

The best way to minimise the risk of a payment being clawed back is to avoid the Debtor/Unsecured Creditor relationship. Some ways to affect this include the following:

- Ensure all trading is carried out on COD (cash on delivery) terms, or require payment in advance of supply;
- If your customer starts to fall behind make sure you make them aware that continued and future supply is dependent on the payment of outstanding invoices ie informing them the next lot of supply will occur only after they make a ???% payment of outstanding invoices. This may create a running account defence if the "unfair preference" claimed is prior to the next lot of supply you provide to your customer;
- Obtain security before credit (or further credit) is extended. Security can include a validly registered interest with the PPSR over Company property, or a mortgage over Real Estate. A Secured Creditor is not affected by the Unfair Preference legislation if the funds repaid relate to the security interest. A mortgage over real estate should be registered with the Lands Titles Office. It should be noted the old Retention of Title clauses must now, in nearly all cases, be correctly and validly registered with the PPSR

It is also prudent to seek legal advice before you issue letters of demand, final notices, threats of legal action and other steps that may prejudice the chances of arguing the "good faith" defence. Ironically the harder you push for payment from a struggling Company, the more likely it is that a Liquidator later appointed to the Company will be able to claw back the payment as an Unfair Preference.

It is important to be aware of the laws in respect to Unfair Preference claims, defences available to any claim and steps you can take now to minimise the chances of an Unfair Preference claim being made in the future. If you receive a Letter of Demand from a Liquidator claiming back a payment as an Unfair Preference it is highly recommended that you seek prompt legal advice to maximise your prospects of successfully defending the claim.

## Condon Updates

By Lyn Dong

Condon Associates is honoured to announce that we were awarded the Australian Small Business Champion Award in Accounting Services. To all who have helped and contributed, in particular, the staff but also to everyone else, a very sincere thank you. We will continue to endeavour to improve and grow.

On April 11 2013 the deferred 2012 RAAA/Condon Associates Golf Day took place under spectacular sunshine with a gentle breeze, making a perfect day for golf. Our largest golf day to date, players competed for the RAA Association Shield, or the Condon Associates Trophy for non-military teams. For the second year in a row the

event was sponsored by Ricoh Australia. The event raised a little under \$2000 for Sydney Legacy. We are proud to play a part in assisting Legacy in its vital role looking after the dependants of service personnel.

Following on from the successes of last year's Luncheon, Condon Associates proudly hosted the Third Annual Turkish-Australian Business Networking Luncheon in May. It was a great honour to have Ms Makbule Dogan, Commercial Attaché of the Turkish Consulate in Sydney and her colleagues join us on the day to foster the existing and developing relationships that will strengthen and enhance the already strong bond between the Turkish and Australian communities.

The Humanise Group launched the Humanise Parramatta Group on 5th June on the Condon Associates balcony. We have been a part of this great professional group since its inception, and we look forward to developing more relationships within the Humanise family.

We are very proud to welcome Kevin Cotter to the Condon Group family. Kevin is a CPA with 7 years' experience in Insolvency and Reconstruction and joins the Practice as a Manager. His experience is not only limited to accounting, he is an ex-police officer, gunner and sailor. We look forward to working with him in the future.

Last but not least, our congratulations to Hiteshi on successfully completing the Certified Practising Accountants ("CPA") program in June 2013 and her promotion to Supervisor.



Schon Condon, Ms Makbule Dogan, Commercial Attaché of the Turkish Consulate, Candan Koyuncu and Hakki Hassan at the Third Annual Turkish-Australian Business Networking Luncheon.



Congratulations to Hiteshi Dekhtawala – CPA



The newest member of the Condon Group family – Kevin Cotter

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## ON THE BEAM

### Telling Tales!!

By Schon G Condon RFD

Whilst the younger generation may think that telling stories is a relatively new thing because of their cultural attachment to all things technological and the internet's ability to spread a tale far and wide rapidly, it is in reality a very old trade. Ask any Indigenous Australian who will tell you they have spent tens of thousands of years passing their history and culture from generation to generation by the use of stories, music and animation (commonly dance). This is also the case for quite a number of other cultures and peoples world-wide.

