



It's been a while...

By Schon G Condon RFD KSJ

It's amazing how many people have contacted me to tell me how much they miss the Condon Associates newsletters!! Yes, it has been a while, and it really has been interesting to note how many people followed up with my office, concerned that they may have missed an issue. I was actually quite touched.

While we may have been quiet in putting together a newsletter at Condon, we certainly haven't been idle, there has been a lot happening. The first and most significant piece of news is that Robert Kite has been promoted to Associate, taking effect 1 July 2009. Robert commenced his employment with us in May 1995 and apart from a two year stint in the United Kingdom, Rob has been with us ever since. It is very pleasing to see someone who started with the Firm achieve this level of success.

We've also updated our website, giving it a fresh new look and making it more user friendly. I've also added a blog which is updated on a fortnightly basis and provides topical and timely information.

Soon to follow will be new websites for FIT Practitioners and EBIT Management Services Pty Ltd - our consulting arm. We're also working on an exciting new education component within Condon Associates, so I do recommend that you check in often to see what has changed and what is new. Don't forget our website is www.condon.com.au

While we've experienced a steady flow of work at Condon Associates, there has been much talk within the profession concerning the lower than expected level of work that is currently available in the market. During a presentation in February I proposed that

the current downturn would not last as long as was expected and that we should see a gradual return around the middle of next year. That coupled with the greater degree of tolerance being provided by the ATO and other institutions has created a climate that has slowed the level of actual insolvencies, and there are now far more practitioners in the Insolvency and Turnaround space.

While this is positive for the economy we are not out of the woods yet and business owners should be taking an honest and thorough review of their operations to ensure that they have a sustainable advantage. When the tide turns and positive signs become reality this new tolerance is likely to disappear rapidly. It would therefore be very disappointing to weather the nightmare storm at sea only to go to the bottom within view of the safety of a port!

Without a doubt there remain some interesting times ahead, therefore seeking out and then heeding the right advice will be paramount.

In closing it would be remiss of me not to acknowledge the recent passing of a former employee David Watson. David's sudden death was, I am sure, difficult for his family, but I trust he now rests in peace.

I promise a shorter gap to the next "On the Beam," but in the meantime, enjoy the read.

Inside this issue:

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Are all animals created equal?

By Robert Kite

We are probably all familiar with the teachings of the book "Animal Farm" in which it raised a question "Are all animals created equal?"

The purpose of this article is to question whether all animals are created equal when considering it from a commercial point of view. In this article, I will discuss certain advantages which are enjoyed by the Australian Taxation Office ("ATO") in the commercial environment as far as it concerns insolvency appointments under both Corporate and Bankruptcy Legislation.

In considering this article, it is important to consider the object which both the Bankruptcy Act and the Corporations Act are trying to achieve in both Liquidation, and any of the Bankruptcy Scenarios.

In essence, each of the legislations provides that all unsecured creditors are to be treated equally, and that any funds which are available for distribution are to be distributed "pari passu" amongst all creditors who are all eligible to claim for dividend. The reference to "pari passu" basically means that all creditors receive the same cents per dollar distribution.

Under the following scenarios, I am going to consider the equity/inequity of certain arrangements which are favoured by the ATO in relation to various insolvency appointments. Each of the scenarios are discussed as per the headings below.

Bankruptcy

Under the principles of the Bankruptcy law as discussed above, all Unsecured Creditors should be treated equally when matters of distributions from the Bankruptcy Estate are considered.

In addition to the above, it is further noted that under Bankruptcy Legislation, a creditor is not permitted to continue with any enforcement proceedings against the Bankrupt (after the Bankruptcy is commenced) without the leave of the Court. In essence, this section of the legislation is designed to prevent creditors from gaining an advantage over other creditors in trying to realise assets of the Bankrupt which should otherwise be available for distribution for the entirety of the Estate.

