

Australian Receivables Ltd Newsletter

Australian Receivables offers a range of collection processes, designed to meet the needs of customers with both commercial and consumer receivables service requirements.

highly motivated, experienced and professional

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traditional values, innovative solutions

Welcome to the Winter edition of our Newsletter

This newsletter is designed to assist our clients and prospective clients alike with their credit management activities and includes informative articles on debt collection techniques and credit industry news.

This edition also includes details on the launch of The Australian Collectors and Debt Buyers Association (ACDBA) which was established earlier this month and of which I am one of four founding Directors. The association has been set up to represent companies who collect, buy and/or sell debt and is discussed in further detail in the article below.

I would like to take this opportunity to thank our clients for their continued custom and support and we look forward to working with you and assisting you through the unpredictable economic climate that lies ahead of us.

Paul J Cooney
Managing Director

In this Issue

Our feature article provides you with some information and advice on unfair preferences.

In addition to this we have some ARL news to share with you, including our Employee of the Month Awards, our recent attendance at the Rating Professionals Conference at Bathurst and the Revenue Management Association Conference in Phillip Island, the launch of our new Client Referral Program and some tips to assist with your collection techniques.

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Article - Launch of the Australian Collectors and Debt Buyers Association (ACDBA)

The Australian Collectors and Debt Buyers Association (ACDBA) was established last month to represent companies who collect, buy and/or sell debt.

Membership in ACDBA is voluntary and open to all interested parties: collectors, buyers, sellers, credit providers, suppliers to debt collectors and debt purchasers, consumer representatives and government regulatory agencies.

The objectives of ACDBA are to:

- represent the interests of members involved in debt collection and debt buying;
- establish and maintain a code of practice for the business activities of members;
- encourage best practice of members in their professional activities;
- provide opportunity for members to discuss and deliberate on matters affecting them professionally; and
- facilitate representation to further the professions of members.

To enquire about membership to the above organisation please send an email to admin@acdba.com or phone 02 4925 2099.

Collection Tips

A small investment in debt management can make all the difference to your bottom line and can save you no end of money later!

It may seem like a large expense but the cost of not managing debt collection can be very high in terms of lost working capital and bad debt accumulation so get on to those bad debts now and give your cash flow that vital injection.

Feature Article

A Short Guide to Unfair Preferences – Nikki Dennis

Imagine this familiar scenario.....You have spent valuable time and resources chasing a bad debt for which you eventually receive payment, good news, well done, end of story you think. Well not quite.....within the next six months the company who paid you goes under and suddenly you have their liquidator demanding the payment back, not such good news, sound familiar? Welcome to the world of unfair preferences.

Many people who have had to hand back payments classed as 'unfair preferences' find it extremely, well, 'unfair'. They have provided a product or service which they have received payment for, so why should they now just hand it back? Well, the law of unfair preference payments is there essentially to ensure that all unsecured creditors are treated equally and receive proportionate payments. The traditional position in Australia is that when a liquidator claims an unfair preference they are doing so on behalf of all unsecured creditors. The monies recovered don't go to secured creditors, nor do they form part of the property of the company, rather they are held on trust by the liquidator for the benefit of all unsecured creditors of the company.

The following is the definition of unfair preferences as stated under Section 588FA(1) of The Corporations Act:

A transaction is an unfair preference given by a company to a creditor of the company, if, and only if:

- a. the company and the creditor are parties to the transaction (even if someone else is also a party); and
- b. the transaction results in the creditor receiving from the company, in respect of an unsecured debt that the company owes to the creditor, more than the creditor would receive from the company in respect of the debt if the transaction were set aside and the creditor were to prove for the debt in a winding up of the company;

even if the transaction is entered into, or given effect to, or is required to be given effect to, because of an Order of an Australian court or a direction by an agency.

Therefore, any creditor that has received a disproportionate share has had an 'unfair preference'. If this is the case then they are required to return the amount they have received, unless they have a suitable defence. What constitutes a suitable defence will be addressed later. First, we will take a look at some of the rules behind unfair preferences and what a liquidator needs to prove to the courts in order to establish an unfair preference.

