It is at this third step that the Liquidator has sold and disposed of a Capital Gains Tax ("CGT") Asset of the Company which opens the question of tax, particularly, those consequences borne by the Liquidator. Prior to 1985, individuals and entities alike were only subject to tax on the derivation of income and not the disposal of CGT Assets. However, since the introduction of the Capital Gains Provisions within the Income Tax Assessment Acts, dealing with the disposal of Assets has become more burdensome and complicated for Liquidator's.

The starting point in dealing with the disposal of CGT Assets in a Liquidation is to determine who the CGT Asset actually "vested" in. Section 104-10 of Income Tax Assessment Act 1997 ("the Act") provides that the CGT Asset vests in the Company and that the Liquidator did not acquire such CGT Asset upon their appointment. Therefore, upon disposal of the CGT Asset, CGT Event A1 being the disposal of a CGT Asset, is not attracted by the Liquidator, rather it is attracted by the Company in Liquidation. A summary of the CGT Events can be found under Section 104-5 of the Act.

This is reinforced under Section 106-35 of the Act which provides that any act done by a Liquidator in relation to the disposal of a Company's CGT Asset, is said to be an act undertaken by the Company and not the Liquidator. This removes the Liquidator from any personal liability arising from the disposal of such CGT Assets. Essentially, this means that the net capital gain arising from the disposal of the Company's CGT Asset is an increase in the Company's Income Tax Liability.

As such, the Commissioner of Taxation ("CofT") is entitled to adjust his claim against the Company in the Liquidation. For example, if the CofT makes a $100,000 claim against a Company in Liquidation, and during the course of the Liquidation the Liquidator sells a CGT Asset of the Company attracting a net Capital Gain of $20,000, then the CofT is entitled to adjust his claim to $120,000 ($100,000 plus $20,000). Accordingly, in the event the Liquidator is with sufficient funds to declare a dividend to Creditors; the CofT is entitled to the adjusted calculable return $120,000 claim.

As such, unless the CGT Asset is disposed of again after the disposal made by the Liquidator, then no CGT liability payable against an individual or entity has been incurred. It should be noted that the CGT provisions included within the Act limit the liability of the Liquidator on the disposal of CGT Assets, however, it does not eliminate personal liability in full. There are other complex areas involved in Liquidation scenarios which may make the Liquidator personally liable for net capital gains. In such complicated situations it would be diligent for all Insolvency Practitioners to obtain the appropriate Taxation advice.

Condon Update

Condon Associates celebrated its 7th birthday with a Mad Hatter's Tea Party balcony bash this October. Thank you to all of our friends and colleague who have supported us over the years, and welcome to our new friends who we most definitely look forward to working with in the future.

We are very proud to announce that our own Lyn Dong was a Winner of the Rotary Club of Wetherill Park 2013 Pride of Workmanship Award at a formal dinner held at Smithfield RSL. Congratulations to Lyn for her great efforts and achievements.

Here are some Kodak Moments …

Schon with guests at the Condon Associates' 7th Birthday Balcony Bash.

Hakki, Charyn, Lyn, Schon and Bob at the Rotary Club of Wetherill Park *2013 Pride of Workmanship Award* dinner.

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ON THE BEAM

CONDON
FORENSIC INSOLVENCY TURNAROUND
ASSOCIATES

Volume 7, Issue 5, November 2013

And From the Fires of Hell

By Schon G Condon RFD

As I write this we have felt and are continuing to feel the first onslaught of this fire season. The very first on the 10th September when I went to Portland to attend one of my Great Aunt's 100th Birthday functions and returned to find my own home, as well as the others in our estate, under serious threat in Windsor, and of course more recently and more ferociously the fires in the Blue Mountains that have destroyed, at the time of writing, around 200 homes.

Needless to say our thoughts and prayers go to those that have suffered any loss in this situation and as with the rest of the country our thanks go to those of the Rural Fire Service and other organisations that have fought long and hard to protect and save what they could. A member of my staff lives in the Winmalee area and, had it not been for the efforts of his son, some of his mates and a neighbour then their houses would not have been saved, the remainder of the street was essentially lost including his own garage.

Whilst I am certainly very aware of ASIC's view on phoenix activity, I can assure you that I certainly hope that in the days, weeks and years to come there is significant phoenix activity around the people of the Blue Mountains!

In many ways the emotions in situations such as this, whilst certainly on a much greater scale, are not dissimilar to those encountered by those experiencing total financial collapse. A complete sense of loss, an overall bewilderment, fear of the unknown future, a passionate regret, a despising of anyone who they perceive was to blame and a desperate yearning for that great magician that says trust me and I can take you back to yesterday. This last point translates as a person who can convince them that all can be made good and you won't notice it.

In reality full recovery from such circumstances both fire and financial collapse will take years. Unfortunately though there will be some future events that will never allow the events to be forgotten – think of milestone birthdays without the childhood memorabilia that speaks of the passage of life.

