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THE OFFICIAL SV PARTNERS NEWSLETTER

Issue 028 - June 2020

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Don't Waste the Crisis

Is NOW the Opportunity of a Lifetime to Restructure?

I am stating the obvious by saying the COVID-19 caused lockdown in Australia will not be remembered by most as the Time of Opportunity in the lucky country, or in any country. Seeing revenue drop for many businesses by amounts no-one (save for those wearing tin-foil hats) would have planned for, has caused intense stress amongst business owners. Add to that the concern washing over your face as you see the toilet roll stash dwindle and it is understandable that many have been left petrified by the situation.

If such a severe situation was isolated to a single business, or small number of businesses, we would likely see those business owners seeking timely insolvency advice about options available to them, including restructuring. This is not currently happening. What we see at the moment, I believe, is a Safety in Numbers mentality – 'because everyone is in the same boat, I will wait and see how it pans out'.

Hibernation – Good for the Business, not for the Business Strategy

The Government-supported hibernation sounds good in theory, but will it work? I am one of those people that always pushes a metaphor well beyond its intended parameters – typically because I try to apply it too literally, and the hibernation metaphor was no exception.

If you'll indulge me for a moment – so, a bear will eat a number of huge meals in autumn to sustain it during an extended period (hibernation) over winter where it consumes very little, and once awoken in spring, again consumes a number of huge meals in order to meet its energy deficit and restore its body to pre-hibernation state.

Applying this to business – business will need to have had a bumper period of trade in January and February (possibly March) to sustain it through a period of shutdown or reduced trade where its revenue plummets, and will require a bumper trade when coming out of 'hibernation' to meet accruing liabilities on top of ongoing costs, in order to return to pre-hibernation state.

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Don't Waste the Crisis - continued

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The glaring problems with the metaphor for me are that many businesses were not doing well pre-COVID19 hitting our shores and strong economic bounce-back is far from predictable.

As identified in the SV Partners Commercial Risk Outlook Report - March 2020, a staggering number of businesses had a high risk of failure BEFORE the COVID19-caused lockdown in Australia. Factors that contributed to this include the bushfires, drought, floods and deteriorating economy (yes, Australia has had a rough trot to put it lightly). These high-risk businesses are now in a state of Government-induced 'hibernation' as a result of the response to the COVID19-caused lockdown. It seems that many of the business owners may also be in hibernation (again, I come back to the Safety in Numbers mentality). This may cause a lost opportunity.

There are a number of things business owners should be doing now to ensure their business is in the best possible shape when markets fully reopen. These include:

1. Get ATO lodgements up to date and understand any director-liability that may exists for PAYG, GST or SGC;
2. Get the books up to date – all invoices entered, management accounts reflect true position, conduct stocktakes etc;
3. Gain a better understanding of the numbers – speak to your accountant about what the numbers can tell you and what you can do to improve business performance (eg other revenue streams, changes to pricing, inventory management);
4. Prepare a cashflow using bottom-up approach (ie start with overheads and determine required sales). Consider whether the business is realistically viable;
5. Seek advice about possible restructuring – where the business has substantial debt or strategic challenges that may not be overcome, it is prudent to obtain advice about the options available from an insolvency practitioner, accountant or lawyer. It is this task I want to consider further.

Broadly speaking, a restructure can either occur prior to/without an insolvency appointment or with the aid of an insolvency appointment. Businesses and advisors should be particularly careful and diligent if engaging in restructuring prior to/without an insolvency appointment.

Of particular relevance to restructures prior to/without an insolvency appointment is the Treasury Laws Amendment (Combatting Illegal Phoenixing) Act 2020 which came into effect on 18 February 2020. This Act, amongst other things, improves the mechanisms available to combat illegal phoenixing and thereby tightens the manner in which a business may be legitimately restructured.

The Act creates a new type of voidable transaction – creditor-defeating dispositions (transfers of company assets for less than market value (or the best price reasonably obtainable) that prevent, hinder or significantly delay creditors' access to the company's assets in liquidation). Essentially, it is cracking down on the undervalued transfer of businesses or assets among related parties (although the law does not only apply to related parties) and the advisors that enable such transactions.

A common restructuring tool where an insolvency appointment is utilised, is the Deed of Company Arrangement (DOCA). Commencing with a Voluntary Administration, a proposal is put to creditors, typically by the current directors, whereby a return is made available to creditors in exchange for regaining control of the company. The return typically will need to be better than what could be obtained within a liquidation scenario to gain creditor support.

Whilst a DOCA is a very useful restructuring tool, it is certainly not the only option available to an insolvency practitioner. Other, often cheaper, options may include a sale of the business or business assets during either a liquidation or voluntary administration which will generally not require creditor approval, can be done quickly and is often a less-expensive process than a DOCA.

