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Legal Alert

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Don't let the sands of time get in your lunch...

Key Summary

In the world of insolvency, time is often of the essence for any number of reasons. As a result, the method of calculation of time is a critical matter to be considered in the context of a practitioner's day-to-day decision making.

In this Alert, we consider some important timing concepts in the context of the corporation insolvency areas, including convening meetings and directors penalty notices.

Introduction

A failure to correctly calculate time can have a range of consequences, from minor, repairable, errors to dire, irreparable, outcomes. Whilst there are opportunities for some miscalculations to be remedied by the Court, this is not always the case and practitioners should always take care where such calculations are involved.

The Corporations Act - a Brief Review

The Corporations Act (Cth) 2001 (**Act**) is littered with references to time limits relevant to the corporate insolvency context, such as:

- "within 6 months after the creation of the charge" (s267);
- "at least 5 days before the meeting" (s439A and s445F);
- "within 15 days after the end of the meeting" (s444B);
- "during or after the 3 months ending on the day when the application was made" (s459C);
- "within 21 days after the demand is served" (s459E); and
- "during the 6 months ending on the relation-back day" (s588FE).

Such references are all aimed at identifying the beginning or end of a period from which a calculation can be made, so as to give rise to clarity as to when something can, should or must be (or not be) done.

In order to assist such calculations, the legislators have included s105 in the Act, which takes the form of a code in respect of any calculation of time under the Act (although the inclusive reference to s36 of the Acts Interpretation Act (Cth) 1901 is noted). The Court has indicated that any conflict between the terms of s105 and the Rules of Court must be resolved in favour of s105. It should also be noted that the Court has determined that s105 does not apply in cases where the phrases "begins on" or "beginning on" are present in the relevant section.

Also of note in respect to this discussion, and present in the Act at s9, are the definitions of "business day", "month" and "calendar month".

When is a meeting "convened"?

The terms of s439A (and similarly s445F) of the Act are such that an obligation is imposed for a meeting to be convened within a specified time-frame. As noted above, s105 allows us to calculate the relevant time-frame, but we need to know when a meeting is considered to be "convened" in order to complete the calculation.

Having regard to s439A(3) and s445F(2) of the Act, it is clear that a meeting is convened when written notice of the meeting is given to the company's creditors. When does this happen?

In considering this question, the Court looked at the terms of the Act, as well as its associated Regulations, and found that, unlike the typical provisions included in other legislation dealing with service or giving of notice, no provisions existed which deem when notice is given. That being the case, the conclusion reached by the Court was that written notice of the meeting is given at the time it is put in the post, for the purpose of sending it to the person by pre-paid post.

Director Penalty Notices

Whilst Director Penalty Notices (DPNs) are not creatures of the Act, they are something that practitioners will be familiar with and have a calculation of time component to them.

A DPN is notice given by the Commissioner pursuant to s222AOE of the Income Tax Assessment Act (Cth) 1936 (**ITA Act**). The Commissioner is not able to recover a penalty payable by a person pursuant to that Subdivision of the ITA Act unless they are given 14 days notice in accordance with that s222AOE of the ITA Act.

As practitioners are aware, failure to comply with the options for the remission of the penalty within the 14 days after having been given notice will result in the recipient being unable to remit the penalty identified in the DPN.

It is therefore of some importance that the calculation of time in respect of the expiry of that period is known. The NSW Court of Appeal was called upon to look at the question of when notice is given by the Commissioner as required by s222AOE in the context of the issue of the onus of proof of receipt (or lack thereof) of a DPN, which had been issued by the Commissioner.

The Court of Appeal noted that the Commissioner was only obliged to arrange for a DPN to be posted to the recipient. In the course of its deliberations regarding the primary subject matter of the appeal, and relevantly for our purposes, the Court of Appeal did appear to endorse the view that the date upon which a DPN (ie, the notice required to be given) is put in the post is the date upon which a person is given notice for the purposes of s222AOE of the ITA Act.

It is certainly the case that this view might lead to circumstances where the recipient will not know the date upon which the DPN is posted to them. Having said that, the date of the DPN cannot be later than the date of postage. That being the case, a prudent practitioner should work on the premise that the date of the DPN is the date of postage, and advise, or act, accordingly.

Conclusion

Whilst experienced practitioners will be extremely familiar with such matters, it is sometimes not until it is too late that an incorrect assumption or misunderstanding of the principles involved in the calculation of time, and the attached consequences, is uncovered. Therefore it is always useful to review the basic principles to ensure that problems do not arise as a result.

This article was prepared by Colin Brown, a partner in our insolvency and reconstruction team. We invite you to contact Colin, or Michael O'Neill, should you have any questions or require any further information about the matters discussed in this article.

The contents of this article are intended to provide only a general summary on matters of interest as at the date of publication and are not comprehensive, nor does this article constitute legal advice. You should seek legal or other professional advice before acting or relying on any of the contents of this article.

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