Upcoming Presentation - Keeping the Wolf from the door

Hall Chadwick and Cozens Johansen Lawyers are pleased to invite you to attend our presentation "Keeping the Wolf from the Door" focusing on the recent developments in insolvency industry. This complimentary seminar will provide knowledge sharing as well as networking opportunities with fellow professionals in the Darwin area.

Here's a snapshot of some of the topics to be covered at the seminar:

Draft legislation on Safe Harbour

Pursuant to Section 588G(1) of the Corporations Act – Director's duty to prevent insolvent trading by company, a director of a company can be held personally liable, and the risk of being held personally liable (and also criminal liability) can be seen as a trigger for director's to place the company into Voluntary Administration prematurely rather than working towards a restructure outside of a formal appointment in a distressed situation.

The draft safe harbour proposal provides directors with a defence, as opposed to a 'carve out', against liability for insolvent trading where they "start taking a course of action that is reasonably likely to lead to a better outcome for the company and the company's creditors" than an external administration. It should be noted that, as it is presently drafted, such protection only extends to debts "incurred in connection with that course of action."

Draft legislation Ipso facto clause

Ipso Facto Clauses allow one party to terminate a contract upon the occurrence of a particular event i.e. the appointment of a voluntary administrator. This can result in trade creditors refusing to supply goods or services even though they are still being paid.

For advice on how we can help you, contact Joanna Gawlak on (08) 8943 0645

These clauses can have disastrous effects on a business attempting to go through a formal restructure and can heavily impact on the value of the business should a sale take place, which effects any return to creditors.

The proposed reform looks to prevent counterparties to a contract from terminating them solely on the basis of an 'event of insolvency'. An event of insolvency would include the appointment of a voluntary administrator or receiver and company's entering into a scheme of arrangement or deed of company arrangement.

Counterparties will be given some protection as the Government intends to carve out certain "prescribed financial contracts" (to be set out in the regulation) where uncertainty around the ability to enforce that type of contract represents a material risk to the efficiency, stability and liquidity of the capital markets which depend on them, e.g. swaps, certain derivatives.

Remuneration – what is reasonable?

Sanderson as Liquidator of Sakr Nominees Pty Ltd (in liquidation) v Sakr 2017 New South Wales Court of Appeal 38

In November 2016, the Court of Appeal heard the appeal from the decision of Justice Brereton on Mr Cliff Sanderson's remuneration application in Sakr Nominees Pty Ltd. Justice Brereton in his previous ruling had held that liquidators' remuneration in "small" liquidations should be calculated as a small percentage of realisations ("ad valorem" remuneration) and distributions rather than on a time cost basis.

ASIC appeared on appeal and submitted, in line with Justice Brereton, that the "ad valorem" remuneration should be preferable in smaller liquidations. The main points of that position were that:

- time-based remuneration focuses on the liquidator's costs while ad valorem remuneration focuses on the value received by the creditors and contributories.
- time-based remuneration encourages liquidators to maximise the time spent on tasks; and
- the apprehension that the liquidator's fees are likely to be determined on an ad valorem basis may guide that liquidator in deciding what work should be undertaken.

The Australian Restructuring Insolvency and Turnaround Association ("ARITA") was also granted leave to appear and adopted the contrary position that a time-based approach was preferable as:

- many tasks which are required by legislation or the liquidator's professional obligations do not augment recovery or distribution;
- some of the criteria in s473(10) focused on the quality and difficulty of the work, and the quantum of recoveries and distributions may be unrelated to those factors; and
- uncooperative and combative creditors can increase the work required, and the wishes of creditors may influence whether certain work by the liquidator could be considered reasonable.

The Court of Appeal upheld Mr Sanderson's appeal. It was held that:

> *'it would not... be appropriate to fix remuneration on an ad valorem basis by simply applying a percentage considered appropriate to all liquidations or to a particular class of liquidations without regard to the particular work done or required to be done in the liquidation in question'.*

The Court of Appeal went on to find that:

- the questions of proportionality and reasonableness remain an important consideration, and the work done must be proportionate to the difficulty and importance of the task;
- evidence as to the percentage that remuneration constitutes of realisation will identify those cases in which there ought to be a real concern in that respect;
- the mere fact that particular work does not increase distributions does not mean the liquidator is not entitled to be remunerated for it; and
- costs are commonly incurred in an unsuccessful attempt to recover assets. Provided the work and amount charged were reasonable, there is no reason the liquidator should not recover that remuneration. The Court of Appeal emphasised that there is a public interest in liquidators bringing recovery proceedings.

The Court of Appeal noted that its judgment should not be taken to indicate that a time-based calculation would always be appropriate. It acknowledged that there was force to the criticism of time-based remuneration expressed in ASIC's submissions and by the primary judge, and noted there may be circumstances were ad valorem remuneration is appropriate.

To RSVP for the seminar, please contact Regina Rao of this office at rrao@hallchadwick.com.au or via phone at (08) 8943 0674.