

In both instances, applications for extensions of the convening period were made by the Administrators in different ways, and the outcomes were different. Both Cases suggest that the Courts will raise searching questions of the Administrators seeking such an extension.

In the Harrison Pharmacy Case, an extension was granted for six (6) months. In granting the extension, the Court commented as follows:

"The Court sets the following relevant considerations for Extension Applications:

- The extension should be for no longer than is required (Costs of the Administrators and the Receivers and Managers can be unnecessary costs, thus lower return to Creditors).
- In respect of the goodwill of the business, an extension leaves Employees unsettled and the Employees leave employment for more certain employment, this lowers the business value of the Company in Administration.
- Unnecessary delays expose the assets of the Company to market risk.
- It was the intention of the legislature that the Administrations be conducted expeditiously."

The major reason for the granting of an extension in the *Harrison Pharmacy Case* was that there was no objection by any party to the proposed extension at the time of the hearing.

In the *Autodom Ltd* Case the application for the extension was for a period of four (4) months. This was on the basis that the Administrators were experiencing difficulties in formulating a suitable recommendation to the Creditors of the Company. In this case, two interested parties, namely the Employees and the Landlord, opposed the Administrators' Application for the extension. The Landlord argued that the extension, if granted, served no commercial purpose as his (the Landlord's costs) would rise to \$200,000.

In this Case, there was indication that the court considered the impact of overall costs of the Administration should it grant the extension, which would result in a lower return to Creditors. For this reason, the Court declined the Application for the extension for the period of four (4) months and, instead, granted an extension for seven days to enable the Administrators to convene the Second Creditors Meeting in accordance with the statutory obligations of the Administrators.

While the decisions in both cases differed, such decisions demonstrated that the Court's primary consideration is the benefit derived by Creditors if such extensions are granted, that is, will such extension provide a greater return to Creditors, and not just merely add further costs to be borne by them in prolonging the Administrations.

Administrators be on notice – extensions of the convening period are not readily given!

Condon Update

By Lyn Dong

A big thank you to those who nominated Condon Associates for the 2013 Local Business Awards in Professional Services¹ and the Western Sydney Business Awards of Excellence 2013 (WSABE)².

Congratulations also go to Schon Condon who has been nominated for the Business Person of the Year of 2013 Local Business Awards³. Save the date: Condon Associates 7th Birthday Bash will be held on 10th October come and join us to celebrate our 7th birthday.

The 2013 Condon Associates Annual Golf Day is also coming soon; it will be on 31st October. Please let us know if you are interested in sponsorships for the Golf Day.

Invitations for these events will be sent out soon.

Here are some Kodak Moments ...



Kevin Sheedy and Hakki Hassan at the 100Day100K charity event raising money for the Westmead Medical Research Foundation.



Schon, Sophie and Hiteshi at the BRAVE Magazine Launch in Penrith.

¹ & ³ Winners of the 2013 Local Business Awards will be announced on 4th September.
² Winners of the 2013 WSABE will be announced on 10th September.

ON THE BEAM

Vision: Yes, It's Only A Perception

By Schon G Condon RFD

By the time you are reading this the election is just about to occur, regardless of the way the result goes, one given is the fact that the one thing you probably spotted from the whole process was a void of "Vision".

But what really is vision? Well when I was young people like Leonardo Da Vinci, Einstein, Ghandi, Washington, James Watt and the like who could see beyond the end of their lifetime were considered people of vision. Today, at least in Australia it is a recognised fact that for Australian politicians, vision expires at the date of the next poll. Regrettably the impact of this is that it is quickly determined that reality is based not on what I can actually do but what I say, or is that more precisely promise. Even further the more immense impact is that there are those that willingly follow without real direction.

I recently attended a function where the audience would have been 20 per cent current technicians, 25 per cent past technicians and the remainder in essence the general public. The presenter, a senior figure in the game, spent the better part of twenty minutes demonstrating to the few in the room who really understood that in reality he had no idea what he was talking about. Regardless those that knew remained polite, and regrettably those that didn't walked away in the belief that they were now better informed about the subject at hand.

Earlier in the year I attended a trade mission from Turkey, during which they put forward their plan to aid in the growth and development of business within the whole country for the future with a visible horizon of some ten to fifteen years. The two things that leapt out of the presentation were the existence of a genuine vision and the audacious simplicity in its execution, even a high school student could have understood how they intend to achieve their aim.

It is with such activity that you can get a lot done. Admittedly in its origins it no doubt begins as a dream, but the dream forms a conceptualisation, which leads to an outline plan then to a detailed plan and then action. Without the complete suite we have nothing more than a dream, if you do half of the rest of the work but not the action then in reality you have an expensive dream, but nonetheless still a dream.