So why do I take this strange deviation away from the staid world of business? Simple, every now and again an issue comes up that is really significant and it becomes imperative that the message is understood.

We have for some time promoted increased learning through the publishing of newsletters, case studies and the like as well as maintained a web presence. However certain events over the last six to ten months prompted us to raise concerns about the sort of advice that was being given to various parties, in particular those facing imminent financial stress or disaster. This was initially announced in a recent article for the Western Sydney Business Access newspaper entitled "Hey, We were just acting on advice" (WSBA Issue 26, [www.wsba.com.au](http://www.wsba.com.au)).

What we are finding is that there is an increasing frequency where we are meeting with potential clients who essentially arrive on our doorstep with simply no options or alternatives. What make this diabolical is that they have regularly been initially advised by others, and in some cases over some considerable time and cost, with the ultimate result that they now have nothing. No alternative for recovery, no funds with which to start again, and no real value gained for the (in some cases) significant money spent. In one case a quarter of a million dollars fighting a legal action that never found resolution prior to bankruptcy and another where someone had been advised to draw down their super as they had been led to believe they would lose it anyway. In addition this experience has also recently been reinforced by some of the other media that has dealt with our industry commenting on some amazing fee claims that have been made.

Getting advice is one thing but getting the right advice for the circumstances that you are in at a fair value is the key to success, and yes success can even come out of financially unstable or terminable situations. We are human and therefore mistakes are made, the real key is how we recover from them.

In business, errors, dramas and the like are occurring around all of us all the time and therefore it is important that we remain vigilant to

the potential impacts and that when we are regrettably caught we seek to extricate ourselves (and as many other players) at minimal cost.

So why the initial reference to storytelling? We considered this issue to be so important that we decided to have a little dalliance into film and create a short tale entitled "Tina's Story" you can find it on the Condon Associates YouTube channel or via the Blog on our website at <http://www.condon.com.au/archive/2013-blog-posts/the-right-advice-2/>

We as a group are genuinely focussed on providing solutions and seeing that businesses and individuals are given every real opportunity to get back on their feet. Certainly there are instances where this is simply not possible and we do accept that and formalise things as professionally as we can, but when you see situations that could have been recovered but are no longer capable of so being because of some adviser that attacked the problem solely from their own perspective rather than the genuine needs of the client it is most unreasonable.

The people we deal with do provide the right advice, and may I say well done, but we must be ever vigilant of those that don't.

#### Inside this issue:

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### Don't Wait Until It Is Too Late – Directors Need to Take Action Sooner

By Kevin Cotter

People often ask me how I ended up in accounting after being a constable in the NSW Police Force. For me it has not been that much of a change. Granted it is no gang and drug war on the streets of Cabramatta in the late 90's but there are a lot of similarities which I am willing to chat about to anyone that cares to listen.



With this background I bring a fresh approach which is different to the typical insolvency specialist when dealing with minimising loss and recovering efficiently from unforeseen challenges they face. However, not all challenges are unforeseen and some are even preventable if corrective actions are taken as soon as possible.

Ask yourself: what would you do if there is a fire in your home or office? Would you ignore it and hope it goes away? Of course you wouldn't, you'd do something about it be it fighting the fire or getting out and calling in the professionals to help. You might be wondering why I am even asking you this. Well, believe it or not, managing a corporation is pretty much the same. However, I and every other insolvency practitioner have witnessed time and time again Directors ignoring their house burning down around them until it is too late. They ignore the signs and wait until it is too late to save their business. An example of such missed signs I have witnessed include the collapse or loss of a major client, change of law, change of funding agreements, cash flow issues and key personnel leaving.

Why do Directors ignore the signs? This can range from inexperience and lacking the skills to saving face, anxiety and hiding the issues "until after Christmas". That means it falls upon us as professionals to educate and suggest to our clients what help is available and how to avoid the failure of their companies just like the fire awareness messages and fire prevention policies of the Emergency Services. Also Directors should be reminded of their statutory responsibility to act with due care and diligence (see Brandon Lee's article in the September 2012 edition of On the Beam).

