

Sheridans' View



Insolvency Practices Inquiry

On 10 October 2019, Kate Carnell, the inaugural Australian Small Business and Family Enterprise Ombudsman ("ASBFEO"), announced an inquiry into Australia's insolvency system, to investigate if current insolvency practices achieve the best possible outcome for small and family businesses in financial trouble.

As the ASBFEO, Ms Carnell, an independent advocate for small business owners, said there were serious questions about whether the current insolvency system encourages practitioners to restructure and turn a business around rather than sending it into administration.

The stated aims of the inquiry are to identify areas where practices can be improved, and recommend changes to the system to achieve fairer outcomes for all parties involved.

The professional body for insolvency and turnaround practitioners, ARITA, has expressed its "disappointment at another insolvency inquiry that misses the real issues."

ARITA's CEO John Winter has voiced ARITA's view that "The very pretext of the inquiry - seeking to turnaround failed small business - is unfortunately very naive. By the time the vast majority [of] small business [es] reach a decision to appoint an insolvency practitioner, they are generally well beyond saving."

The problem most people from outside the insolvency regime have, when looking in, is that they struggle to understand that there is not enough to go around. So the ostensibly laudable objectives of achieving "the best possible outcome" and "fairer outcomes for all parties involved" does not auger well for a constructive outcome to the inquiry.

The ASBFEO will issue an interim report in December 2019, with a final report to be handed down in February 2020.

Whaling attack! Are you vulnerable?

On 30 April 2019 AFSA issued a cyberfraud warning to all bankruptcy trustees.

A trustee had advised AFSA of a fraud carried out on a law firm they were working with. The law firm was due to remit monies to the trustee, and received an email apparently from the trustee directing that the monies be paid to a particular bank account. The law firm complied with the directions. The email was in fact from a fraudster and the monies went to the fraudster's bank account and not the trustee's.

This alarming recent fraud appears to have been a sophisticated form of phishing scam known as a whaling attack. Whaling refers to the seniority of the victim. Whaling attacks are specific and the targets are usually senior executives (e.g. CEOs and CFOs) who are impersonated to trick others.

In 2016, an employee at Snapchat disclosed all of the company's payroll data to a scammer. The employee had received an email that appeared to be from the CEO, and replied promptly.



FOREWORD

"I'm not upset that you lied to me, I'm upset that from now on I can't believe you."

Friedrich Nietzsche

"When truth is replaced by silence, the silence is a lie."

Yevgeny Yevtushenko

"A lie with a purpose is one of the worst kind, and the most profitable."

Finley Peter Dunne

"It is better to offer no excuse than a bad one."

George Washington

"In human relationships, kindness and lies are worth a thousand truths."

Graham Greene

CONTACT US

Level 9,
40 St. George's Terrace,
Perth WA 6000
PO Box Z5209
Perth WA 6831

T: (08) 9221 9339
F: (08) 9221 9340
E: general@sheridansac.com.au
W: www.sheridansac.com.au

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Quarry Quandary

A defendant's response to a liquidator's unfair preference claim is often to attempt to avail themselves of the statutory Section 588FG(2) defence.

The elements of this hybrid defence that usually require consideration are Sections 588FG(2)(b)(i) and (ii): "at the time when the person became such a party:

- (i) the person had no reasonable grounds for suspecting that the company was insolvent at that time or would become insolvent as mentioned in paragraph 588FC(b); and
- (ii) a reasonable person in the person's circumstances would have had no such grounds for so suspecting; and".

The defendant has the onus of showing that the matters which the defendant was aware of were insufficient to induce a suspicion of insolvency. In other words, the statutory defence will not be satisfied either where the subjective beliefs held by the defendant as to the solvency of the company, even if accepted by the court as being genuine, are found not to be reasonable, or in a case where a reasonable person would have suspected the company's insolvency, irrespective of any beliefs held by the defendant.

The recent decision in the successful appeal to the Supreme Court of Queensland Court of Appeal in *Queensland Quarry Group Pty Ltd (in liq) & Anor v Cosgrove* [2019] QCA 220 re-emphasised the requirements of the two key limbs of the defence:

" Under neither test can the creditor's idiosyncratic views and beliefs as to the known circumstances overcome the objective signs of insolvency unless they are also reasonable and a reasonable person in that creditor's position would hold them."