As a country we are certainly yearning for a vision, our forefathers had it, and this nation was certainly built on it both in its original phase at the end of the nineteenth century/start of the twentieth century and in the rapid post war expansion as the displaced people from Europe arrived. They simply tied the words dream and action together and got on with it.

These days we seem to be capable of building impediments which in turn limits the vision both due to a restriction on effort itself but also that built in is the cost of meeting and dealing with those impediments.

Let us hope that in the next term we can see some genuine vision that will carry us beyond simply the next three years. Oh yes, and it will actually require all sides to agree if it really is to be a Vision ... not just a dream.

Enjoy the read...

Inside this issue:

- Director Penalty Notice ("DPN") – Important Update!!!!
- Business Ethics Part 2 – Strategies for Defining and Promoting Ethical Business Conduct
- Recent Supreme Court of Queensland Decision – Mine Operators Beware!!!
- Voluntary Administrations and Granting of Extensions of the Convening Period for the Second Creditors Meeting – recent Court decisions
- Condon Update

Director Penalty Notice ("DPN") – Important Update!!!!

By Hakki Hassan

On 5 July 2012 Condon Associates issued a Media Alert in regard to changes to Taxation Legislation on 29 June 2012 which resulted in Directors becoming personally liable for their companies' PAYG Withholding and Superannuation Guarantee Charges.

Briefly, the Director Penalty Notice Regime now provided:

- Directors' penalties to be issued in respect of unpaid Superannuation Guarantee as well as unpaid PAYG; and
- A Director could no longer discharge or extinguish a DPN by placing a company into voluntary administration or liquidation when the PAYG or Superannuation Charge remains unpaid and unreported for three months after the due date; and
- Directors and their associates will not be able to access PAYG credits in their own personal taxation returns when such PAYG withholdings have not been remitted to the ATO.

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Some retrospective provisions were to apply in regard to any unpaid and unreported PAYG liabilities.

What has been the practical impact of these legislative changes since 29 June 2012?

Apart from widening the DPN Regime to now include Superannuation Guarantee payments, the Director of a company can no longer avoid personal liability for a penalty debt when PAYG withholding or Superannuation Guarantee payments remain unpaid and unreported three months after the due date.

The message to Directors is loud and clear – **BAS statements must be lodged by the due dates – or you will be exposed to the issue of DPNs.**

Simply put, where there are outstanding BAS lodgements more than 3 months past due, and the ATO issues a DPN, the Director is no longer able to place the company into liquidation or voluntary administration to avoid the personal liability for a company tax debt in regard to PAYG or Superannuation Guarantee payments.

Even more disturbing for Directors is that the ATO can consider (and in fact has) issued DPNs when companies are already in liquidation.

A new term “locked down”: is now used to describe the Director’s situation – he will be held personally liable for such tax debts and will have no basis to escape such personal liability unless he can summons the six basic defences. These defences will be subject to a follow up article in the next edition of “On the Beam”.

Be warned, the message from the ATO is quite clear – they are adopting a newer and a far more aggressive approach towards serious tax evasion by companies and those who own and/or operate them.

A final word of advice – LODGE YOUR BAS RETURNS ON TIME!!!!

Business Ethics Part 2 – Strategies for Defining and Promoting Ethical Business Conduct

By Brandon Lee

In our July 2013 issue of On The Beam, I discussed the definition of Business Ethics and why it should be encouraged to eliminate or reduce corporate wrongdoing. As mentioned previously, promoting Business Ethics is essential for the functioning of a successful business and ultimately the economy. Every professional makes his or her decisions and bases their actions guided by their definition of Business Ethics. Having said this, all professionals have to understand the importance of promoting Business Ethics in their ordinary course of business and also be aware of the different types of corporate wrongdoing that may occur. I will be discussing the strategies for promoting ethical business conduct in this issue.

There are many ways to promote ethical business conduct in society. As part of more comprehensive compliance and ethics programs, many businesses have formulated internal policies pertaining to the ethical conduct of employees. These policies can be simple exhortations in broad and general language which are communicated verbally, or they can be more detailed policies, containing specific behavioural requirements which are communicated through various written medium such as the Code of Ethics or relevant Corporate Governance module contained in the Company’s constitution. They are generally meant to identify the Company’s expectations of workers and to offer guidance on handling some of the more common ethical problems that might arise in the course of doing business. It is hoped that having such a policy will lead to greater ethical awareness, consistency in application, and the avoidance of ethical disasters. Employees and Directors should refrain from engaging in or supporting any activity that would discredit their profession. When faced with significant ethical issues, practitioners should follow the established policies of the business and profession bearing on the resolution of such conflict. A well-written code of conduct can spare a Company legal liabilities and much embarrassment.

An increasing number of businesses also require employees to attend seminars regarding business conduct, which often include discussion of the different Company policies within the profession, specific case studies, and legal precedence as well as up to date legal requirements. Some businesses even require their employees to sign agreements stating that they will abide by the Company’s rules of conduct.

