STANLEYMORGAN
Solvency Accountants

Newsletter – no. 5/2016

We are proud to announce the recent registration of Leon Lee, a Senior Director at SM Stanley Morgan Solvency Accountants, as a trustee and registered/official liquidator.

Insolvency member body discourages indemnities

The Australian Restructuring, Insolvency and Turnaround Association ("ARITA") represents itself as a key industry body for those working in the field of insolvency practice. It is not mandatory to be a member of ARITA in order to be registered as a liquidator or trustee.

ARITA recently announced that insolvency practitioners should not accept indemnities for remuneration and outlays from parties related to the insolvent company/individual to whom they have been appointed, on the basis that a perceived lack of independence may arise. It is noted that ARITA's code of conduct does not prohibit related party indemnities though.

In practice, many insolvent entities do not have sufficient assets or other recoveries available to cover remuneration and outlays incurred by an insolvency practitioner. A 'blanket ban' on indemnities from related parties may discourage insolvency practitioners from consenting to act for companies/individuals voluntarily attempting to enter into liquidation/bankruptcy. Also, it is unclear how upfront payments from related parties differ substantively from upfront indemnities.

It is inevitable that issues will arise in insolvency appointments which may give rise to concerns about a practitioner's perceived independence. For instance, should a bankruptcy trustee be compelled to sell a bankrupt's family home on the open market to avoid a perceived lack of independence, or is it acceptable for a financial settlement to be reached with the bankrupt's spouse. Often the second option results in a quicker and less riskier return to the estate with the benefit of less disruption to the bankrupt's family, however most would agree it is more likely to give rise to perceived independence concerns.

Trends with ATO settling preference claims

In general, payments made to creditors by a company prior to it being placed into liquidation may be clawed back by a liquidator if it is established that the creditor ought to have been aware the company was insolvent at the time of the payments, and the payments were made preferentially ahead of other equal ranking creditors.

We have noticed that the current approach taken by the Australian Taxation Office ("ATO") in dealing with preference claims is to offer a discounted settlement amount to avoid the liquidator commencing court proceedings. In the absence of a court order voiding a preference, the ATO cannot pursue a company's directors personally for withholding tax and superannuation guarantee charge debt included in the voided preference. This right of indemnity against directors is contained in Section 588FGA of the *Corporations Act 2001 (Cth)*.

In the past it was common for the ATO to settle preference claims but still require the liquidator to apply for a court order (which the ATO would not oppose, but which joined the company's directors as parties to the proceedings) to enable the above-mentioned indemnity.

Insolvency Law Reform update

It has been announced that certain aspects of the *Insolvency Law Reform Act 2016* have been delayed from implementation in March 2017 to September 2017, primarily to allow education on the reforms to be rolled out in a more orderly manner.

AICM National Conference

SM Stanley Morgan Solvency Accountants is proud to support the Australian Institute of Credit Management ("AICM") by sponsoring the golf day of its upcoming 2016 National Conference being held at the Gold Coast, QLD.

The AICM is an industry body for commercial and consumer creditor professionals.

Wesley Hospital Prostate Cancer Care Charity

SM Stanley Morgan Solvency Accountants was a proud supporter of the 4th Annual Wesley Hospital Prostate Cancer Care Luncheon held recently. The luncheon raised funds for the charity and was hosted by Ipswich City Council Mayor, Paul Pisasale.

Further information

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