

Russell Kennedy Webinar: Credit Management Tips in Challenging Times

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Webinar housekeeping

- All attendees will be on mute and their cameras turned off for the entire webinar.
- We have BD tech support live to assist with any technical issues.
- Use the chat function for any comments/technical issues.
- Use the Q&A function for specific questions related to the webinar content - Questions will be addressed at the end of the webinar.
- There will be a post webinar survey link sent at the end of the webinar, we value attendee feedback, presentation slides will also be sent to all attendees.
- We will also have a QR code linking to our feedback survey towards the end of the presentation so you can provide instant feedback.
- This webinar is being recorded.

Disclaimer

The information contained in this presentation is intended as **general commentary only** and should not be regarded as legal advice.

Should you require specific advice on the topics or areas discussed, please contact the presenters directly.

Webinar Overview & Introductions

- Overview
 - Existing credit management strategies
 - Impact of COVID-19
 - Tips for creditors on voidable transaction framework
 - Preview of proposed insolvency law changes
 - Security, proven strategies and success stories
- Live Q&A

Overview of suite of existing debt recovery tools

Conventional Preventative Tools

- Direct communication with debtors
- Alternative Dispute Resolution
- Legal demands
- Creditors Statutory Demands/Bankruptcy Notices
- Court Proceedings
- Other Enforcement Options

What's new? Legislative changes during COVID-19

Coronavirus Economic Response Package Omnibus Act 2020

- Creditors Statutory demands (\$20,000, 6 months)
- Bankruptcy Proceedings (\$20,000, 6 months)
- Declaration of intention to declare bankruptcy – 6 months
- Insolvent trading moratorium – provided appointment occurs during the period of operation of the laws.
- Current expiry at 31 December 2020

Temporary Measures during COVID-19 and the impact on recoveries

- Consequences of the current changes
- Impact on Debt Recovery
- Higher levels of risk in the current climate
- Greater level of due diligence/assessment required
- Should we still continue with debt collection during the Covid-19 Crisis?

Voidable transaction framework - Liquidators

Creditor focus

- *“insolvency law has long adopted the policy of avoiding transactions by which an insolvent individual or company disposed of property within a relevant period prior to the commencement of formal insolvency in circumstances where the transaction would be unfair to the general body of creditors.”*

Explanatory Memorandum to the Corporate Law Review Bill 1992

- See also *Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019*

Transaction

Definition – s. 9 of the Corporations Act

- Definition is broad
- Includes a payment, a security interest, a guarantee, release, waiver, loan
- Can include a series of payments (s.588FA(3))
- May include third party payment - *Re Emanuel (No 14) Pty Ltd: Macks v Blacklaw & Shadforth Pty Ltd* (1997) 147 ALR 281

Voidable transaction framework – relevant dates

Corporations Act 2001 (Cth)

Description	Corporations Act s.	Period prior to relation back day
Unfair Preference	588FE (2)	6 months
Creditor-defeating disposition	588FE (6B)	12 months
Uncommercial Transaction	588FE (3)	2 years
Related party transaction, Unreasonable director related transaction	588FE (4) or 588FE (6A)	4 years
Creditor defeating purpose	588FE (5)	10 years
Unfair loan	588FE (6)	At any time

Common defences to unfair preference claims

- Security;
- Good faith;
- Running balance;
- Preferential – must reduce the value of net assets available to creditors - *Re Discovery Books Pty Ltd* (1973) 20 FLR 470
- ‘prepayment’ – *VR Dye & Co (a firm) v Peninsula Hotels Pty Ltd (In Liq) & Anor* [1999] VSCA 60
- Set off – may apply in limited circumstances

Voidable Transactions – Relevant dates

Bankruptcy Act 1966 (Cth)

Description	Bankruptcy Act s.	Period prior to commencement of bankruptcy
Undervalue Transactions	120	5 years
Transfers to defeat creditors	121	At any time
Avoidance of preferences	122	In most cases, 6 months