A key operative of the Bankruptcy Act is that the Bankrupt is released from his/her obligations after he or she is discharged from Bankruptcy. Therefore, while becoming Bankrupt prevents creditors from taking further action in relation to the Bankrupt's Estate and/or assets without leave of the Court, Bankrupt's are not released from their debts until they are discharged from Bankruptcy.

As a result of the above, the ATO retains a benefit over other Unsecured Creditors by reference to the legislation of the Taxation Administration Act. A practice of the ATO is that where an individual is entitled to receive an Income Tax refund as a result of lodging their Income Tax Return, the ATO has been keeping such refunds to offset against any Bankruptcy liabilities the Bankrupt may have with the ATO.

Section 8AAZL of the Taxation Administration Act gives the ATO the power to retain the refunds.

As can be seen from the above, it is clearly evident that the ATO has gained a financial advantage which is not otherwise accommodated or afforded to other ordinary unsecured creditors.

Calling for Proofs of Debts

In both Bankruptcy and Corporate matters, when seeking to declare a dividend, the appointee is required to write to those Creditors who are yet to forward a Proof of Debt informing them that they are required to lodge a Proof of Debt within a given time frame. Should the creditor fail to lodge the Proof of Debt within the given time frame, the appointee is entitled to declare the distribution without further regard to their claim, and the creditor has no recourse against the appointee for any dividends foregone.

Under Section 260-45 of the Taxation Administration Act, certain conditions are placed on a Liquidator when distributing the assets of the company. A Liquidator is required to write to Commissioner of Taxation, and request the "Notified Amount". The Notified Amount is the sum which the Commissioner of Taxation believes is outstanding from the incapacitated entity. It is this sum which is used by the Liquidator to admit the ATO's claim as a creditor in the Liquidation for dividend purposes.

Section 260-45 requires that the Liquidator does not distribute the assets of the company until he or she has been provided with the Notified Amount.

To further secure this position, the legislation poses a personal liability on the Liquidator in such events where he or she distributes the funds without regards to the ATO's claim, and that had such a claim been received and dealt with in time, then the distribution that would otherwise have been paid to the ATO is a personal liability of the Liquidator.

As can be seen from the above, while every other unsecured creditor is required to adhere to the Notice issued by the Liquidator when calling for Proofs of Debt for dividend purposes, it would appear that the Taxation Administration Act provides an advantage to the ATO which is not otherwise available to ordinary unsecured creditors.

Sale of Secured Assets

In a recent case before the Federal Court of Australia, the Liquidator of PM Developments Pty Limited sought to challenge and/or question, the ATO's right to recover funds (the GST from a sale of such Secured Asset) in priority to the secured creditor over such assets.

In the matter of Deputy Commissioner of Taxation v PM Developments Pty Limited, the Court was asked to consider the question of whether the sale of an asset via Liquidator to which GST was charged, creates an obligation on the Liquidator to pass on the GST to the Australian Taxation Office, or should such funds be retained by the mortgagee to the secured assets. The focus of this case for the purpose of this article is to concentrate on the ability of the ATO (an unsecured creditor) to recover monies from the sale of an asset which is subject to a mortgage or charge.

In the circumstances of this case, the Liquidator of PM Developments sought to enter into a contract of sale for a residential unit in Queensland, where the property was subject to a mortgage. It is noted, that from the sale of the unit, there were insufficient funds to repay the mortgagee in full. Therefore, the matter was brought before the Court to determine the liability for the GST from the sale of the unit.

The arguments raised on behalf of PM developments were such that it was the sale of a Secured Asset, and how could an unsecured creditor (the ATO) have the right to recover funds in advance of the secured creditor, who had advanced monies for the purpose of securing the asset, and held adequate and appropriate mortgages and charges in relation to same.

The ATO sought to argue that when the Liquidator enters into the contract for the sale of the asset, the obligation to pay the GST in relation to the sale vests on the Liquidator, and that the Liquidator is personally liable to remit the GST from the sale.

There were many arguments as to why or why not a Liquidator should be held personally liable for the GST in relation to this transaction, the details of which are beyond the scope of this article. Notwithstanding the above, the decision of the Federal Court of Australia was such that the present drafting of the legislation as it stands did not create a personal liability of the Liquidator for the GST collected from the sale of the asset.