Rules of Unfair Preferences

Relation-back period - If you have received a payment from a company within six months before the commencement of liquidation then these payments are vulnerable to being deemed 'unfair preferences'. This time frame of six months is referred to as the relation-back period. It is worth noting that the 'commencement' of a liquidation is not always the same date as when a company 'enters' liquidation (this is further defined in the Corporations Act).

Insolvency - A Company has to have been insolvent at the time of making the payment for it to be deemed as a preference payment. Generally, the key issues in unfair preference cases relate to the solvency or otherwise of the company. Solvency is defined in Section 95A of the Corporations Act as follows:

1. A person is solvent if, and only if, the person is able to pay all the person's debts as and when they become due and payable.
2. A person who is not solvent is insolvent.

Even though there is a six-month time frame, it is important to note that a company may not be insolvent throughout the entire six months. It is up to the liquidator to prove insolvency by preparing a report on the financial position of the company. Therefore, if defending a preference claim, it is worthwhile seeking a second opinion on the company's solvency from another insolvency practitioner.

Liquidation - Payments are not liable to be preferences if the company is merely in receivership or Voluntary Administration; a company must be in liquidation for a payment to be considered a preference.

Interest and Costs - If the matter goes to court and the liquidator is successful, they can claim interest and legal costs. The interest on a preference claim runs from the date of the liquidator's letter of demand for payment.

Transaction - Obviously when a creditor receives a payment, that in itself is the transaction but there are cases where the definition of the 'transaction' has proved important. For a liquidator to establish that an unfair preference transaction has taken place they must prove that the company who is alleged to have made the unfair preference was a party to the relevant transaction with a creditor of the company, which leads us to the next rule.

Debtor/creditor relationship - The liquidator must prove that there was a debtor/creditor relationship at the time of the preference payment. It will usually be the case that the recipient of the payment must have been owed monies at the time of payment. As such, COD payments can never be preferences.

Unsecured creditor - There cannot be a preference payment against a creditor who has valuable security over the company's assets such as a bank. Therefore, the liquidator must prove that the creditor who received the preference payment was an unsecured creditor.

Preferential effect - The liquidator must also prove that the preference payment was actually a 'preference' and more than the creditor would have received if they were to prove for the debt in a winding up of the company.

Defending an Unfair Preference Claim

A common defence to unfair preference claims is that there were no grounds for suspecting that the debtor company was insolvent. This defence requires the creditor to prove the following three elements, that they had:

1. Good Faith - Payments in most cases will have been made in good faith. Examples of a lack of good faith would be where there has been a serious threat that prompted the collusion or payment with the company.
2. No reasonable grounds for suspecting insolvency, and that;
3. A reasonable person in the circumstances would have had no grounds for suspecting insolvency – In this case the creditor must demonstrate that a reasonable person in the circumstances would have no grounds for suspecting (as opposed to actual knowledge of) the debtors insolvency.

Another defence is what is referred to as the 'running account defence'. This is set out in section 588FA(3) of the Corporations Act and applies where there has been continual trading between the creditor and the debtor company throughout the relation-back period. In situations where there has been continuous supplies of goods or services and payment for those supplies throughout the period (as opposed to merely payments without the supply of goods or services), the creditor may have a valid defence. Whether such a defence can be used is dependent on whether the concerned parties were looking to continue the business relationship into the future or whether the creditor was merely trading with the company in order to extinguish the debt.

Example of running account defence

For an example of this defence we can refer to the case *Rennie & Ors v Printbase Pty Ltd* [2002]. In this case, the defendant supplied consulting services to the company over a period of 5 years. These consulting services were to facilitate the design and manufacture of communication systems to the Royal Australian Navy. The defendant invoiced the company and during the trading relationship payments were made up to 120 days after the date of invoice. The liquidator of the company sought to recover payments that amounted to \$82,480 made by the company to the defendant claiming that the payments were unfair preferences made at a time when the company was insolvent.

The defendant raised the defence in s588FG(2) and said that they had received the payments in good faith and at a time when they did not suspect the company of being insolvent. The defendant also claimed that the payments were an integral part of the continuing business relationship between them and the company and that a running account existed.