Proposed insolvency law changes

- Expected to be legislated in the next 3 months, exposure drafts of legislation released for limited consultation
- Adoption of a 'debtor in possession' model
- Similarities to the *Corporate Insolvency and Governance Act 2020* (UK)
- Reference to *Chapter 11 US Bankruptcy Code*
- Intended to replace temporary measures introduced during COVID-19
- Restriction of unfair preference claims mooted

Features of Proposed legislation

- Moratorium on liability for insolvent trading whilst restructuring;
- Small business restructuring process for debtors with less than \$1 million in creditors;
 - Small business to seek advice from and sign up IP;
 - 20 days to prepare a restructuring plan;
 - 15 days for creditors to vote on restructuring plan;
 - Upon approval from 50 percent of creditors by value, restructuring plan binds all unsecured creditors, and there is a moratorium on further enforcement measures by creditors
 - Employee entitlements required to be paid

Unanswered questions

Insolvency law reforms

- Director Penalty Notices?
- Low cost, fixed fee model – what fee?
- Will secured creditors stand by?
- Priority for creditors trading with restructuring entity?
- What constitutes misconduct?
- Notice of restructuring required?



Proven strategies against corporate and individual debtors

Prevention is better than the cure

- Know the identity of your debtor
- Have up to date, binding terms of trade in place
- Have an accounts receivable system and implement it robustly
- Don't over extend credit and avoid concentration risk
- Stay in touch

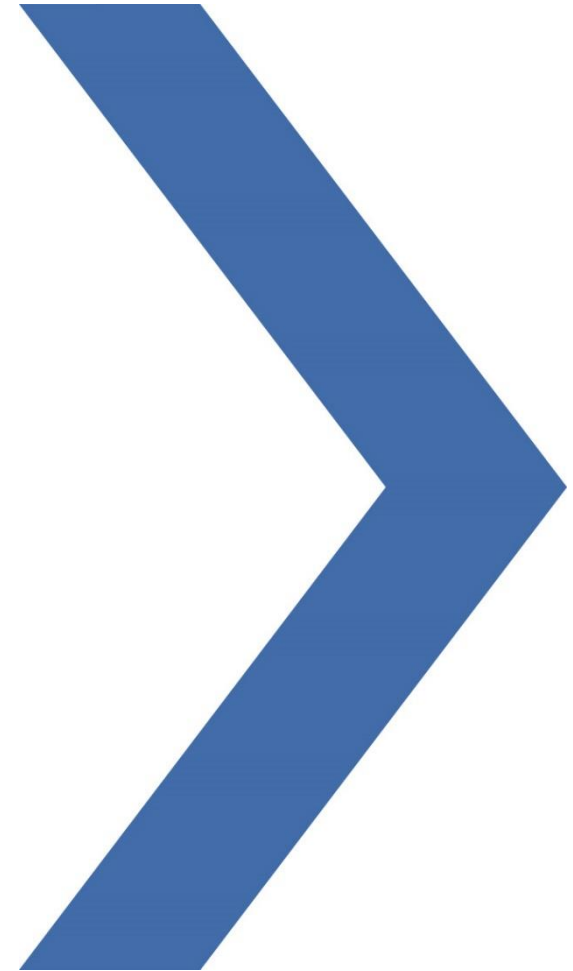


"That's where we add the fine print."

Proven Strategies for Corporate and Individual Debtors

Recovery for unsecured creditors

- Assess the value of the relationship early
- Personal Guarantees - what are they worth?
- Third party payers – what are the options?
- Sue or Statutory Demand/Bankruptcy Notice?
- Upgrade to secured position
- Covid = creativity



Security, Charges and the PPSA

To be (secured) or not to be?

- **Equitable charging clauses**
- **Mortgages**
- **Security Interests under the PPSA (an overview)**
 - What is the PPSA/PPSR ?
 - How does the PPSR work?
 - When does PPSA apply?
 - What's included/excluded from PPSA?
 - Attachment
 - Perfection
 - Enforcement options

Q&A – Your Russell Kennedy Contacts



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