penalties for Insolvent Trading. However, Liquidators are not able to take Criminal actions against the Directors. The only body that can initiate these actions is the Australian Securities and Investment Commission ("ASIC") through the appropriate Government departments.

If a Director is found to have committed a Criminal Offence under Section 588G(3), the Court may make one or more of the following orders:-

1. The Director to pay a penalty of up to 2,000 penalty units – which at the time of releasing the Regulatory Guide 217 is equal to $220,000; or

2. The Director is imprisoned for up to five (5) years.

In conclusion, as businesses become more complex and more demanding, the inherent duties will increase proportionally, so it would be wise for Directors to continually assess their positions and responsibilities within an organisation to ensure that they are complying with the various duties. As Directors now face the potential of not only compensation claims from Liquidators but also potential Civil and Criminal actions by ASIC, it is in the Directors best interest to understand the implications of allowing their Company to trade and incur debts when it is insolvent and the risk to their personal assets and even Personal Bankruptcy.

## *Good News for Directors On Defence Costs?*

By Hakki Hassan and Lyn Dong

Directors and Officers Liability Insurance ("D&O") is liability insurance payable to the Directors and Officers of a company, or to the company itself, as indemnifications for certain damages (or losses) or advancement of defence costs in the event any such insured suffers such a loss as a result of legal action brought for alleged wrongful acts in their capacity as Directors and Officers or against the company.

Such coverage can extend to defence costs arising out of criminal and regulatory investigations/trials as well as civil and criminal actions against the Directors and Officers personally.

Bridgecorp was a Property Financier that funded its activities by issuing debentures to the public. It went into receivership in 2007 owing $NZ459 million, and criminal and civil legal actions followed.

When the Directors called on their D&O policy to fund their defence costs in regard to such legal actions, Bridgecorp's receiver asserted a charge over the policy, as the receiver intended to sue the Directors for about $NZ450 million.

In September 2011, the High Court of New Zealand held in favour of the receivers and prevented the Directors from having access to their D&O policy to meet their defence costs in proceedings against them concerning their role in the collapse of Bridgecorp.

On 20 December 2012, the New Zealand Court of Appeal **overturned** the High Court's decision and held that the statutory charge created by Section 9 of the Law Reform Act 1936 (NZ) **did not** prevent the Directors from having recourse to their D&O policy for their defence costs. This decision may be appealed.

This decision of the New Zealand Court of Appeal has ramifications because in New South Wales, the ACT and the Northern Territory equivalent legislation to Section 9 of the Law Reform Act 1936 (NZ) (NSW by the Law Reform (Miscellaneous Provisions) Act 1946, Section 6, in ACT by the Civil Law (Wrongs) Act 2002 s.206 and in NT by Section 26 of Law Reform (Miscellaneous Provisions) Act.). Thus this decision, and any subsequent appeal of same, will potentially become a real issue for Australian company Directors, other professionals and their insurers.

It is noted that the decision of the New Zealand Court of Appeal has already resulted in changes to D&O cover in Australia and New Zealand, with insurers restructuring D&O policies to ensure Directors have access to funds for defence costs. This decision has also impacted on recent cases in Australia as Chartis has filed an application in the NSW Supreme Court seeking declarations intended to clarify whether the Bridgecorp decision would apply in the insurance policy issued to Centro.

Whilst at first glance the decision of the New Zealand Court of Appeal is good news for insurers, Directors and other professionals, a word of caution because the issue has yet to be determined by an Australian Court. Accordingly, we recommend our readers seek clarifications and advice from their legal advisers and insurers in regard to separate limits of liability for defence costs and for ultimate liability to a claimant and in regard to their overall insurance coverage.

## *Directors' Inspection of Records of a Company in Receivership*

By Padmini Saheb

The appointment of a Receiver by a Secured Creditor does not take away all the powers and duties of the Directors. As such the common law rights of Directors to inspect the books and records of the Company during receivership is unquestioned. However, Directors have to act in such a way so as not to threaten the security interests of the Secured Creditor.

In the cases of *Oswal v Burrup Fertilisers Pty Limited* and *Carey v Korda*, the Directors were able to inspect the Books and Records of Companies in Receivership in certain circumstances, being where granting of such access was not considered prejudicial to the efforts of the Receivers to realise the assets subject to the Secured Creditors charge over such assets. In other circumstances, Directors were not given access because it was likely to impede the Receivers ability to deal and then realise the assets subject to the security interest. In these circumstances, the Receivers were able to claim Legal Professional Privilege ("LPP") over records and not permit Directors to inspect certain documents. The Court will however require evidence in substantiation of any claim of LPP claimed by Receivers.

Generally, in Receiverships, Directors do have the common law right to inspect the Company's records, however, access to the Company's records is limited and they will not be granted full access if such access threaten the interests of the security holder.

## *A Baptisms by Fire*

By Jack Li

A bright and early start was in order for my first ever networking event for my new Firm Condon Associates. I was excited about attending and it was held at a familiar place, where I had experienced both great joy and great heartache, the Parramatta Leagues Club!

The event was part of Parramatta Chamber of Commerce's breakfast series and the main feature was Channel Nine's resident sporting guru and master interviewer, Kenny Sutcliffe, having a no limit one-on-one discussion with new Parramatta Eels coach Ricky Stuart.