

# Sheridans' View



## New insolvency regime

In a bold and rather unexpected move, on 23 September 2020 the Treasurer Josh Frydenberg announced *"the most significant reforms to Australia's insolvency framework in 30 years"*.

The government intends to introduce what it claims will be a simpler, faster more cost-effective insolvency recovery process for small business (with less than \$1 million in liabilities).

The new insolvency regime is a "debtor in possession" model, where the owners (directors) remain in control of their businesses during the process, and a new liquidation process.

The new insolvency regime is to start when the temporary COVID-19 insolvency measures are lifted. The stated aim is to help small businesses restructure and survive the economic impact of COVID-19 or to wind down their operations in an orderly manner.

The detail and draft legislation are to follow, so the jury is out, but a better insolvency system for small to medium sized business has long been called for.

## ATO asks for the bat

In a first, the Deputy Commissioner of Taxation has taken an assignment of a liquidator's recovery rights: *Nicols, in the matter of Anatax Pty Ltd (in liquidation) [2020] FCA1320*.

Since the reforms introduced in 2017, liquidators and trustees have been able to assign causes of action to a third party, including a creditor. Anatax was wound up in May 2015 with only \$333.08 cash remaining, and the Commissioner was the only creditor for \$5.4 million.

In 2019 the Anatax liquidator obtained approval from the Federal Court for the assignment (which was required because the assignment imposed obligations on Anatax for longer than 3 months). However, more recently the liquidator went back to the Federal Court to obtain extended confidentiality orders over the assignment and related documents.

Justice Brigitte Markovic noted in her judgment delivered on 16 September 2020 that *"The Commissioner sought the assignment so that he could take action for the recovery of monies. This is the first time he has done so in furtherance of his role as the person charged with the administration of the Tax Administration Act. He may wish to do so again in order to recover funds owing by taxpayers for the benefit of creditors including the Commonwealth. His ability to do so may be compromised if the terms on which this assignment was effected become known at least in the near future."*

All the documents concerning the assignment were ordered to remain confidential until 30 June 2021. Liquidators, and trustees, will have to wait until then to learn what was paid by the Commissioner in the case of Anatax, but in the meantime they know that the Commissioner could be a potential interested party to acquire and run "in-house" certain causes of action.



## FOREWORD

*"Fight for the things that you care about, but do it in a way that will lead others to join you."*

*"Real change, enduring change, happens one step at a time."*

*"So often in life, things that you regard as an impediment turn out to be great, good fortune."*

*"Women belong in all places where decisions are being made. It shouldn't be that women are the exception."*

**Ruth Bader Ginsburg**

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## The Emperor's New Clothes

The Morrison Government introduced in late March temporary relief for 6 months from insolvent trading for company directors, which has now been extended to 31 December 2020.

Arguably this has in reality provided little protection or cover for directors of small to medium sized businesses. Why?

Besides a director's S588G(2) duty to prevent insolvent trading, there are various other duties a director owes to a company, plus other means of recourse against directors:

- A director's statutory duties to act with care and diligence in good faith, and in the best interests of the company.
- Personal guarantees (especially with creditors being currently hamstrung in pursuing principal debtors).
- Superannuation and tax liabilities, which directors can find themselves liable for.

So any unwary director could potentially find themselves like the Emperor: naked and vulnerable.

## Our Solutions Recent Assignments

### Formal Insolvency

- Liquidation of:
  - a matchmaker for private campervan hire
  - a residential building contractor
  - a commercial builder
  - a property development consultant
- Personal insolvency administrations, including individuals involved with hospitality, electrical contracting, property investment, formwork construction and assisted-living property development.

### Litigation Support

- Valuation of a personalised candy manufacturer & retailer regarding a dispute with a former landlord/breach of lease/claim for compensation.
- Valuation & opinion on inter-entity transactions for a Supreme Court matter for alleged loss & damage.
- Valuation of a mirrors & framing business for a family law matter.
- Indicative valuation of a farming partnership and cattle transport company for a family law matter.
- Valuation of a minority shareholding in an accounting practice for shareholder negotiations.
- Valuation of a steel fabrication business for a family law matter.

**"If you think you are too small to make a difference,  
you haven't spent the night with a mosquito."**

African proverb quoted by the Dalai Lama

### DID YOU KNOW? Sweden Hills



**There is a Japanese town that looks just like a Swedish town, celebrates Swedish traditions, hosts Swedish festivals throughout the year and sells Swedish folkcrafts.**

Sweden Hills, on Hokkaido island, was inspired by a visit from a Swedish ambassador, who commented that the climate and surrounds were similar to those in Sweden.

The 420 houses are painted red with white corners, the typical Swedish villa, and the concept of the town is "the perfect quality of life".



### EDITORIAL

## The Notorious RBG Ruth Bader Ginsburg

**On the evening of 18 September 2020 at the age of 87, Ruth Bader Ginsburg died.**

Ruth Bader was born in Brooklyn in 1933. Her father had arrived in the US from Russia aged 13 and her mother was born in the US just months after her parents arrived from Austria. Ruth's mother, who convinced Ruth she could do anything, died two days before Ruth, class valedictorian, graduated from school and went to Cornell University.

At Cornell, Ruth met Martin Ginsburg, who she married soon after graduating. Their marriage was one of extraordinary compatibility and mutual support. Both went to Harvard Law School, where Ginsburg was scolded by the Dean for taking up a man's seat at the institution.

Despite being the first student ever to serve on both the Harvard and Columbia Law Reviews, and graduating at the top of her class, she couldn't get a job at a premier law firm or a Supreme Court clerkship.

Ginsburg taught at Rutgers and Columbia schools and in 1972 co-founded the Women's Rights Project at the American Civil Liberties Union. She argued six gender discrimination cases before the Supreme Court between 1973 and 1976, winning five. By the time she left the ACLU, she had wiped off the books close to two hundred discriminatory laws. In 1980 following a nomination by President Jimmy Carter, she was appointed to the Court of Appeals, where she served for 13 years until being appointed to the Supreme Court in 1993.

Ginsburg was a shy, understated incrementalist (case by case) who became the Great Dissenter, dedicated to equality not only for women but for minority groups. Ginsburg was Jewish, which she believed "... makes you more empathetic to other people who are not insiders, who are outsiders."

In later years Ginsburg, largely as a result of her iron will and gritty determination, acquired the moniker "Notorious RBG", and the five-foot-one justice developed a cultlike following. There are mugs (you Bader believe it), onesies (The Ruth will set you free), tote bags, bobblehead dolls, action figures and Notorious RBG t-shirts.

If you don't know, or know little, of Ginsburg, check out Hollywood's film *On the Basis of Sex*, and the documentary *RBG*. Learn some more about a unique, tenacious legal giant who created a vital legacy, for all of us.

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