The court ruled that the defence in s588FG(2) couldn't be applied as a reasonable person in the defendant's position would have suspected that the company was insolvent. This was due to the fact that the defendant was aware that the company couldn't pay all of the defendant's debts when they were due and payable. However, the court did rule that the payments were made as part of a continuing relationship and as such a running account existed and the amount of the liquidator's claim was reduced accordingly.

In this ruling, the court cited the decision in *Sutherland v Eurolinx* (2001) where Santow J stated:

"The basis of a running account is a continuing relationship between a debtor and creditor with an expectation that further debts or credits will be so incurred.

For the defence to be maintained there are some essential prerequisites. First, there must be no cessation of that mutual assumption of payment and reciprocal supply throughout the relevant period. Second, those payments must continue to have at least one operative, mutual purpose, namely inducing further supply".

Accordingly, the court found in the present case that the relationship between the company and defendant had existed for several years and essentially hadn't changed over that period. It was held that payment was made to meet an obligation to remunerate for past services and to create good will to ensure a continuation of the relationship.

So what can you do to reduce the chance of a preference payment?

Get Directors' Guarantees - Although payments from a company are at risk of being preference payments you can still go after the Director(s). Take security over a company's assets - there have been some previous cases where payments under an agreement containing a valid ROT clause were not preferences as the ROT clause was considered 'security'.

It is normal to want a debt paid in full even if you suspect the company may be insolvent at the time. As long as you are aware that it could be taken back further down the track as an unfair preference payment then it maybe worth taking the risk and accepting the payment in full, there is always the chance that you won't have to repay the preference. For example, the company could go into voluntary administration and enter a Deed of Company Arrangement and as long as the DOCA was successful, you wouldn't be required to pay it back.

It is also worth noting that if you are confronted with a preference claim there is sometimes the opportunity to settle the liquidator's claim for less than the full amount claimed. The sooner the preference claim is settled, the greater discount the liquidator may be prepared to take.

Further information - Roger Misso is a Senior Lawyer at our Melbourne Forbes Dowling Office, for further legal advice you can contact Roger on 03 9320 2324.

Local Government

ARL recently attended both the Rating Professionals NSW conference at Bathurst and the Revenue Management Association conference at Phillip Island. Both conferences were a huge success.



AICM Golf Day

ARL participated in and won the AICM golf day that took place this month. The winning ARL team consisted of Peter Horne from Brimbank Council, Mal Bendle and Martin Kristan from Melbourne City Council and Paul Cooney. Congratulations to all four, a good day was had by all!

Employee Awards

ARL's dedicated employees are integral to our future growth and success and we like to recognise employees that have gone the extra mile either for their clients or fellow team mates.

Our January employee of the month award has been won by the following:

RONETTE GILES – EXECUTIVE ASSISTANT TO MANAGING DIRECTOR

Recognised for her constant help and support and for going the extra mile.

Our February employee of the month award has been won by the following:

ANNETTE COSTAGANNA – ACCOUNT MANAGER

Recognised for her dedication to the Sydney team, clients and staff and for leading from the front.

Our March employee of the month award has been won by the following:

MELISSA GRIFFIN – ACCOUNT MANAGER

Recognised for her mentoring skills and initiative.

Client Referral Program - ARL Experience Prize Draw

ARL recognises that referrals are an important way to help us growing our business and we have always been grateful to clients that have referred new clients to us. By launching our referral program however, we can now recognise these referrals in a more formal and fun way. From now on for any referral that you, as clients or prospects of ARL, pass on to us you will receive an entry to our Seasonal ARL Experience Prize Draw.

This season's winter prize draw will take place at the beginning of September 2009 and the prize will be a choice of:

- A V8 Race Car Driving Experience - 5 Laps
- A Day Spa, Massage, Facial & Body Scrub Package (2.5 hours)



To refer someone to us please send an email to sales@arcollect.com.au with 'Referral' as the title and include the referral company's name, contact name, position, address & phone number in the email. Alternatively, if you tell someone to give us a call, remember to get them to advise who referred them when they speak to one of our Business Development Executives.

We thank you for your continued support and look forward to delivering these exciting awards.

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ARL's Head office and administration facilities are located in Melbourne's CBD. For other national and regional office details please select from below.

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