

- ii. Introduce a general duty on franchisors and franchisees to act in good faith in their dealings with each other;
- iii. Improving disclosure and transparency of marketing funds and online sales arrangements;
- iv. Providing prospective franchisers with short form, easy to understand information regarding the risks and rewards of franchising early on before they become financially and emotionally committed; and
- v. Clarifying and streamlining the operation of the Code

It is noted that this draft gained widespread support across the industry and positive feedback as the flexibility and agility for the regulator to deal with breaches of the Code is greatly enhanced. Furthermore, the introduction of civil pecuniary penalties and infringement notices facilitates greater compliance across the franchising industry and cut red tape by clarifying and streamlining provisions. In addition, the obligation to act in good faith makes participants in the franchising sector more accountable for their conduct, thereby ensuring Australia hold world-class franchising regulations to nurture and flourish the development of this industry.

Once the Bill is passed by Parliament, the Federal Executive Council will progress the new Code Regulations in late 2014. The new Franchising Code is expected to take effect from 1st January 2015.

Condon Update

By Lyn Dong

What a busy couple of month we've had! And we're going to get busier with more events to come!

On 7th August, the 2014 RAAA and Condon Associates Charity Golf Day took place at Rosnay Golf Club raising more than \$3000 which will be donated to the Sydney Legacy.

Our thanks to the 180 Group, Nab (Parramatta), JPG Business Solutions, the Condon Associates Group and long-time supporter RICOH Australian for sponsoring the event. Thanks also to 180 Group, Quintessential Equity, the Club and Bibby Financial Services for donating prizes, and to everyone who contributed to the raffle sale. Last but by no means least, a big thank you to our staff and the staff at the Club for organising the event.

On 25th September we will be having the next Condon Forum on Employment and Leadership. You will learn about the recent changes to Employment Law, Empowerment Leadership and Management. For event registrations, please contact Lyn or Sharyn on 9893 9499.

In October this year we will be celebrating our 8th birthday, an invitation is on the way to you. We hope you can join us on our special day to catch up with some old friends and make some new ones.

Here are some Kodak Moments ...



Jon Gillingham, Schon Condon, Jason Greasby, Shane Sloan and Jarrad Pope at the golf dinner.



John Burke with the speakers at the Franchise Condon Forum on 23rd July: Schon Condon, Steven Clare and Jon Gillingham.

ON THE BEAM

Thank You. But How Fit Is Your Business?

By Schon G Condon RFD

Firstly I must acknowledge and thank those involved in our achieving Finalist status in two categories of the Western Sydney Awards for Business Excellence, commonly referred to as the WSABE's. It is with pride that I acknowledge nominations for both *Business Ethics* and *Leading Business 2014*. I suspect that by the time you read this the final results will have been made public and we will still be proud of our achievement regardless of the ultimate result.

Winning, in itself, though is something that we must be careful of. Winning normally means that you have run a race and scored a victory over your competitors. The true underlying issue, however is, "Are you in the right race?" In a reverse application of the old proverb, "What gets measured, gets done" if you are measuring the wrong thing, then what is being done has a high potential of becoming counter productive.

We were recently introduced to a potential client who when met was confident that they were actually winning most of the races they were in, there was one particular problem that was not insignificant, being a tax debt with an active Commissioner. Regrettably, this has become a common story these days. However aside from this one issue all of the other factors purportedly suggested that the business was both sustainable and recoverable.

A number of measures were in place and the statistics were proudly spruiked by the Director and the evidence was all there to prove it. Regrettably though, much of the measurement was of things that were important to the Director rather than the long term success of the business. As a consequence as we enquired further so as to appropriately formulate a strategy forward that would work it became increasingly obvious that the underlying integrity of the business was, to say the least, questionable.

What this now involves is the theoretic and systematic disassembly of what we actually have so that the actual existing components can be reassembled so as to determine if there is any combination that will provide a sustainable albeit smaller business. If this cannot be achieved then the simple alternative will be to break it up and dispose of the resultant components which, as always, will result in a significant loss of value.

It is therefore clear that it is imperative that you measure every aspect of your business regularly to ensure that you are appropriately on track. The above has been an immense shock to someone who walked in Balance Sheet solvent, but with a cash flow under strain. The reality in this instance was that the balance sheet was more of a dream, than a fact.