The current economic environment may provide somewhat favourable ingredients for a restructure to occur, providing timely value to creditors and enabling a business to survive.
Such factors include:

1. Cash is king – creditors will entertain proposals that result in some return now;
2. Many asset values may currently be low which may improve the chances adequate funding/capital can be obtained to acquire those assets;
3. Appetite in the marketplace to acquire businesses is generally low which can make the 'best available price' clearer to stakeholders;
4. Time is on your side – due to the temporary increase in the threshold at which creditors can issue a statutory demand / bankruptcy notice (to $20,000) and the time with which companies or individuals have to respond (to six months).

I could probably throw into the above list that not many businesses are currently doing this (based on current insolvency statistics), which may change come September/October and that may alter creditors' attitudes to such proposals.

If any of your clients are at risk of being the person poking their business with a stick in the coming months wondering why it is not waking from hibernation (there I go pushing the metaphor again), then it might be worth giving the client a poke now to consider whether a restructure, in some form, would assist.

It is absolutely critical the right people are engaged to give restructuring advice, and that may include accountants, lawyers or insolvency practitioners who operate in the space regularly.

Article written by Matthew Bookless
Director - SV Partners Gold Coast

References:

'Don't Waste the Crisis' – M.F. Weiner - Medical Economics 1976

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Travel Vouchers & Insolvency - Clear Skies or a Turbulent Ride?

Australians love to travel. We're an adventurous and resilient lot. COVID-19 has tested that resilience on a number of fronts, including the restraint on exercising our free movement. Global tourism and air travel has effectively been brought to a resounding halt, and the domestic travel front hasn't fared much better, with the pandemic causing some State Governments to impose hard border closures, all but surrendering certain state economies to the same fate as the global market and declaring their state vacation destinations "off limits".

The pandemic has placed a severe financial burden on carriers and intermediaries (and their stakeholders). A travel intermediary is an organisation that buys and/or sells travel, such as agents, travel management companies, distributors, tour operators, and wholesalers.

Virgin Australia's woes have been portrayed extensively by media outlets, as has the ailing share price of listed travel agencies Webjet and Flight Centre. As global and domestic demand evaporates, carriers and travel intermediaries have been affected by large-scale cancellations and rebookings. Some unfortunately will succumb to their circumstances and enter a form of external administration.

As purchasers and users of travel products, consumers have a number of financial interests in (and risks associated with) carriers and travel intermediaries. In the digital age, consumers of travel products can purchase via a number of payment mediums, including travel vouchers. Vouchers can arise from gifts or credits (say, in lieu of a refund after a booking has been cancelled).

Disruptions to travel plans are an inevitable part of the journey, however the Insolvency of a carrier or travel intermediary, brings angst for consumers holding travel vouchers, concerned at what (if any) value they continue to hold.

Creditor Status

In an insolvency context, consumers holding travel vouchers issued by an insolvent carrier or travel intermediary are entitled to claim as an ordinary unsecured creditor and share equally in the distribution of the Company's assets.

As a creditor, consumers bearing travel vouchers are entitled to request information from the External Administrator at any time, concerning the affairs of the externally administered Company.

Travel Voucher usage during an Insolvency Event

Consumers should proactively exercise their rights and obtain information as to the type of insolvency appointment the Company is subjected to (for example Voluntary Administration or Liquidation) and to what extent (if any), a travel voucher is available for redemption during the course of the external administration or by other means.

Liquidation

Liquidation is ordinarily associated with bringing the business of a Company to an end. The business may have ceased to trade on or prior to the appointment of the Liquidator. Alternatively, the business of the Company may have been sold as a going concern and may now be operated by, say, a third party.

It is unlikely that a Consumer would be able to use a travel voucher in a Liquidation context as it is probable that the business has ceased trading and (in that circumstance) there is no service to redeem.

This may not be the case however if the business was sold prior to Liquidation and is now operated by a third party.

The appointed insolvency practitioner will be able to tell you this and direct you to the current operator in order to determine the ongoing utility of your voucher.

Voluntary Administration

The scale and complexity of a travel intermediary will influence the type of insolvency event utilised. Recapitalisation or formal restructure will ordinarily be undertaken via a Voluntary Administration and Deed of Company Arrangement (DOCA) / sale of business process. This will signal an intent to have the business of the Company continue as a going concern (in one format or another).

It is common for an Administrator, conscious of preserving the Company's image and branding, to incentivise consumers to continue to utilise the Company's services. This could include the honouring (say, in part or possibly, in full) of any outstanding travel vouchers issued to consumers prior to the Administration. For example, the administrator of an airline may agree to accept a $250 travel voucher in full, on the condition that the consumer makes a $500 transaction and pays the other half, say, via cash, money transfer or credit card.

It is important for consumers to note that the extent of any incentives offered (including the honouring of travel vouchers) is at the complete discretion of the Administrator and will be influenced by such considerations as cashflow management, operating constraints and capacity.

Other Tips for Consumers

- Take the "Bird in Hand" approach – if you can obtain or are entitled to a refund (rather than a credit or voucher), take it. After all, cash (or cash in your bank) is king! Check your terms and conditions carefully and consult the ACCC website for information on your consumer rights (it's possible that certain terms are not legally enforceable, such as blanket "no refund" clauses). In some circumstances, such as airlines, a refund is mandated (on request), as opposed to being optional.

