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CONDON
FORENSIC INSOLVENCY TURNAROUND
ASSOCIATES

ON THE BEAM

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Fraud Management

By Jack Li

The management of fraud is an essential element not only of a strong corporate governance structure, but also your market reputation and bottom line. Fraud is a distinct risk that needs to be properly identified, assessed and managed to ensure senior management are fully aware of all the risks facing the business. If left unchecked it could lead to the insolvency of the business.

Common types of fraud and misappropriation of assets can include:

- Embezzlement
- Removal of physical assets or intellectual property
- Inappropriate payments for goods and services not received
- Inappropriate use of an entity's assets for personal use

The misappropriation of assets is often accompanied by false or misleading records or documents in order to conceal the fact that the assets are missing or have been pledged without proper authorisation.

A weak ethical culture increases the risk that employees will bypass, override or breach any controls that an entity has in place because employees perceive that management is doing the same. In other words, a good system of controls is at risk of failing if the ethical culture is weak.

Effective oversight by both the business management and those charged with governance is critical to sound financial reporting. This means that those charged with governance should have sufficient understanding of the entity's operations and risks, and management must have in place controls over the financial reporting process. A culture of integrity and honesty is integral to ensuring controls are adhered to.

Management should lead by example. To mitigate fraud risk a Company may implement the below controls:

- Effective oversight exercised by those charged with governance.
- An effective internal audit function.
- The existence and enforcement of a written code of conduct.

Having effective procedures in place in detecting fraud is critical for a business' success. It is ultimately up to management and those charged with governance to have primary responsibility for not only detecting, but also preventing, fraud within the entity. This includes creating a culture of integrity and honesty, so that people understand how they are expected to act in circumstances where potential conflicts of interest or other ethical matters may arise.

Condon Update

The very first Condon Forum of 2014 was held on 26th February. We were honoured to have Michael Collett and Michael Hoy joining the presenter's panel on Share Investment, a big thank you for presenting to the group.

After the success of last year's event, we are proud to announce that the 2014 RAA Association (NSW) and Condon Associates Annual Charity Golf Day 2014 will take place in August.

Last year we helped to raise $1000 which was donated to the Legacy Foundation and we hope to do even better this year. Once again we will be coordinating with the RAAA and will be sending out invitations soon.

Help us to make an even more significant donation this year by registering a team, sponsoring a hole or even sponsor the entire event! It's all for a very worthy cause.

Call Jason or Lyn on 9893 9499, or contact them via email at events@condon.com.au and ask about the event and/or hole sponsorship packages. Don't miss out, register your team now!

Here are some Kodak Moments …

Kevin Cotter, Schon G Condon with guest speakers Michael Hoy and Michael Collett at the Condon Forum on Share Investment.

The Condon Associates staff members at the 2013 RAA Association (NSW) and Condon Associates Annual Charity Golf Day. We look forward to having you at the 2014 Golf Day. See you soon!

Jobs, Business, the Watershed?

By Schon G Condon RFD

Whilst I have made some comments about this recently in our online Blog, given what I believe is its importance I consider that it is worthy of further comment here.

Growing in 2013 and arriving with a real crunch in the first part of 2014 has been the reality that a number of our Australian industries that have grown and developed over the two centuries of this countries modern economic period, are about to close permanently, at least for those alive now, in our foreseeable future. With these closures will also go a number of jobs that have provided staple employment to a number of communities for many years.

The following (logical) issue of course will be the impact on supply industries and businesses, and what of those will remain. The Alcoa decision is one of those, if there is no automotive manufacturing in Victoria/South Australia, then without an immediately obvious replacement, there is no real need for a smelter.

One of the benefits (or penalties) depending on how you look at it, of my youth was being born with a Mother who had a passion about history, but most particularly Australian history. As such I was engrained from an early age with the deeds of our forebears, their trials and tribulations, their desires and fears and most importantly their visions. Consistently over our earlier history there was a burning and passionate belief in the growth and unity of the nation and it was something that was visible at virtually every level of society. It was a very Australian thing, it was part of our ethos and it was a contributor to the ANZAC legend. In the eyes of many there was nothing that was being done overseas that could not ultimately be done here, if not done better here, and it was on this belief that many industries were born. What was also of interest was that there was this Australian vision, you could look at it from the right, or you could look at it from the left, but there in the middle was this genuine and substantive nationalistic vision that was shared.

Today we see these industries fail under a present belief that we simply cannot sustain them; but the real question that we and the Government should be asking is "from what perspective?" To better clarify my issue; as we dig big holes all over North Western Sydney to make way for a railway I am reminded of the words of the then NSW Government Railways in the late 1940s when the then extant line (predominantly goods) to Castle Hill was closed. The Department stated at the time that *"there was no point in its retention for passenger use as the area was too far from Sydney to ever be capable of becoming a dormitory suburb"*. Somehow I think they missed something. Mind you though, before the War someone did have the vision to build a bridge with eight lanes, two rail tracks and two tram tracks!