Inside this issue:

- Does The Law Really Encourage A Fresh Start For Bankrupts?
- Vexatious Litigation Process
- Bankruptcy Statistics
- For Asset Protection – Make Sure Your SMSF is Complying
- Amendments to the Franchising Code of Conduct

In businesses that are made up of humans (the majority at this point in time) we will often identify components or individuals that are in our business and that are not performing to the peak and we exercise a degree of leniency, it is a human thing to do. However when we identify a component that is not performing it is critical that you take time to sit down and look in detail at those shortcomings so that a rectification plan can be created. The next crucial thing is then to agree that failure to achieve the rectification plan has agreed and final results; and that should not simply be considered to be termination, it could mean transfer, demotion, relocation or some other productive result.

Once created it must be continually measured and monitored with an improving trend established early and then not only sustained but also increased. The minute a reversal occurs then the agreed final action needs to be taken. Failure to do so will convert the lack of performance into a cancer, and regrettably we have still not found a cure for cancer.

Enjoy the read.

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Does The Law Really Encourage A Fresh Start For Bankrupts?

By Hiteshi Dekhtawala

In a recent Federal Court Decision, *Di Cioccio v Official Trustee in Bankruptcy* [2014] FCA 782, it was affirmed by Justice Pagone J that any after acquired Property by a bankrupt vests with the Bankruptcy Trustee, whether acquired from his income or savings.

The Judgement does leave one with a very interesting question, i.e. does the legislation really encourage a fresh start to bankrupts?

The facts and circumstances of the case were that Mr Di Cioccio was made bankrupt while he was in prison and upon his release from prison, he lived rent-free with his parents seemingly to allow him to get back on his feet. From the income that he had earned for the work done whilst he was in prison and some post release new start allowance, the Bankrupt decided to invest in shares. However, these shares were realised by the Official Receiver as after acquired property for the benefit of the bankrupt estate. Mr Di Cioccio then unsuccessfully sought a Court review of the Official Receiver's decision to sell the shares.

Whilst the above Judgement is consistent with the previous decision of the WA Supreme Court in *Rodway v White*, it does point out an ambiguity in terms of the income thresholds allowed to a bankrupt pursuant to the provisions of the Bankruptcy Act, 1966. Had Mr Di Cioccio left his income and savings in his bank account until his discharge from bankruptcy, he would have continued to own the funds. However, because he converted his income and savings (although from his accumulated income that was below the threshold allowed by the Bankruptcy Act) to an asset, he lost the protection that would have otherwise been afforded to his income.

As we all know, any legislation is stipulated to encourage the public to think straight, plan their finances and consequently avoid irresponsible and/or criminal behaviour. In the above case, it appears that Mr Di Cioccio who earned income below the allowed threshold attempted to start afresh by planning his finance and taking steps towards building his net worth from the available funds. Unfortunately, the current conflicting provisions of the legislation may have interfered with his attempt.

In light of the above, and subject to an amendment to the existing provisions, the above decision appears to be in conflict with the "fresh start" objective that the bankruptcy legislators often refer to.

For Asset Protection – Make Sure Your SMSF Is Complying

By John Burke

In the recent decision of *Coshott v Prentice* [2014] FCAFC 88 the Full Federal Court found on dismissing an appeal that property claimed by the Bankrupt to be held by a self-managed superannuation fund was in fact beneficially owned by the Bankrupt. An important consideration by the Court was that the fund was not complying with the requirements of the Superannuation Industry (Supervision) Act 1993 (Cth). The decision of the Full Federal Court substantially upheld the decision of the Primary Judge. The Court confirmed the property in question was beneficially held by the Bankrupt and his wife and not by a self-managed superfund as claimed by the Bankrupt and his family.

- The appeal was only upheld to the extent that the Trustee in Bankruptcy's costs could only be paid out of the Bankrupt Estate and not the co-owner's share as well; and
- There needs to be 2 Trustees appointed under Section 66G of the Conveyancing Act – not just the Trustee in Bankruptcy.

Issues dealt with in the case include:

1. What amounts to sham? The Court found the Primary Judge had erred in finding there was a sham but in this case it was not necessary to establish a sham in order to find the property was beneficially owned by the Bankrupt.
2. Superannuation funds – ensure that they actually operate as a complying fund if you wish to establish assets are held in the superfund.
3. The limitation of the powers of Section 30 of the Bankruptcy Act. Whilst section 30 does not empower the Federal Court to order the sale of a property jointly owned by a Bankrupt and a non-bankrupt person, section 79 of the *Judiciary Act 1903* (Cth) operates to pick up and apply both procedural and substantive State Law such as the NSW Conveyancing Act, as a surrogate federal law.
4. Section 66G of the Conveyancing Act and the interaction with the Bankruptcy Act 1966. The need for two Trustees for the purpose of Section 66G. Independence is a consideration.
5. Consideration of the proper discretion to award indemnity costs.

