

Sheridans' View



Combating Illegal Phoenixing

Finally the *Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019* was reintroduced into Federal Parliament on 4 July 2019, after lapsing at the last election.

The objective of the proposed legislation is to tackle and discourage illegal phoenixing (see *Sheridans' View Issue 43*) and therefore reduce the damage or cost to those affected by such activity. In short, illegal phoenixing occurs when a new company is created to continue the business of a company that has been deliberately liquidated to avoid paying its debts, including taxes, creditors and employee entitlements.

The Bill creates a new concept: "creditor-defeating dispositions", which relate to a disposal of company property for less than the lesser of market value or the best price reasonably obtainable.

How busy is the Safe Harbour?

The new safe harbour legislation came into effect towards the end of 2017, with the aim of supporting a culture of restructuring within an insolvency regime that imposes tough penalties on directors who continue to trade a company while it is insolvent.

The safe harbour provisions apply if (and subject to certain conditions being met), after the director starts to suspect the company is or may become insolvent, the director starts to develop "one or more courses of action that are reasonably likely to lead to a better outcome for the company".

So how has this legislation impacted insolvency work so far?

ARITA¹ reports² from its State of the Profession 2019 survey³ that "Eighteen months after the laws came into effect, the extent of safe harbour work in the profession is sitting disappointingly low."

In ARITA's survey, the response to the question "In the last 12 months has your firm undertaken any safe harbour advisory appointments?" was as follows:

A significant % of our work now comes from safe harbour	%
A reasonable % of our work now comes from safe harbour	-
A small % of our work now comes from safe harbour	16
Negligible safe harbour appointments	84

Early days perhaps, but it seems that there is still some way to go before the anticipated impacts of the safe harbour reforms on insolvency practitioners' work materialise.

¹ ARITA – Australian Restructuring Insolvency & Turnaround Association

² ARITA Journal Volume 31 #02 // 2019

³ Survey of 53 firms from across Australia



FOREWORD

"Extract the eternal from the ephemeral."

Charles Baudelaire

"Think big thoughts but relish small pleasures."

H. Jackson Brown, Jr.

"Realise deeply that the present moment is all you have. Make the NOW the primary focus of your life."

Eckhart Tolle

*"What day is it?" asked Pooh.
"It's today," squeaked Piglet.
"My favourite day," said Pooh.*

A. A. Milne

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Sheridans' View

A matter of trust

Section 433 of the Corporations Act 2001 (Cth) ("the Act") obliges a receiver to pay out of circulating assets certain unsecured employee creditors in priority to secured creditors. In June the question was finally answered as to whether Section 433 applies to trust asset proceeds in the winding up of an insolvent corporate trustee.

The High Court of Australia's decision in *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth & Ors* [2019] HCA 20 (the *Amerind case*) said yes, it does apply. But the extent of its application depends on the nature of the trustee's right exercised.

The decision also confirmed that the obligation to pay priority employee claims incurred by a trading trust out of trust assets also applies to liquidators, under the relevant provisions of the Act (Sections 556, 560 and 561).

The decision does not answer all current insolvency queries regarding trading trusts (particularly where there are "mixed" liabilities), so insolvency practitioners need to continue to exercise care when dealing with trust property, and if appropriate, apply for directions (Section 90-15 of the Insolvency Practice Schedule).

This issue is significant given the number of trading trusts in Australia and the considerable advantage afforded to employee creditors by the Act.

Recent Assignments

- **Continuing liquidations and bankruptcies involving:**
 - Public examinations (Sections 596A and 596B).
 - Obtaining a property sale order.
 - Pursuit of several preference and uncommercial transaction recovery claims.
- **Personal insolvency administrations, including individuals involved with engineering design and project management.**
- **Informal insolvency advice to various businesses, including those involved in construction, real estate, share trading, music instruction and fine furniture manufacturing and retailing.**
- **Litigation support including:**
 - Informal expert advice regarding the valuation of a dental practice.
 - Informal advice regarding investigations into and valuation of a group of companies and businesses for a Family Court matter.
 - Sundry advice regarding various Family Court matters.

"When you can't find the sunshine, be the sunshine."
Unknown

DID YOU KNOW? Moon landing insurance



In 1969, the three astronauts Armstrong, Aldrin and Collins, shortly to be moon-bound on Apollo 11, were unable to get adequate life insurance, and at that time NASA did not cover astronauts when flying.

The men devised their own "insurance covers", capitalising on their fame, to provide for their families if the worst happened. Prior to their mission, the three men autographed hundreds of envelopes, each with a special design and stamp. The envelopes were given to a friend, who was to postmark them on launch day or moon-landing day, and in the event of tragedy, give the memorabilia to the astronauts' families for them to sell.



EDITORIAL

This, too, shall pass

This proverb reminds us of the ephemeral nature of the human condition. The one constant in our lives is change.

The quote is thought to be a Persian adage, translated and used in multiple cultures and languages. It is said that a powerful eastern Persian ruler asked his wise counsel for one quote that would be accurate at all times and in all situations. After much contemplation, the answer given was *"This, too, shall pass."* Apparently the ruler was so impressed by the quote that he had it inscribed in a ring.

There are similar tales relating to King Solomon, and the proverb relates to the Buddhist concept of "impermanence". The quote has been used in many writings and was even employed in a speech by Abraham Lincoln in 1859. It has been an independently arising cultural meme for centuries.

The proverb aligns with Rudyard Kipling's 1895 didactic poem "If", being Kipling's attempt to define for his son a balance in life and to provide specific values to live by, in which he said:

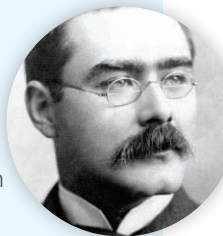
*" If you can meet with Triumph and Disaster
And treat those two imposters just the same;
... Yours is the Earth and everything that's in it, ... "*

Kipling believed the key to leading a satisfactory life is to remain balanced; deal with the ups and downs in life with an imperturbable mind.

The simple basic message from the proverb is to remember to take each day at a time because when things are bad, it won't always be that way, and when things are good, enjoy those moments as they will also not last.

I regularly meet and see people having a bad time (through financial and/or litigation strife), and I am often tempted to comment that it will not be like this forever, but I am concerned that such a comment, without explanation, may seem glib or unsympathetic. However, it is often true.

Yet while extreme moments will pass, they usually leave an indelible mark. For me the key to limiting the damage is getting help and support to put the problem in perspective.



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