

RECENT DEVELOPMENTS UPDATE

REVIEW OF ADMINISTRATIONS UNDER CORPORATIONS LAW — ONE YEAR LATER

QUESTIONS AND ANSWERS

Comment - Paul Bear (Chairman):

I am very reluctant to open up the Pandora's box of question that is likely to come, but I think we have probably got time for one or two brief questions.

Question - Nigel Winter (Johnson Winter & Slattery, Adelaide):

My question is directed to either of the last speakers. In the few deeds of company arrangement that I have been involved in, we have been able to successfully, I think, improve the dividend to the unsecured creditors compared with a liquidation. But I think it has actually been at the expense of the Commissioner for Taxation, because the economic incentive for the transaction was to take a future tax benefit through losses. And I just wondered whether that has been a common observation from these deeds, and what the Commissioner thinks about it?

Response - David Clout (Commentator):

Certainly I understand that a great percentage of voluntary administrations in New South Wales have been tax driven. So that answers part of the question. I am sure the Commissioner is not very happy with the use of these provisions to maximise the tax benefits, however I would also say that if recovery of tax losses is the sole purpose of the voluntary administration, I think that is socially unacceptable. Further, I would suggest that the Commissioner will probably change the legislation to limit the amount of losses carried forward to equate to the actual dividend that is being paid — so that will please him no doubt.

Response - Bruce Hambrett (Speaker):

I just wanted to comment that in New South Wales there were a couple of decisions in *Re Data Homes* about 20 years ago and one of the incidents of this new procedure, of course, is the court's role has changed. The court is no longer involved in approving a deed of company arrangement. And in the days of schemes of arrangement, the court used to run an eye over it and check the scheme from the point of view of public policy, and you can no longer do that. So I think there is an opportunity there for some enterprising shareholders and the like, to take advantage at the moment. But I happen to agree with David in that I think the Commissioner is conscious of this particular environment, and I think it might change before too long.

Comment - Peter Hedge (Coopers & Lybrand, Sydney):

As an administrator, I wonder if I could just perhaps throw a little bit of balance on to our discussion this afternoon, given that after all this is a meeting of banking lawyers. And that is, before we get carried away with the euphoria of trying to analyse statistics, being the banks supporting administrations, I must admit my observation is that one of the reasons the banks have not moved to protect their positions more pro-actively seem to have been first of all, they were a bit caught by surprise when they found their security being usurped by administrators being appointed to companies with a motive to act for the directors and the unsecured creditors. Secondly, I think there has been an element of sucking it and seeing. And unfortunately the record of administrators has been quite poor as regards improving the bank's position, even if it is purely a matter of the bank having the matter tidied up a little bit more quickly. And administrators' conduct has not necessarily endeared them to banks. There was one situation in Adelaide recently where basically all the director's friends and family voted in favour of the administration. They had the numbers. The bank voted against, and it had the dollars — something like a million dollars more than everybody else added up together, and the administrator just conveniently cast his vote in favour of the administration, given that he had been appointed by the directors in the first instance etc. So I actually believe we are going to see banks starting to pull back a bit and saying to the administrator: "Listen mate, give me one good reason why I should not protect my position, my shareholders' position, and my security, given that the basis upon which I took or granted the loan and took the security was that I was not going to have that right removed by a Law Reform Commission." And I guess one of the problems we have, and this is a question to the panel, is how are we going to avoid this administration attracting the same criticism as Part 10 did, particularly in more recent years, of it just being an ambulance chasing exercise to try and usurp unsecured and directors' interests over our clients?

Response - David Clout (Commentator):

Peter, I think those points you made, really, I happen to agree with. If we are reviewing the administration procedure in five years' time, the results might be different. The success of it will depend upon the integrity of the administrators, there is no question about that. And if the administrators do not perform, the confidence of the business community and the banking community will just fall away, and it will not work. I agree. So I think it is too early to pick trends, and the statistics and the evidence available at the moment suggest that it is working, and there is some confidence there. Anecdotally, as I said a week ago, a senior banker said "the jury is still out". So I think we have just got to watch this space.

Response - Bruce Hambrett (Speaker):

Yes, I think one other point there is the casting vote that the administrator has at a meeting. And I think in the particular case you talk about, the casting vote of the numbers rather than the value. I think that is a discretion that will have to be very carefully exercised, and clearly, if it is not properly treated, it will fall into disrepute and it will become subject to criticism like the Part 10s.

Comment - Paul Bear (Chairman):

Ladies and gentlemen, I am sorry but we are going to have to call a halt to it there. I am sure you have been very interested in the first paper, which turned out to be a very interesting discussion between legal wets and dries, and in the second paper, which presented to us a note of caution — but also some optimism. So I am sure you would like to join with me in thanking our speakers for their presentations this afternoon.