If Directors act quickly enough, help may save their businesses burning down around them. Such help can involve:

- i. Changing company structure, size and capitalisation;
- ii. Informal workout plans; and/or
- iii. Formal insolvency arrangements such as Voluntary Administrations leading to Deeds of Company Arrangement.

Help is available, all they need to do is ask. For me, seeking help is not a sign of weakness but a show of strength that one is willing to take on the problem head on. Let us get that message out there.

## **Business Ethics and Corporate Wrongdoings – Part 1**

By Brandon Lee

When a Company is struggling, the organisational environment is fraught with ethical pitfalls and traps. More often than not, one party makes a decision in their favour but at the expense of another party. Therefore it is my opinion that every professional, upon making that decision, should base their actions on a guided definition of business ethics.

To start, one must ask; what is ethics? In its most basic form, a definition of ethics boils down to knowing the difference between what is right or wrong, and then choosing to do what is right. Ethics

can be comparable with moral values that guide how one ought to behave, such as respect, honesty, fairness, responsibility and so on. However, the right thing is not as straightforward as it is conveyed in a great deal of business ethics literature. Business ethics can be defined as written and unwritten codes of principles and values that govern decisions and actions within a Company. Most ethical dilemmas in the workplace are not simply a matter of "Should I steal from my friend?" or "Should I lie to my parents?" In the business world, the organisation's culture sets standards for determining the difference between good and bad decision-making and behaviour in the ordinary course of business. The phrase "Business Ethics" can be used to describe the actions of individuals within an organisation, as well as the organisation as a whole.

Business ethics is emerging as one of the greatest recognised needs in business and government today. No other element in business life can profit so greatly for such a small investment. Lacking this, no other element can cost business so dearly. Business ethics should be encouraged to eliminate or reduce corporate wrongdoing, however as for the detection and investigation of corporate wrongdoing, the Company's Director and staff have to understand the importance of promoting business ethics in the ordinary course of business and also be aware of the different types of corporate wrongdoing that may occur.

Ethical business conduct in its broader sense, deals with Employees' or Directors' conduct in relation to what is morally good and bad, right and wrong. To determine whether a decision is good or bad, the decision maker must compare his or her options with some standard of perfection; in this case they need to refer to either the code of ethics or relevant Corporate Governance module contained in the Company's constitution. This standard of perfection is not a statement of static position but requires the decision maker to assess the situation and the values of the parties affected by the decision. The decision maker must then estimate the consequence or outcome of the decision and be ready to be responsible for its results. A good question for Directors or Employees to ask themselves when faced with an ethical dilemma is, "Will my actions be fair and just to all parties affected?"

Promoting business ethics is important not only in business but in all aspects of life because it is an essential part of the foundation on which a civilised society is built. A business or society that lacks ethical principles is bound to fail sooner or later. A strong business ethics education can create a sense of accomplishment among employees. Recent events in corporate Australia have demonstrated the destructive effects that occur when the leadership of a Company does not behave ethically. One might wonder why highly educated, successful, and business savvy corporate professionals at Barings Bank, HIH, One Tel and corporate America's infamous Enron got themselves into such a big mess. The answer lies in a profound lack of ethics.

In my opinion I think promoting business ethics is essential for the functioning of a successful economy. Failure in business ethics is a real threat to the future of every corporation. Business ethics as an issue is a hundred times more powerful than the internet or globalisation and can destroy your business in a week. To make matters worse, standards of business ethics are changing rapidly in response to random events which capture public imagination.

Over the coming newsletters, I will illustrate the following issues surrounding Business Ethics with a focus on Corporate Wrongdoings. Broadly, the plan is to cover the following issues:

- Part 2 – Strategies for Defining and Promoting Ethical Business Conduct
- Part 3 – Identifying and Eliminating Corporate Wrongdoings
- Part 4 – Advantages and Disadvantages in Identifying and Eliminating Corporate Wrongdoings

## **Litigation Schemes and Proof of Debt Schemes: Managing Conflicts of Interest**

By Jack Li

A proof of debt scheme is one of the ways for creditors or members to fund external administrators such as Liquidators to enable investigations, seek or enforce a remedy against a third party or defend proceedings against a body corporate.