The function of those that assist through these situations is to not only finalise the past but also to assist with the re-establishment of the future. I clearly remember one bankrupt who found himself there because he had failed as a businessman. A great technician he certainly was; but a business operator he was not. Confronting the situation head on the action was taken, liquidation and then bankruptcy resulting from the personal guarantees. Next the necessary grieving was dealt with and then the action plan followed: The house was sold to get rid of the bank's debt, the wife's share into a deposit account his to the Trustee in Bankruptcy, finding a new job, relocation to a new area where rent was much cheaper and savings could be maximised, children into far more affordable schools, everything focused on starting and ultimately winning again.

With careful management their savings built and his Income Contributions paid in full. The amazing conclusion was that whilst still a bankrupt their new bank offered them a housing loan based on their financial performance. The Bankrupt indicated to the manager that the bank would not honour the offer as he was an undischarged bankrupt, which regrettably proved true. However, the offer was again put on the table very shortly after his discharge, a credit to the financial institution involved.

This family was on their feet again much faster than many others, but then they were determined to be and were assisted to get there.

In the present circumstances all involved must stop the fall, if additional financial decisions must be made then they should be made early so that a solid foundation on which a future could be built is achieved. You cannot move forward if you are still falling backwards, regrettably that's a reality.

There is a positive future there if you focus on it and if we can assist anyone to focus then that is what we are here for, we will be more than willing to help.

Throughout this fire season I trust all take care, not just for themselves but also for those around them. Teams get more done!

Enjoy the read…

Inside this issue:

- Part 3 – Identifying and Discussing the Different Types of Corporate Wrongdoings
- Moral Compasses – Do Businesses Need Them?
- Raising from the ashes – Confused about illegal phoenix activities?
- Liquidator's Capital Gain Tax Consequences
- Condon Update

Part 3 – Identifying and Discussing the Different Types of Corporate Wrongdoings

By Brandon Lee

In our September 2013 issue of *On The Beam*, I discussed the strategies for defining and promoting ethical business conduct. Discussions about ethical issues, not to mention attempts to encourage ethical behaviour, are constantly derailed by the invocation of common misstatements of ethical principles all of which ultimately leads to corporate wrongdoings. Most corporate wrongdoing is not criminal but all of it is unethical. However some might argue that some of them are legal or rather rationalised to be so. This is due to legislative loopholes, reckless deregulation and other accommodations. Being legal, of course, does not make the wrongdoing less consequential. In light of this subject, I will be discussing the ways of identifying and discussing the different types of wrongdoings in this issue.

According to the *2011 Global Economic Crime Survey* (PricewaterhouseCoopers 2011), the most common detection methods were suspicious transaction monitoring, followed by internal audit, internal tip-offs, external tip-offs and finally fraud risk management.

For the purpose of detecting and discussing corporate wrongdoing, we must first identify the different types of wrongdoing that may occur in the course of running a company. A classic example of fraudulent financial reporting would be accountants being able to use their accounting skills to produce creative or "magic" accounting figures hence making the financial statements look better and misleading financial analysis would then be published to the public. If the public relies on the information provided and consequently base their decisions on it, they will suffer detriment even though this was not intended by the accountants as they may have just wanted to make the financial statements appear better to raise capital for the company.

Other than that, there is also the corporate wrongdoing concerning the manipulation of financial markets through insider trading, securities fraud, bucket shop, and Foreign Exchange ("FOREX") scams. Many directors of large companies have been imprisoned and even banned from management for a period of time due to being criminally convicted for the manipulation of financial markets and misusing their powers as directors. For instance, Steve Vizard, a non-executive director of Telstra obtained information from board meetings and internal briefing documents to be used for his own benefits; consequently the Australian Securities and Investment Commission ("ASIC") sued him for breach of statutory and fiduciary duties. He was ordered to pay penalties and was disqualified from being a company director. Rodney Adler and Ray Williams both directors of the collapsed HIH Insurance company received the same fate as Steve Vizard did after they were found to be in many breaches of the Corporations Act 2001.

Bribery, kickbacks, and facilitation payments are many forms of corruption and it is one of the great scourges in globalization that could be considered as a corporate wrongdoing. While this may be in the short term interests of the company and its shareholders as they are able to achieve their goals by just bribing another party, these practices may be anti-competitive and offensive against the values of the society. For decades paying bribes internally within the company or externally to other companies was an unspoken but largely inevitable cost of doing business. One of the cases with the highest profile involves the huge telecommunication German firm Siemens, whereby it is under investigation for allegedly paying bribes to win telecommunications contracts. The company said that it has found $550 million in payments it could not clearly identify while checking its books for the past seven years. This proves just how much corruption can cost a company in the long term.

Evident from the discussion above, there is an apparent conflict of interest between profit and social conscience. Perhaps in a less well-informed time there was no need for ethical behaviour, but today's public demands more of its companies than simple profit margins. In the wake of numerous corporate scandals and the Global Financial Crisis, it becomes evident that ethics frequently equal profit in this era and a socially responsible and ethical company is a company that will profit in the long term.

Moral Compasses – Do Businesses Need Them?