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The further visibility of the underlying issue was raised recently by the NRMA when they reported that we now hold no more than three (3) weeks supply of automotive fuel within the country. Regrettably I am old enough to remember the queuing for petrol during those famous strikes of the 1970s and 80s. So I do fear, given our reliance on road transport, such a situation.

Yes I understand that economic drivers, business rationalism and globalisation are forcing things to the cheapest provider but we must look not only at today, but also at tomorrow. As I have indicated elsewhere, this is not simply an issue for manufacturers it is also for everyone else where we export our jobs overseas, accountant, lawyer service industry, manufacturing, etc. What are we really creating for our children? What is genuinely the modern Australian vision? Too whom, or what, will we be subservient in the future?

To revive something that exists, but is not operational, is one thing, but to completely restart can often be economically impossible. We have some (but lessening) time for thinking. Just as we train, and are trained in Business Planning, that you must have a goal, if you don't have a goal then firstly you won't know if you ever get there, but more importantly you won't know what steps to take along the way. Australia is now in desperate need of a Vision, its own Vision. Certainly one that can be looked at from both sides, but nonetheless a Vision that stands between

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these views with its own clear identity and one that is committed to by all. If we continue with three (or more) visions then while we play games changing sides, others will move our industry and our jobs into their Vision.

Insolvent Deceased Estates (Part XI of the Bankruptcy Act 1966)

By Padmini Saheb

Part X1 of the Bankruptcy Act 1966 ("the Act") contains provisions enabling the Insolvent Estate of deceased persons to be administered in Bankruptcy. Part X1 of the Act provides for the following:

1) Administration of Deceased Estates for persons who are insolvent at the date death; and
2) Administration of Deceased Estates that subsequently become insolvent due to excessive legal costs incurred.

Insolvent Deceased Estates can also be administered under the State and Territory Laws and do not have to be administered under the Act. The similarity with both the State and Territory Laws and the Bankruptcy Act is that both pay rateable distribution to Creditors. However, in the Bankruptcy Act the Trustee can recover property that may not otherwise be available to Creditors in respect of the antecedent transaction provisions of the Act.

It is noted that the Official Receiver is not involved in the Application Process. An Order for the Administration of a Deceased Estate can be made by the Federal Circuit Court or the Federal Court. A Creditor or the Legal Representative of the Deceased Debtor may apply to the Court for an Order that the Deceased Estate be administered under Part X1of the Act presenting a petition to the Court pursuant to Sections 244 and 247 of the Act. Should the proceedings already be commenced in the State or the Territory Court for the administration of a Deceased person's Estate under the respective State or Territory Law, a petition cannot be presented underpart X1 of the Act without the leave of the Court. If a Creditor is seeking an Administration Order, the application is very similar to presenting a Creditor's Petition against a living Debtor except there does not need to be an "Act of Bankruptcy".

If a Creditor has presented a Creditor's Petition against a Debtor but the Debtor dies prior to being served with Creditor's Petition, the proceedings lapse and fresh proceedings must be commenced under Part X1 of the Act. Where a Bankrupt dies before his/her discharge, the Administration of the Bankrupt Estate can continue as if as if the Bankrupt were alive.

Director Penalty Notices and Superannuation

By Leonard Khoury

The topic of Director Penalty Notices ("DPN") continues to be of interest within the Corporate realm. Recently, I was approached for information on the consequences of a Company's failure to meet Superannuation obligations.

For those who are unaware, the Director of a Company has a duty to ensure Superannuation provisions, liabilities and payments are met when due payable. Failure to adhere to this responsibility will result in the Director becoming personally liable by way of a DPN.

This article will cover the following two sub-topics:

1. Why Companies fail to meet Superannuation obligations; and
2. The impact of a DPN.

Superannuation Obligations

Experience and study show that the main reasons Company Directors fail to meet Superannuation obligations can be listed as follows:

1. Poor management;
2. Minimal and restricted cash flow;
3. Fraudulent activities;
4. Poor and limited understanding of Business Law; and
5. Statutory restrictions

Whilst this list is not exhaustive, it is a good indication of causes for failure to meet Superannuation responsibilities and, hence, the issuing of a DPN.

Impact of a DPN

In the event a Director does not meet Superannuation obligations (or Pay As You Go liabilities), the Deputy Commissioner of Taxation ("DCofT") may issue a DPN against the Director, in turn, enforcing a personal liability of outstanding Superannuation liabilities.

Upon receipt of the DPN, the Director will have one of the following three options. Either:

a. Remit the liability in full;
b. Enter into a payment arrangement with the DCofT; or
c. Place the Company into some form of External Administration.

