

Emerging trends

We are in a perfect storm of worsening economic conditions, including cost of living hikes and rising interest rates, combined with skills shortages and supply chain issues.

What are the emerging trends?

- ASIC's July 2022 figures show that insolvency numbers are, more quickly than expected, returning to pre-COVID levels.
- The ATO has ramped up its debt recovery program, and has just re-commenced court wind-ups.
- In all likelihood, frenetic insolvency activity in the short-term.
- Considerable strain felt by the SME sector, which will feel the brunt of the ATO's enforcement activities.
- Heightening strain for certain sectors: construction, retail, hospitality and transport.
- Increasing pressure on the judicial system as insolvencies and related disputes rise (see article below on referees).
- Possible Federal Government initiatives including review and reform of insolvency law and, possibly, FEG's ambit.

Phone-a-Friend

Court appointed insolvency referees

The use of court appointed insolvency referees is gaining momentum in Australia.

Their use is being encouraged as a proactive way to potentially reduce legal costs involved in insolvency litigation.

The Federal Court of Australia is leading the charge. Section 54A of the *Federal Court of Australia Act 1976* allows a Judge to refer a matter to a nominated referee for investigation and report, and conveys a discretion on the court to adopt, vary or reject a referee's report.

Most courts have expansive powers to refer individual or collective questions of fact or law out to third-party referees for determination. The Family Court has utilised a not dissimilar system of single experts for some time.

Two recent examples of the Federal Court's use of referees (both for the determination of when a company was trading while insolvent) are:

- *Weston in his capacity as liquidator of Starcom Group Pty Ltd (in liq) v Rajan* [2019] FCA 1455: for an insolvent trading claim.
- *Jahani (liquidator) v Commissioner of Taxation, in the matter of Delta Coal Mining Pty Ltd (in liq)* [2020] FCA 1642: for a series of alleged unfair preferences.

The aim and perceived benefit of such referees, particularly in large-scale insolvency proceedings, is to streamline proceedings while also ensuring the just, cost-effective and efficient determination of claims. Instead of each litigant engaging their own expert, one referee is appointed, whose findings can be disputed if necessary, perhaps at a comparatively lower cost.

However, the referee option may not always produce the hoped-for cost savings: there may be dispute about the proposed reference, the referee selected, the information provided to the referee and the ultimate decision of the referee. Such disputes could potentially increase the overall costs.

Referees are an important option for the courts and as insolvencies increase, are likely to be more often and widely considered.



FOREWORD

"Attitude is a little thing that makes a big difference."
Winston Churchill

"Our attitude towards life determines life's attitude towards us."
John Mitchell

"A positive attitude may not solve all our problems but that is the only option we have if we want to get out of problems."
Subodh Gupta

"If you don't like something, change it. If you can't change it, change your attitude."
Maya Angelou

"Keep your face always toward the sunshine – and shadows will fall behind you."
Walt Whitman

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Insolvency news

- *Lo Pilato (Trustee) v Gold Coast Hinterland Tree Houses Pty Ltd (No2)* [2022] FCA 911: In a recent interlocutory application it was noted that the respondents' defence to a bankruptcy voidable transaction claim for an alleged \$700,000 payment was that valuable consideration had been provided in the form of an Exclusive Arrangement, pursuant to which the second respondent had agreed to:

"(a) provide Services to the Bankrupt on an exclusive and ongoing basis for an indefinite period, such Services including sexual and non-sexual services, including conversation, taking phone calls, responding to emails and text messages, and other non-sexual time spent with the Bankrupt such as sharing meals, going with the Bankrupt to social occasions and other recreational activities;"

- *Bosanac v ATO litigation*: tackling the antiquated legal concept of the presumption of advancement. HCA hearing on 16 August 2022.
- *Lucan (Trustee) v State of New South Wales, in the matter of the Bankrupt Estate of Williams* [2022] FCA 751: Orders were made vesting the bankrupt's interest in real property in the bankruptcy trustee despite a disclaimer of the property having been made by the former trustee of the bankrupt estate.

Our Solutions

FINANCIAL DIFFICULTIES & INSOLVENCY

We provide help and support for companies and individuals under financial strain. We are specialists in corporate and personal insolvency services, financial and strategic advice and support, and turnaround and restructuring advice.

Recent work:

- Informal assessments of current financial difficulties.
- Conducting public examinations in a corporate liquidation.
- Initiation of another S79A (Family Law) claim in bankruptcy.
- Negotiating the resolution of a number of insolvent trading claims in several corporate liquidations.
- New personal insolvency administrations including a former pizza shop owner, a carpenter, a vehicle & equipment financier, a hairdresser, a construction project manager, a registered nurse, a vocational skills trainer and a trucker/heavy haulage pilot.

LITIGATION SUPPORT

Litigation support and forensic services can take many forms and we tailor our approach to the individual requirements of each assignment.

Recent work:

- Valuation of a specialist consultancy business in the therapeutic goods industry.
- Informal valuation of a medical practice.
- Solvency analysis expert report for the termination of a liquidation.
- Review of an expert report regarding a loss of profit claim.
- Valuation of a women's clothing online and boutique retailer.

DID YOU KNOW?



The Easter Island heads have hidden buried bodies. The iconic stone heads (moai) protruding from the ground are familiar to most, but many don't realise what lies beneath the surface.

As early as 1914 archaeologists discovered the subterranean bodies which, covered by centuries of erosion, gave the illusion that they were only heads.

More recently, starting in 2010, a team of UCLA archaeologists excavated two of the heads to reveal full torsos, measuring as high as 33 feet.



EDITORIAL

All in the mind

I got a random marketing email from a stranger today which started with *"I hope things are going your way"*. A quaint and humorous variation of the usual salutation, but I immediately thought *"No, not really"*. And then thought *"That's not the right attitude"*.

Attitude

My mind wandered to thoughts of Sir Ray Avery, the renowned, and recently slightly controversial, New Zealand pharmaceutical scientist, who grew up in Britain in "very Dickensian" orphanages.

Undiagnosed short-sightedness, dyslexia and hearing problems meant Avery often struggled at school and regularly found himself seated *"at the back of the classroom and left alone"*.

At age 14, Avery (now 75) absconded from his orphanage. He made a home under a London railway bridge, visiting public libraries and museums to keep warm, and started developing a keen interest in science.

Many years later in 2003, after a return to formal education, several years of travel and settling in New Zealand, Avery founded Medicine Mondiale, a global network of experts who donate their time to developing accessible healthcare solutions for the poorest developing nations. Avery was named the inaugural New Zealander of the Year in 2010 and knighted for his services to philanthropy in 2011.

Attitude

A settled way of thinking or feeling about something. In psychology, attitude is a psychological construct, a mental and emotional characteristic of a person. It is your approach to something, or your personal view on it, involving your mindset, outlook and feelings. Feelings you have about yourself and the world.

Attitude colours our view of ourselves and the world. It significantly influences the impact of events happening to us, our responses to events and how we look forward and plan. And accordingly, we are told that Attitude is Everything.

So, I pulled up my metaphorical socks, sat up straighter and adjusted my view-point from grey to colour. The world did not change but amazingly, perhaps my prospects for happiness, success, achievement and pleasure did. **How's your attitude today?**

**"You're off to great places, today is your day.
Your mountain is waiting, so get on your way."**

Dr Seuss

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