

What's up? What's new?

One year bankruptcies

One year bankruptcies are, yet again, back on the table.

One year bankruptcies were being considered by the government in 2019, and legislation was drawn up. However, as a result of the ousting of the then Prime Minister Malcolm Turnbull and the subsequent Federal Election, the Bill to effect the change to the minimum bankruptcy term from three years to one year was not passed by the Senate.

It was generally thought that the moment for change had passed. Then COVID-19. In a surprise move in January 2021, in response to the impacts of the pandemic, the government issued a discussion paper that suggested cutting the default period of bankruptcy to one year.

The majority of stakeholders who responded to the discussion paper submitted that the pandemic should not be a driving impetus for reforms to the bankruptcy system, citing the need for a longer-term approach to reform.

After the public consultation in 2021, silence once more, until now. On 28 January this year, the government raised its head again on the issue, releasing an options paper for further consultation on the proposal to reduce bankruptcy to one year.

Consultation closed on 25 February 2022. What next?

Set-off defence not available for preference claims

The Full Court's recent decision (16 December 2021) in *Gavin Morton as Liquidator of MJ Woodman Electrical Contractors Pty Ltd (In Liquidation) & Anor v Metal Manufacturers Pty Limited* [2021] FCAFC 228 appeared to give clear direction to creditors and liquidators that a defence of set-off is not available to a defendant of a claim by a liquidator for an unfair preference, principally because of the lack of an essential element of set-off i.e. mutuality.

The decision was a salve for liquidators lamenting the recent loss of the "peak indebtedness rule".

Nevertheless, on 13 January 2022, the unsuccessful creditor in *MJ Woodman* filed an application for special leave to appeal to the High Court.

CGT in bankrupt estates

Where a trustee in bankruptcy disposes of a capital gains tax (CGT) asset, formerly owned by a bankrupt, in administering a bankrupt estate, a long-standing view held by the bankruptcy profession (consistent with historic ATO guidance and practice) has been that the trustee in bankruptcy is not responsible or liable for any CGT obligation of the bankrupt as a result of the disposal.

However, the ATO has recently (August 2021) confirmed a published contrary view, which the insolvency profession argues represents a change in the previously published ATO's interpretation of the relevant law.

The U-turn by the ATO is causing consternation and significant uncertainty and practical problems for current, and former, bankruptcy trustees, bankrupts and creditors. In some cases, administration of bankrupt estates has halted because of the uncertainty. ARITA is currently in discussions with the ATO aimed at resolving the issue.



FOREWORD

*"Dream as if you'll live forever.
Live as if you'll die today."*
James Dean (actor)

*"It may be that those who do
most, dream most."*
Stephen Butler Leacock

*"Start where you are. Use what
you have. Do what you can."*
Arthur Ashe (tennis player)

*"A dreamer is one who can only
find his way by moonlight, and
his punishment is that he sees
the dawn before the rest of
the world."*
Oscar Wilde

*"There is only one thing that
makes a dream impossible to
achieve: the fear of failure."*
Paulo Coelho

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I own the company, so I can do what I want!

No, for so many, many reasons.

But let's start with Corporate Governance 101: shareholders own the company and directors manage the company. Two distinct roles and vantage points. Shareholders enjoy certain rights in the company (e.g. to receive dividends) but are generally not liable or legally responsible for company debts, and they do not manage the company.

Directors, on the other hand, are given the authority and power to manage the company but with this power comes the attendant common law and statutory duties. Put simply, directors must act in good faith in the best interests of the company, with the appropriate degree of care and diligence, putting the interests of the company above their own interests.

In times of financial distress, a director's duties extend to include consideration of the interests of the company's creditors.

Such director's duties apply even if the directors are also the shareholders, an issue which is accentuated if a company is close to, or actually, insolvent.

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, including assessment of options and explanation of implications.
- Initiation of two S79A (Family Law) claims in bankruptcy.
- Liquidation of a mining shareholding company.
- New personal insolvency administrations including a dancer/entertainer, a theatre technician, a restaurateur and an indoor sports centre owner.

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 café franchise.
- Indicative valuation of a paediatric practice.
- Valuation of a mining consultancy business.
- Valuation of a turf management business.
- Valuation of a service provider (assessments/monitoring) for mine water systems.

DID YOU KNOW?



A shipping crate containing 28,000 rubber ducks was lost at sea 30 years ago when it fell overboard.

Unwittingly, the charismatic ducks (the "Friendly Floatees") then embarked on many long journeys across the globe, from Australia to Alaska, with some ending up frozen in the Arctic ice and some still bobbing up ashore today.

See "Moby Duck": Donovan Hohn



EDITORIAL

"I Have a Dream"

The iconic words of Martin Luther King Jr, and arguably something we all need.

There are many reasons why we need dreams, a vision, a goal or desire; most importantly they can get you through even the worst days, and can provide a reason to keep going and try again the next day.

Dreams can distract from the negative events in life (not in a Walter Mitty kind of way!), making dreams rather than drama more important. We need dreams to stop us sinking to a place where we feel as if there is no hope left.

Chasing dreams can help develop courage, great dreamers can grow to be independent and a dream can be strong enough to define you. And "You are never too old to set another goal or to dream a new dream" (CS Lewis).

"Don't ever let someone tell you that you can't do something. Not even me. You got a dream, you gotta protect it. When people can't do something themselves, they're gonna tell you that you can't do it. You want something, go get it. Period."
(Will Smith/ The Pursuit of Happyness)



Your dreams can create more clarity and focus in your life. They can teach you about failure, perseverance and determination. They are an attractive force.

Be careful to know the difference between what is worth pursuing and what is not. Importantly, consider what is motivating you. But find your dreams, big and small, for today and the future. When there is a dream, there is life.

"There are some people who live in a dream world, and there are some who face reality; and then there are those who turn one into the other."

Douglas H. Everett

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