By Hakki Hassan

At the recent Condon Associates 7th Anniversary Birthday Bash, Schon Condon, our Managing Principal, thanked all his staff for the outstanding work efforts and contributions to another successful year. I fully endorse Schon's recognition and acknowledgement of the efforts and commitment of our staff throughout the last 12 months.

Schon singled out one of his staff and publicly acknowledged his role as "the moral conscience" for his practice. My initial reaction was – why do you (or for that matter) any business owner need a moral conscience – you are the Managing Principal, or Owner, or Director and you should demand from yourself and all your employees, the highest standard of professional and ethical conduct. Where does a "moral conscience" fit in?

Peter Drucker, of *"Future Shock"* fame, offered the following advice to leaders: "Do not knowingly do harm." Clearly, the key word is "knowingly". Knowing how to read and use your moral compass will help all leaders such as Business Owners, Directors, or other Leaders of our social and economic frameworks make better ethical decisions.

Three helpful steps[1] when faced with difficult ethical decisions are:

1. Analyse the consequential/side effects of the decision
   a. Who will be helped by what is done?
   b. Who will be harmed by what is done?
   c. What kind of benefits and harms are likely to result from the decision – trust, health, loyalty, profits, damage
2. Analyse the actions
   a. Consider all options from different perspectives, without thinking of the consequences
   b. How do the actions measure against society's moral principles like honesty, fairness, equality, respecting the dignity of other people's rights – dare I say, consider the "common good"
   c. Do any of the actions "cross the line?"
   d. If there is a conflict between principles, or between the rights of different people involved, is there a way to see one principle as more important than the others?
   e. Which option offers actions that are least problematic?
3. Make a decision. Take both parts of your analysis into account and make a decision.

A wise man in a recent presentation to a group of businessmen stated that the military was a great believer in the **6 Ps** principle: **P**rior **P**lanning and **P**reparation **P**revents **P**oor **P**erformance.

We should adopt this approach in all our personal and business endeavours. Alas, we are only human, with all the inherent weakness of ego, vanity, pride, avarice and ambition.

Remember, everything in life has a price – are you prepared to sacrifice your integrity, respect and honour in the pursuit of another dollar. I hope not.

1 David Lassiter at The Center for Business and Ethics at Loyola Marymount University

Raising From The Ashes – Confused About Illegal Phoenix Activities?

By Kevin Cotter

What are you going to do about the phoenix activities of the Directors? That is a common question we get asked all the time by creditors and even some accountants and solicitors.

There seems to be so much confusion on what is and is not illegal phoenix activities. This is because there appears to be no commonly communicated definition that is generally understood by the average person. An internet search found numerous different versions from legal practices, government agencies and insolvency practices. No wonder everyone is confused.

The Australian Securities and Investments Commission ("ASIC") recently released a statement advising they will be cracking down on illegal phoenix activities. So the issue has been brought back into the limelight once again.

However, there is limited information on the internet that supports the concept that a transfer prior to the appointment of an Insolvency Practitioner can be legal. So everyone seems to jump to the conclusion that it is always illegal. It can be legal and beneficial to creditors. This is due to the fact that a "going concern" sale prior to an Insolvency can usually return a higher value to the Company and therefore ultimately increase returns to creditors. As such, a sale prior to an Insolvency Practitioner being appointed can sometimes be more beneficial and these pre-appointment transfers in and of themselves do not automatically become illegal phoenix style activities.

How can you tell if it is legal or illegal?

Commonly there is a sale agreement in place and the transfer has been done on legitimate grounds. These transfers only become illegal phoenix activities when they involve any or all of the following common aspects:

i. It was uncommercial;
ii. It was undervalued;
iii. It was hidden; or
iv. It involved illegal conduct.

Rest assured, the law does protect creditors should the company be placed into liquidation and the business has already been transferred. This protection is the ability to overturn transfers found to be illegal phoenix activities. All Insolvency Practitioner are required to conduct an analysis and investigation into pre-appointment transfers. ASIC even provide the opportunity for funding to pursue some of these claims under the Assetless Administration Fund.

These investigations involve, amongst other things, an analysis of the assets, values and liabilities transferred compared to the amount paid and how the transaction is completed. Basically what needs to be considered is if the amount received is more than that which would have been recovered if the Insolvency Practitioner sold the business.

So creditors and their advisors should stop automatically jumping to the conclusion that any transfer of a business prior to an Insolvency Practitioner being appointed is illegal. These matters need to be addressed on a case by case basis. Please let your client's know, if they ever ask, that there are some valid reasons why these transfers can occur legally and may actually be beneficial to them in the end.

Liquidator's Capital Gain Tax Consequences

By Leonard Khoury

Like every other working individual, Liquidators are also faced with that three letter word ending with an X which everybody loves to hear, TAX! A Liquidator's duty in dealing with the assets of a Company under Liquidation can generally be summarised into a three step process as follows:

1. Identify the Assets;
2. Secure the Assets; and
3. Sell/Realise the Assets