AMENDMENTS TO THE COMPANIES ACT 1993

THE LIQUIDATOR'S PERSPECTIVE

PREFACE

It is interesting to contemplate the scale of change to the Companies Act since its enactment in 1993. Parliamentary Counsel Office's website only keeps a history of the Act since 2007 on its legislation website. Between then and now there are no less than 34 different versions. What is the practitioner, insolvency or otherwise, accounting or the law, to make of this? Perhaps it is redolent of Prince Charles' famous lament about the disfigurement on the face of an old friend, when referring to the extension to the National Gallery in London.

Some of the change is beneficial – the change to the voidable preference rules is an example, even if the legal fraternity insist on *de facto* repeal by its failure to understand the simplicity of the new rule. Another example might be the freedom for a liquidator to sell rights of action and to conduct a hive down. But why were criminal penalties added in the phoenix company rules when the existing criminal penalties were sufficient but prosecution very rare? Another criminal penalty has been added during 2014, this time for directors acting in bad faith. Why bother? Does this signal the intention of the Crown to seek criminal redress for the ubiquitous misdeeds that plague our corporate world? One can live in hope but I doubt it. This is law as tokenism. See a problem, busy yourself with the appearance of action, but don't take the hard steps such as enforcement. Corporate fraud in the closely held company context will continue unabated. Legislative change makes no difference in the absence of follow through.

The greatest disfigurement to the face of our simple and elegant Act as originally conceived has been the voluntary administration (VA) regime. It was never necessary. The compromise regime – 8 sections – achieved the basic objective. The VA regime caused more than 150 sections to be added and, after the initial flurry, lies unused. I remember hearing an American insolvency specialist, when asked about application of Chapter 11 (the equivalent to VA), saying: don't do it unless the turnover is $1 billion or more – exactly. We now have another major disfigurement necessary because of the repeal of the original Financial Reporting Act and its replacement with another two decades on. It is the consequences of this upheaval that is the subject of the notes.

Why did this happen? I have given some of the history in the notes. What happened was this. Many years ago at about the time the Australians devised an accounting standard for self-generating and regenerating assets (agriculture in other words) the primary sector group at the Institute took fright. The Australian standard, much as its counter-part amongst the IASB's standards, put great emphasis on market values. As with all standards attempting to cause 'relevant' information to be imparted in balance sheets, the standard required complex actuarial formulation. The instinct of the primary sector group can be understood when the tax rules in respect to livestock will broadly achieve an appropriate value. In any event agitation began to cause the closely held company to escape the strictures intended to make accounting relevant. Exacerbated by the sudden influx of

IASB's standards, the agitation resulted in more than a decade of official activity. Inelegant solution to non-existent problem after inelegant solution was proposed and finally we have the second great disfigurement.

Two question need to be posed. First, was the change necessary? Second, does it make any difference? The answer is no in both cases.

In the aftermath of the hasty introduction of IASB's standards the position with respect to the closely held company was held in abeyance for nearly a decade. The old displaced New Zealand standards, modified for reduced compliance as they were, were left intact. Those standards were filled with unnecessary disclosure and certain redundant standards, group accounting being pre-eminent. But the standards were elegantly designed and blemish could have been dealt with by judicious pruning. That they were incomplete was of little account. GAAP was configured to incorporate measurement and recognition rules from elsewhere in the event a company had a complexity such as currency accounting or complex liabilities. Albeit a bit 'jerry built', the regime worked.

To think about the second question think about a map. A map is an abstraction of reality that is of no use unless it broadly depicts the contours it purports to depict. For instance, few people would use a global map produced by the mythical flat earth society. Why would a balance sheet be any different? Central to the practice of insolvency is the determination of solvency or otherwise and, particularly, when the one state becomes the other. In deploying an aviation metaphor the famous words of an Australian judge, in discussing the need for proper accounting records, are apt.

> The whole policy of the section is to prevent this from happening, that is to say to prevent its officer from flying the company blind and upon its crash, and without having any information capable of sustaining the opinion, from then saying that he thought that he had more altitude.

If a director were to think that producing a balance sheet purely on the now wholly discredited historic cost basis and, on that basis, defend him or herself from retribution then they are either naïve or disingenuous or both. Significant space is given in the notes to proving such a person will be sadly mistaken. In other words, despite the upheaval and the gross disfigurement, nothing changed. I have no doubt that what I say will be disputed. But isn't that the point? Directors and accountants dealing with the closely held or small company face a period of uncertainty as to meaning and effect.

Finally, if anyone were to ask why I did not say all this before the change, the answer is I did, many times. I then decided it was no great benefit to me as a liquidator to ensure clarity and uncertainty. I have the luxury of viewing companies from the vantage point of history. Directors and their advisers don't. Meanwhile officialdom, having wreaked havoc, has declared victory and departed the scene.

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