

Insolvency Update



It is a common misconception that the Australian Taxation Office ('ATO') is the reason that companies are placed into liquidation. While the ATO is often the largest creditor in corporate insolvencies, our experience suggests that unpaid tax is a symptom of insolvency rather than the cause.

While the ATO is responsible for winding up more companies than any other individual creditor in Australia, the ATO's collection policies indicate it is accommodating and patient when dealing with companies with unpaid taxes. However, once the wheels of enforcement are in motion, the ATO can be unrelenting and a client unable to pay the outstanding debt in full is likely to result in its eventual winding up.

[Deputy Commissioner of Taxation v Swoosh Hand Car Wash Pty Ltd \[2014\] FCA 73](#)

A debtor company's ability to prevent a winding up order being made once the ATO has commenced proceedings has been further hindered by the recent Federal Court of Australia decision in *Deputy Commissioner of Taxation v Swoosh Hand Car Wash Pty Ltd* [2014] FCA 73 ('Swoosh').

Briefly, the facts of the case can be summarised as follows:

- The Deputy Commissioner of Taxation ('ATO') issued a statutory demand on *Swoosh Hand Car Wash Pty Ltd* ('the Company') in the amount of \$161,126.46
- The Company failed to comply with the statutory demand within the requisite 21 day period
- As a result of the failure, the Company was presumed insolvent under section 459C(2)(a) of the *Corporations Act 2001* ('the Act')
- The ATO commenced proceedings seeking to wind up the Company relying on the aforementioned presumption
- The Company subsequently paid the debt subject to the statutory demand but had since incurred further debt in the amount of approximately \$148,000 which was largely undisputed
- No statutory demand was issued by the ATO in respect of the additional debt

The Court was asked to exercise its discretion under section 459A of the Act and wind up the Company.

Ordinarily the payment of the debt claimed in the statutory demand would be sufficient reason for the Court to refuse to make an order for winding up. In *Swoosh*, the Court acknowledged that in such circumstances there must be some positive reason to order the winding up of a company beyond the mere presumption of insolvency.

In the present case, the Court found that as additional debt had been incurred and remained unpaid provided further reasoning for liquidating the Company.

Furthermore, the Court noted that it is incumbent upon a company resisting a winding up order to make full disclosure of current financial position to rebut the presumption of insolvency. In this instance, the Company had failed to provide any evidence as to its solvency and consequently the Court ordered the winding up of the Company.

This case now sets a precedent for the ATO (and potentially other creditors) to commence and continue a winding up application in circumstances where the debt claimed in the statutory demand has been paid but further amounts have subsequently become owing.

A finding of insolvency is ultimately a question of fact to be determined by a Court. However, directors have a positive obligation to prevent insolvent trading and therefore must regularly consider and satisfy themselves that the entity for which they are responsible is solvent.

To assist you and your clients, please contact our office for a checklist of the indicators that are likely to be present in an insolvent entity. However, the presence of any one indicator or all indicia will not in itself lead to a finding of insolvency.