Recent Assignments

- **Liquidation of a security systems and services company (involving the immediate sale of the business).**
- **Personal insolvency administrations, including individuals involved with the installation, upgrading and maintenance of fire protection systems, ceiling installation, the ownership and operation of a beef cattle station and a second fire protection services contactor, specialising in tenancy fit-out works.**
- **Informal insolvency advice to various businesses, including those involved in carpentry, glass installation and boutique lodge & chalet tourist accommodation.**
- **Litigation support including:**
 - Valuation of a cleaning master franchisee.
 - Expert report regarding a loss of profits claim.
 - Valuation of a franchise restaurant.

"One of the most troubling things about the term 'fake news' is that it has become a force field against accusations you don't like."

Kevin Young

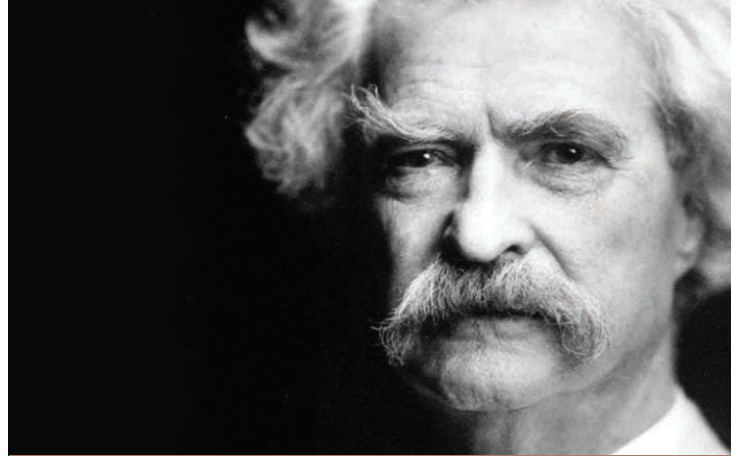
DID YOU KNOW? About deepfakes



A world where nothing is as it seems.

Deepfake (a portmanteau of 'deep learning' and 'fake') is a technique for human image synthesis based on artificial intelligence. The AI software superimposes the face of one subject onto an existing image or video of another. Great for fake news, celebrity pornographic videos, malicious hoaxes and financial fraud.

In *Rogue One: A Star Wars Story* (2016), filmmakers used video synthesis technology to recreate the character Grand Moff Tarkin (Peter Cushing, left). A younger version of Princess Leia was also created. This technology increases the inability to distinguish whether content is targeted or genuine.



EDITORIAL

On Truth and Lies

Mark Twain

"If you tell the truth, you don't have to remember anything."

Mark Twain died on 21 April 1910. More than a hundred years ago. The only difference in his lifetime and ours, when contemplating lies and truth, is that today in the time it takes for the truth to put its shoes on, a lie doesn't travel only half way around the world. Courtesy of the internet, it travels a million million times around the world, expanding and morphing as it goes, its progress unstopably malevolent.

The controversy has raged since the evolution of ratiocination in the brain of homo sapiens about whether it is ever right to tell a lie.

Lawmakers have tried to nail down an answer, requiring witnesses in court to swear to tell the truth, the whole truth and nothing but the truth. Philosophers have endlessly argued for or against the case for the 'whole truth' or instead a 'white lie', dismissed in its guise as a 'half-truth' contemptuously by Twain as *"the most cowardly of lies"*.

Is it honouring someone who asks your opinion to tell them the whole truth and nothing but the truth, or is the risk of hurt feelings, misunderstanding or of giving grievous offence just too great? Should the answer to such a request be a prevarication of sorts e.g. 'no-one cares about opinion, and this is a matter of opinion'?

Was Twain throwing up his hands at the complexity of the question when he said *"never tell the truth to someone who is not worthy of it"*? Of course, deciding who is or who is not worthy of it is often a moot question in itself.

But considering the conundrum can't but be a good idea, if only that it helps keep us curious, and humble. In the works of Huckleberry Finn, channelling his creator Twain, *"I was gratified to be able to answer promptly, and I did. I said I didn't know."*

CONTACTS



Jennifer Low
Principal
B.Sc., FCA
Registered Liquidator
Bankruptcy Trustee



David Blanchett
Senior Manager
BMS (Hons), CA



Melissa Ledger
Supervisor
BCom, CA