Vexatious Litigation Process

By Padmini Saheb

Vexatious Litigants are those in the community who use the civil court system to pursue petty issues and intimidate others, often out of nothing more than vindictiveness, at great expense to society and at little advantage to themselves beyond a feeling of "pay back" at someone.

The *Vexatious Proceedings Act 2008* ("the Act") significantly extends the scope of the vexatious litigant provisions and includes all proceedings in all courts and tribunals of all Australian jurisdictions. The test for the making of a Vexatious Proceedings Order (Section 8 of the Act) is whether a person has frequently instituted or conducted vexatious proceedings. The Act gives Judges the power to ban from their courtrooms anyone declared a vexatious litigant.

The members of the public can question if a person is acting vexatiously with the Attorney General. Where there is a real possibility that an application might be appropriate, the Crown Solicitor is instructed to advise on the merits of an application under the Act. After considering the advice of the Crown Solicitor, Justice Legal prepares a submission for the Attorney General with a recommendation as to whether proceedings should be commenced against the person and the nature of the orders to be sought.

Other relevant factors in addition to the criteria in the Act include:

- The financial status of the person, including whether they are an undischarged Bankrupt;
- The availability of other mechanisms to control the vexatious behaviour;
- The identity of the defendants to the vexatious proceedings; and
- The nature of the vexatious proceedings (e.g. civil proceedings, AVOs).

If an Order is made, any further proceedings can only be brought with leave of the appropriate Court. The applicant is required to serve notice on the Attorney General, Solicitor General and any other relevant party. Before leave is granted, the Court must give the Attorney General and Solicitor General the opportunity to appear and be heard on the application.

Bankruptcy Statistics

By Joanne El-Haddad

Based on the statistical figures provided by the Australian Financial Security Authority ("AFSA") the most common path for insolvent individuals is to file for Bankruptcy. However, the undertaking of a Debt Agreement has increased significantly over the last few years and more individuals have put forward proposals of Debt Agreements.

In 2013, a total of 18,601 new Bankruptcy administrations were filed with AFSA Australia wide. Even though this is a significantly large number it has considerably decreased since 2008 in the midst of the Global Financial Crisis. The Global Financial Crisis affected a number of individuals and may have been a significant

cause of the filing of 27,520 new Bankruptcy administrations. In at least 22 years this was the highest number of new Bankruptcy administrations filed in the space of one year.

Post Global Financial Crisis has shown a decrease in the lodgements of Bankruptcies. The decrease in Bankruptcy may also be attributed to the increase in the statutory amount for a creditor's petitions rising from \$2,000 to \$5,000 in August 2010.

Whilst Bankruptcy administrations have decreased there has been an increase of Debt Agreements by approximately 11% between the 2012 and 2013 calendar years. Debt Agreements are a convenient option for some, however, not all individuals can undertake a Debt Agreement due to debt, asset and income limits that are in place for this type of administration. This is different to a Personal Insolvency Agreement as they are not required to meet these requirements to qualify to propose an agreement to creditors.

Proposing a Personal Insolvency Agreement has always been a less likely option for insolvent individuals. In 1987 a total number of 1285 people submitted a proposal to complete a Personal Insolvency Agreement. However, since then the number of proposals put forward every year has decreased significantly. In 2013 a total of 208 individuals submitted proposals which was a decrease of 83.81% since 1987. The possibility of the proposal not being accepted by creditors is a deterrent and may have been a significant influence in the decrease of proposals put forward every year.

Amendments to the Franchising Code of Conduct

By Sophie Bai & John Jolly

Following the recommendations of an independent review of the Franchising Code of Conduct ("the Code") by Alan Wein in 2013, the Government released a draft of amendments to the Code in April 2014 with the following major reforms:

- i. Enforcement tools available to the Australian Competition and Consumer Commission ("ACCC") will be enhanced through amendments to the Competition and Consumer Act 2010 ("the CCA"), being the Competition and Consumer Amendment Bill 2014 ("the Bill"), by enabling ACCC to:
 - Seek civil pecuniary penalties from the Court for a breach of the Code up to \$51,000, and
 - Issue Infringement Notices without a Court Order for a breach of the Code up to \$8,500.