Appointing a Voluntary Administrator in most cases is the favourable option as it is easily executed (i.e. resolution of Directors) and eliminates the liability. However, Directors should be aware of certain events which will not discharge a DPN for Superannuation liabilities, even if an External Administrator has been appointed. These situations include:

1. Failure to report the outstanding SGC Liability by the end of the required quarter; and
2. Not placing the Company into External Administration to discharge the DPN within twenty-one days of posting the DPN.

A DPN is in most cases easily avoidable and, if issued, can cause significant constraints on a business. To avoid these constraints and the related costs Directors should ensure that they meet all Superannuation obligations. A DPN is a tool becoming more commonly used by the DCofT and applied to Directors. Professional advice should be sought immediately if a DPN is received.

ATO to Take Over Charity Compliance – Is This a Good Thing?

By Kevin Cotter

We have all seen over the years when a new government takes control, State or Federal, there is a shift in how things are run. This usually includes the creation or the rationalisation of agencies and departments for what the new government calls rationality. Mr Abbott's government is no different.

Recently at a Senate Estimates Hearing the Commissioner of Taxation advised that they were planning to take over the Australian Charities and Not-for-profits Commission ("ACNC"). What has been a little concerning, if the information throughout the sector is true, is that those in the sector and the ACNC have not been consulted in relation to this.

On a compliance and government revenue protection stand point the move to the Australian Taxation Office makes economically rational sense but will that be all the ATO focuses on? Will the charities and non-for-profit organisations get bogged down in compliance duties instead of creating benefits to society? These and a number of other questions are yet to be answered.

There is more to ACNC's role than compliance and revenue protection. It also focuses on promoting confidence, supporting and promoting the integrity of the sector as well as simplifying the regulatory red tape. Basically they want to enhance the sector and the confidence the public have in ensuring their donations go where they have been told they will. Will the ATO also take on an active role in these areas or will it solely be about compliance? At the end of the day, many of these organisations need this help to help others in need. Does the ATO have the resources and experience to provide the sector with what it needs? Is it flexible enough to deal with disaster charities and the ever changing social impacts which the sector has to work in?

It is this flexibility which may be the key criteria which may be lost by the ATO takeover. This might mean there would still need to be an independent regulator for this sector. An example of where this works is the case of Indigenous Corporations which are governed by the Office of the Registrar of Indigenous Corporations ("ORIC"). It runs similar to the ACNC and governs Aboriginal and Torres Strait Islander Corporations where such organisations need more flexibility than ASIC can provide and a lot of them are community based not-for-profit style organisations. Having worked with a number of these Corporations and with ORIC itself I have seen firsthand the benefits that a flexible regulatory body can bring. Could it make more sense to merge ORIC and ACNC together than ACNC with the ATO?

At this stage it is too early to tell if the ATO's planned takeover will have a positive or negative effect on the sector. However, at the end of the day some regulator needs to provide the sector with the guidance, promotion and protection that it needs.

Liquidator's and Receiver's Liability for CGT

By Hiteshi Dekhtawala

In a recent Federal Court Decision, Australian Building Systems Pty Limited (In Liquidation) v Commissioner of Taxation [2014] FCA 116, it was held that section 254 of the Income Tax Assessment Act 1936 ("ITAA36") had no application to the Liquidators in terms of retaining money prior to issue of an assessment to them.

Just briefly, section 254 of ITAA 36 makes a Liquidator (and a Receiver) answerable as taxpayer for all income, profits or capital gains derived by him or her in his or her representative capacity. As a result, a Liquidator (and a Receiver) is required to retain an amount sufficient to pay the income tax which is or will become due in respect of any such income.

Notwithstanding the above, in the recent decision, the Honour agreed to the Liquidator's argument that the Liquidator's obligation to retain monies from the receipts is an obligation that is not quantified at the time of its retention and as such that of an undefined content. Such agreement by the Honour was based on the premise that it is impossible to determine the taxpayer's (in this case, the Liquidator's) taxable income until the end of the tax year, particularly where a CGT event has occurred. As such, a Liquidator (and a Receiver) is entitled to retain after the income tax position has been ascertained for a particular tax year and an assessment for same has been received.

Furthermore, there were discussions relating to the priority that should be afforded to the Commissioner for the said gain pursuant to Section 556 of the Corporations Act.

Based on the decision, it appears that the following aspects should be considered by a Liquidator (or a Receiver) in order to avoid/restrict personal exposure in terms of CGT liability:

1. Prior to taking on appointments, consider any CGT events that may occur during their appointment;
2. Notwithstanding the above decision, it would be safe to retain a reasonable amount from the receipts for such liabilities; and
3. Avoid making any distributions until the end of the tax year in which a CGT event has occurred.

Source:
http://www.thomsonslawyers.com.au/awms/Upload/Alert%20Liquidators%20Liability%20for%20CGTv2.pdf
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