- If you qualify, a chargeback is the easier and better alternative to a scuffle with an insurer, although a valid insurance claim may prevent a charge back from being available.

- Consumers would be minded to retain records of their payments and correspondence with the relevant carrier/ travel intermediary and contact their bank with the relevant chargeback request and supporting documents as soon as possible. Each credit card scheme has different limits as to the timeframe you have until your charge back rights expire. They vary from 45 to 120 days from the transaction date.

- Insurance policies could be a "last throw at the stumps" for cash customers, who otherwise will be resigned to hoping there are funds available to distribute to unsecured creditors.

- Know your provider – is it the carrier itself, an agency or a third party booking website.

Like anything travel related, it pays to act early, keep tabs on any changes, retain detailed records and know your rights. Otherwise, you could be in for a turbulent ride.

Article written by Fabian Micheletto
Director - SV Partners Melbourne

This article has been shortened for publishing. Full article available on our website.

Isolating from a Bankruptcy Trustee?

There is an old bankruptcy expression called "keeping house" – an act of bankruptcy in fact before a person is made bankrupt. Picture the blinds that are drawn all day, the doorbell and knocks that go unanswered even though the lights are on and the debtor is at home, but unwilling to discuss his/her circumstances or accept service of legal documents. On a small number of files, this behaviour continues after our appointment as bankruptcy trustee, in some instances for many years.

Does it help? In short, no. In some cases, there will be an ulterior motive to hide assets/income with a cheeky flight to Majorca at the far end of the scale, but more commonly, it appears to be a simple denial of the circumstances, hoping it will pass over and maybe some mental health challenges to deal with the paper/issues and any conversation around it.

While most bankrupts are discharged after 3 years, that only holds true when all of their paperwork has been done. In fact, where a person has been made bankrupt by court order and the bankrupt fails to complete the statement of affairs (now Bankruptcy Form), they remain bankrupt indefinitely – yep, 20, 30, 40+ years as the case may be even if that means the trustee has retired, the estate continues with a new trustee or the government office (AFSA in its capacity as the Official Trustee). Three interesting long running cases we have seen recently include:

1. A fellow who worked and saved hard over 10 years, buying property and building up equity. These assets are available to creditors in the bankruptcy as "after-acquired assets" (pursuant to section 58(1)(b) of the Bankruptcy Act - BA), so creditors are expected to be paid in full in that case. Had he attended to the paperwork earlier, he would have saved thousands, but a win for creditors as it turned out;

2. An inheritance in favour of the bankrupt which vested in the trustee because the grantor died before the bankrupt's discharge – also covered by the after-acquired assets provision mentioned above. While clearly this was not the intention of the deceased, creditors received an unexpected windfall that would not have been triggered if the bankrupt's paperwork was in order and his bankruptcy therefore discharged at the 3 year mark;

3. A bankrupt gentleman who had died in the intervening period. Nothing turned on it from a financial perspective because he had earned only modest income and accrued no assets, but it did result in wounds being re-opened for family members (executors) in relation to the background to their loved one's financial circumstances.
The lesson to learn we say is for bankrupts to meet their obligations, then the time window for after-acquired property scenarios like those listed above is limited to 3 years.

Compliance with the statutory obligations helps avoid other tricky scenarios for the bankrupt such as:

- Deeming of income – when information about income is not provided or the trustee has reason to consider the information is incomplete or skewed, such as by a related party employer situation, the trustee may deem reasonable income (139Y BA).

- Garnishee notices – issued to the employer or major customer of the bankrupt pursuant to s139ZL of the Bankruptcy Act. We prefer to be discrete and otherwise would not contact an employer, so this really is a last resort.

- Offence referrals – s19(1)(h) and (i) of the Bankruptcy Act requires trustees to consider whether offences have been committed and to report these. While many offence referrals receive a light treatment by the justice system, there is a risk that Judge Judy will have had a bad night's sleep, empathise with the plight of creditors and the trustee and take a stricter line.

- Overseas travel bans – overseas travel during bankruptcy is approved in most circumstances, however conditions may be included by the trustee to encourage compliance. Travel without said approval may trigger the Australian Federal Police at the airport to stop the bankrupt's unapproved travel.

- Extended bankruptcies (3 years instead becomes 5 or 8 years) bring with them longer periods of time that the bankrupt cannot be a company director, trustee of a SMSF and if they are trading a business, ongoing disclosure requirements.

Every year we receive calls from people who are bankrupt through other trustees and we steer them toward meeting their bankruptcy obligations in order to take the upside of bankruptcy (moving on from their debts) and to minimise the downsides referred to above.

If you think your client may be avoiding their obligations, please give us a call to discuss better ways forward or ask them to call us directly.

Article written by Malcolm Field
Director - SV Partners Perth

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