This case was a test case to determine the appropriate priority for the receipt of the funds, given the conflicting claims of the secured creditor (the Mortgagee of the Property) and the unsecured creditor (the Australian Taxation Office). By creating a personal liability of the Liquidator to remit the GST, such remittance is

detrimental to the interest of the Secured Creditor.

To combat the outcome of this case, the ATO has written to Insolvency Practitioners advising of their intention to change the GST Legislation, such that the Legislation will be amended to impose a personal liability on the representatives of incapacitated entities, (in this case the Liquidator of PM Developments) for any GST collected on taxable supplies made during the course the Administration/Liquidation of the incapacitated entity. Not only is the ATO seeking to make such changes, they are also seeking to make such changes retrospective from 1 July 2000.

Accordingly, it is apparent that ATO is seeking to gain an advantage which is not otherwise available to other Unsecured Creditors, especially when dealing with Secured Assets.

Garnishee of Debtors

Section 260-5 to Section 260-20 gives the ATO the power to make recoveries from third party debtors where a company is indebted to the ATO in relation to tax related liabilities. In essence, this legislation of the Taxation Administration Act allows for the ATO to recover money from a third party in order to reduce or offset any debts owed by the Company with the primary debt.

For example, ABC is indebted to the ATO to the sum of \$100,000 for outstanding taxation liabilities. The ATO is aware of the trading activities of ABC, and is also aware that ABC has just done a significant amount of work for XYZ for which XYZ owes ABC \$80,000.

In accordance with the legislation referred to above, the ATO can write directly to XYZ and demand that when the \$80,000 becomes due and payable to ABC, that such money is forwarded directly to the ATO, and not to ABC.

If any other unsecured creditor tried to establish a similar regime, they would be required to make an application to the Court in order to achieve the same objective which is afforded to the ATO by the Taxation Administration Act.

As can be seen from the examples listed above, there are wide ranging powers (existing and proposed) available to the ATO which are not otherwise available to other ordinary unsecured creditors.

When one considers the principles and concepts of both the Bankruptcy Act and the Corporations Act when dealing with insolvent entities, i.e., that everybody is treated equally, and that assets which are available for distribution are divided equally amongst ordinary unsecured creditors, it is apparent from a commercial sense, that perhaps some animals are more equal than others.

A warning for all Facebook, MySpace and other social networking users ...

By Joe Russo

It's an everyday event now - solicitors trawling through the Facebook profiles of their clients or opposing parties trying to find damaging information that can help them win their cases.

Posting information on the internet, while it may seem like fun, is risky business. Those most vulnerable are individuals going through a divorce. Jilted partners are, more likely than not, determined to dig up dirt for some perceived advantage in the eventual divorce case.

Recently, Facebook, MySpace and other social networking sites have been used to source evidence that has been used in the following types of cases: -

- Personal injury
- Family Law
- Destruction of Public Property.

Social networking sites have been used to do unofficial reference checking of potential employees. This is where employers search for the applicant's profile, and then examine the contents of their homepage to analyse both their credibility and hire ability.

Let's also not discount the recent news stories where employees have called in sick, only to later post pictures or profile descriptions detailing their exploits, which have ultimately resulted in their own demise.

Social networking sites have also become information hotspots for law enforcement agencies around the world, who trawl the pages of Facebook and MySpace looking for fugitives or people who may be looking to exploit children.

So before you post anything on the internet, make sure it's not something that you believe can be used against you at a later date.

Australia's Biggest Morning Tea

Here at Condon Associates, we love to fire up the barbie, so on Wednesday 27 May, we decided to put our own slant on Australia's Biggest Morning Tea by holding a BBQ to raise funds for cancer research.

With over 60 people in attendance, we managed to raise a whopping \$689.60 to support the Cancer Council help fight cancer!

A great night was had by all, and we'd like to take a moment to thank the following businesses who kindly donated to our raffle.

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