A person providing financial services to fund a litigation or proof of debt scheme is exempt from Chapter 7 of the Corporations Act 2001("the Act"). Consequently, ASIC in April 2013, introduced Regulatory Guide 248: *Litigation schemes and proof of debt schemes: Managing conflicts of interest* ("the Guide"). The Guide seeks to better regulate litigation funders and insolvency practitioners on possible conflicts of interests which might occur between litigation funders, lawyers and members during the course of a litigation or proof of debt scheme.

A litigation funder is defined as a person that provides, or has provided, a financial service to a litigation scheme or proof of debt scheme. The dominant purpose of a litigation scheme as defined in Regulation 5C.11.01(1)(b) to come into effect from 12 July 2013 so that "each of its general members may seek remedies to which they may be legally entitled to". This is also more commonly known as a class action. A proof of debt scheme has the structure of a litigation scheme, however, the main difference is that remedies are being sought against a company that has become insolvent. Hence, legal proceedings cannot be issued or continued without the approval of the Liquidator.

The Guide seeks to limit conflicts of interest which may arise between the funder, lawyers and members during a litigation scheme or proof of debt scheme as each party is divergent on their interests. A funder generally wants to minimise legal and administrative costs and maximise their returns. Lawyers would want to maximise their fees for the provision of legal services, while members want to minimise costs to funders and lawyers and maximise claim returns from the defendant or insolvent company.

According to a paper published on [www.allens.com.au](http://www.allens.com.au) in February 2013 "Class Actions in Australia", class actions are on the rise and have become an important part of the Australian legal landscape. In recent times, Australia has become the most likely jurisdiction outside of the United States for a corporation to be facing a class action.

Proof of debt schemes are also on the rise to resolve complicated disputes of an insolvent entity.

As class actions and proof of debt schemes become more common it is vital for litigation funders and insolvency practitioners to adopt an approach when managing litigations to avoid an ASIC offence. ASIC has stated that "A person providing a financial service to a litigation scheme or proof of debt scheme must maintain and follow, for the duration of the scheme, adequate practices for managing any conflict of interest that may arise in relation to activities undertaken by a person in relation to the scheme". Also ASIC has set a firm guideline where written procedures must be in place and followed during the course of a litigation or proof of debt scheme.

Due to the increasing frequencies of class actions and proof of debt schemes it would be in the best interests of litigation funders and insolvency practitioners to adopt a culture of responsibility as part of their business.

## **Defences to Unfair Preference Claims**

By Padmini Saheb

If an "Unfair Preference" claim is brought by a Liquidator the following defences may be available. Whether any or all of the defences is available will depend on the circumstances of each case:

### **1. "Good Faith" Defence**

It will be a defence to an Unfair Preference claim if the recipient of the payment did not know or suspect that the company was insolvent (unable to pay its debts as and when they fell due) at the time the payment was made. This is a very common defence to an Unfair Preference claim.

### **2. Doctrine of Ultimate Effect Defence**

The Court will consider the net (or ultimate) effect of a payment when considering whether it amounts to an unfair preference. The High Court has summarised this doctrine as follows: "Resort must be had to the business purpose and context of the payment to determine whether it gives the Creditor a preference, priority or advantage over other Creditors, the payment must ultimately result in a decrease in the net value of the assets that are available to meet the competing demands of the other Creditors." (*Airservices Australia Pty Ltd v Ferrier* (1996) 185 CLR 483.)

### **3. Running Account Defence**

The running account "defence" does not provide a complete defence to a claim. However, it will often have the effect of reducing (in some cases significantly) the amount of the Liquidator's claim. It is relevant where there are multiple transactions (an "active account") between the Debtor and Creditor over the relevant six month period. In that case, the court will assess the amount of the preference not as the total amount of all payments made over the period, but rather as the difference between the "peak" (maximum) amount of the debt during the six month period, and the amount owed on the "relationship" date.