Another way of encouraging ethical behaviour is to reward those who witness illegal or unethical practices, and bring them to the attention of the Company or relevant public bodies. To encourage this attitude of reporting unethical practices, Companies should allow individuals who are afraid of retaliation to report and clarify the relevant ethical issues by confidential discussion with an objective advisor to obtain a better understanding of possible courses of action to be taken.

Applying ethics in business makes good sense; a business that behaves ethically induces other business associates to behave ethically as well. The best way to promote ethical behaviour is by setting a good personal example. Teaching an employee ethics is not always effective. Managers who want employees to behave ethically must exhibit ethical decision making practices themselves as they play an important role in establishing its ethical tone. Managers have to remember that leading by example is the first step in fostering a culture of ethical behaviour in their Company. If a Company or a manager exercises particular care in meeting all responsibilities owed to employees, customers and suppliers it is usually rewarded with a high degree of loyalty, honesty, quality and productivity. For example, employees who are treated ethically and with respect will more likely behave ethically themselves in dealing with customers and business associates. Lastly, it is also vital for managers to play an active role in creating a working environment where employees are encouraged and rewarded for acting in an ethical manner.

In conclusion, the foundation for ethical behaviour goes well beyond corporate culture and the policies of any given Company, for it also depends greatly upon an individual’s early moral training and the competitive business environment. We have to understand that the Company is indeed a society as a whole; as such we shouldn’t do anything that would cause detriment to the Company as you would do the same to the society.

Recent Supreme Court of Queensland Decision – Mine Operators Beware!!!

By Hiteshi Dekhtawala

As most of us are aware, pursuant to the Building and Construction Industry Payments Act, 2004 (QLD) (BCIPA), the normal procedure for claiming payment by a person (“Claimant”) from another (“Client”) for performing “construction work”:

1. The Claimant serves a written payment claim on the Client for the work performed
2. The Client can either pay or dispute the claim by serving a payment schedule detailing the amount they believe is their liability for the works performed
3. In case of non-agreement between the parties, the matter may be referred to an Adjudicator for determination
4. If no payment is made even after a determination is made by the Adjudicator, the Claimant can, based on the Adjudication Certificate, serve a notice on the Client advising its intention to stop work until the claimed amount is paid.

The above procedure is to ensure some kind of security to the Claimant and minimise the risk of non-payment to a Claimant upon completion of the entire construction project.

In ensuring such security, it is very important to understand what is covered under the definition of “construction work”, particularly in the mining industry. The mining and construction industries have been operating under the assumption that such security of payment applies to construction work on mining leases, thus giving mine operators the benefit of the above stated legislation.

However, a recent decision in the Supreme Court of Queensland has left everyone astonished in regard to the general understanding of the definition of “construction works” in the mining industry. The decision by Justice Margaret Wilson in *Agripower Australia Ltd v J & D Rigging Pty Ltd & Ors* noted that dismantling of mining plant by the mining operator for the owners of the mine was not “construction work” under a “construction contract” under the provisions of BCIPA. This is because the mining plant to be dismantled did not consist of structures or works “forming part of land”.

As a result of the above decision, the mine owner was relieved of any payments to the mine operator.

The above decision appears to be a signal to the construction companies to very carefully consider the terms of their contracts with the mining companies, particularly in respect to the payment terms. It undoubtedly seems worthwhile to get professional advice in drawing up such contracts to ensure security under some legislation.

(Reference available on request.)

Re: Newsflash on ITSA name change to AFSA

Interestingly the AFSA contacted us subsequent to our release of the above “Newsflash” to just ensure that we understood that they are not getting totally out of their involvement with Bankruptcy, but just changing their name.

So, we certainly acknowledge that they will for the long haul, however, we still do anticipate to see a somewhat lessening involvement over time.

Voluntary Administrations and Granting of Extensions of the Convening Period for the Second Creditors Meeting – recent Court decisions

By Padmini Saheb

Up until recent times, it was commonly known that the Courts would readily grant an Administrator’s application for an extension to the convening period. Not anymore, as evidenced in the two following recent cases:

- 1) Re: *Harrisons Pharmacy Pty Limited* (Administrators Appointed) (Receivers and Managers Appointed), and
- 2) Re: *Autodom Ltd* (Administrators Appointed) (Receivers and Managers Appointed)

Tina’s Story

Thanks to everyone who complimented us on our first YouTube video *Tina’s Story*. A special thank you to Dan Binns from “*Deluded Penguin Productions*”, who produced the video for us. (www.deludedpenguin.com)

If you have not watched the video, go to the Condon Associates YouTube Channel at:
<http://www.youtube.com/user/CondonAssociates>

Enjoy.