



Take on Board

Transcript – Samantha Kinsey

Helga Svendsen 0:00

Today on the take on board podcast, I'm speaking with Samantha Kinsey about some of the new Australian laws relating to directors arising out of the COVID-19 pandemic. First, let me tell you about Samantha. Samantha is a restructuring and insolvency partner in the Melbourne Office of King and Wood Mallesons. Samantha acts for diverse stakeholders in relation to distressed situations including finances, shareholders, insolvency practitioners and potential acquirers. Welcome to the take onboard podcast, Samantha.

Samantha Kinsey 0:30

Thank you.

Helga Svendsen 0:32

So it's really great to have you here because in the last week or so I think it was only about a week ago. So new laws were announced in relation to directors and directors obligations in particularly in relation to insolvency. So I thought you'd be a fabulous person to take us through some of those changes. What are some of the changes?

Samantha Kinsey 0:53

As you know, directors can usually be personally liable if they allow a company to incur a debt while it's insolvent. So the particular problem directors were facing into come the COVID-19 pandemic is that so many companies are now potentially insolvent. Because what we're finding with so many companies is their revenue has just unexpectedly fallen off a cliff. And that's something that directors did not foresee happening. So what parliament has done to help directors continue to trade is they've granted relief to directors for personal liability for insolvent trading, in respect of debts incurred in the ordinary course of business, and so long as directors are not acting dishonestly, when they incur the debts. So what that means is, I think for directors ease, they now have a bit more time than they might have felt they had otherwise, to come up with a plan as to how they're going to respond to these particular issues. challenge to their business before they feel like they have to put the company into administration. So one of the things that directors are grappling with these, well, what does that mean for them? Because all of their other duties, of course, are continuing as usual, directors still have a duty of care and diligence, it still got a duty to act in the

best interest of the company. So the questions that boards are all now asking themselves is what are those duties require them to do in the current situation?

Helga Svendsen 2:32

And it's such a great question. So what do we know about what will be different in that environment where they're allowed to trade whilst insolvent to some extent, yet still need to be fulfilling all of their other duties?

Samantha Kinsey 2:46

I think the real world problem that can't be fixed by a changing directors duties is the fact that companies are having a look at their cash flows and figuring out that they are running out of cash at some point. And you know, that is a problem that can't be fixed by having relief from any of their other duties. So what directors are doing is, they need to actually come up with a plan for how they can string out the cash flow they've got as long as possible to buy themselves time for this pandemic to be over cross fingers, or for their business to be restructured in some other way. or one of the other options that a lot of companies are looking at is how do I actually put my business into care and maintenance until this is all over? You know, just like a mind would do. If the iron ore price crashes? You know, a miner would go into care and maintenance, wait for the iron ore price to come up again and then start back up. After that.

Helga Svendsen 3:50

I've heard talk recently about this concept of hibernation and hibernation for businesses. Is that the sort of thing you're referring to when you're thinking about putting organisations into care and maintenance?

Samantha Kinsey 4:01

Exactly, exactly. Cutting back on as many costs as possible with a view to just preserving the resources that companies have so that you've got something there that you can use to start your business up again, when we all come out of this.

Helga Svendsen 4:16

And again, I understand there might be some, I think there's been some additional announcements since this one around the directors duties and a range of other things that were announced in the same package. But since then, there's been the announcement about the job keeper support provided to organizations which might help them maintain that care and maintenance status.

Samantha Kinsey 4:36

Exactly. One of the things that we're speaking to directors about is really on top of getting a handle on your own cash flow, looking very critically at what government assistance is available, and to keep looking, because every other day, there's another package announced and the scope of potential relief is broader than it was, you know, Usually I would say that's a far fetched hope that the government will bail you out if your business is struggling, but that's not the sort of time we're in right now.

Helga Svendsen 5:09

Yeah, it certainly is a time like no other in so many ways, whether it's, you know, some of the health impacts or or some of the economic impacts, or it seems now the impacts on on directors. It's extraordinary when I first heard that this had been announced, if there's one thing that is drilled into the heads of directors do not trade whilst insolvent. So having these new laws around it is pretty amazing, an extraordinary move that no one would have predicted. I think previously.

Samantha Kinsey 5:40

Your comments are interesting because directors still do need to be very careful. So what is your duty to act in the best interest of the company requiring this situation? If companies can be avoiding incurring debts or any significant new expenditure, they should absolutely still be thinking about whether they can do that. in the usual way, because the best interests of the company are probably best served by having the smallest number of liabilities possible coming out of this. And if something can be avoided, unless it's going to enhance the value of the company's assets, or the company is missing some net positive way, we are finding most directors are looking at what they can defer until later or not do at all. Because the other thing to bear in mind about the insolvent trading relief is it doesn't apply if directors are acting dishonestly. And, you know, most respectable directors will think Well, I'm not a dishonest person, and that would be right about that. But if they are incurring, causing the company to incur liabilities that they think the company or know the company doesn't have the resources to discharge, you know, that may constitute dishonesty and they may still be liable for that.

Helga Svendsen 6:59

I assume certainly I had commented this earlier that I certainly don't envy the judges at the end of this having to unpick some of these and some of the intentions. I mean, it's always hard to do, but maybe even harder in these instances to really unpick the intentions of directors and what was honest and what wasn't honest, and what was in the best interest of the company and what wasn't in the best interests of the company, and so on.

Samantha Kinsey 7:21

What I'm saying to directors about that is, I think the courts will give you a lot of latitude, if you're diligently trying to do your best and you've got a plan. And you're pursuing that in a diligent way. I don't think the court is going to criticize you too harshly for not seeing this coming. And for taking some time to take stock and assess the situation before you start making big changes to your business. But something that would be good to be doing for all boards, I think with a lens to what might happen afterwards. It's just keeping a very good Detailed paper trail of all decision making that is happening, all of the things that the board is thinking about keeping a record of what the plan is, and then regularly so at least weekly reassessing where you're at as against that plan. I think this is a period of time for a good paper trail of a really active directing of the company through this period of time.

Helga Svendsen 8:28

Excellent advice, I think directors to do probably not just now but often in other difficult circumstances as well. Excellent little gem of advice there. I just wanted to return you talked before for organisations about really carefully managing their cash flow. Now, of course, that's on both sides, like companies are often dealing with other companies that are also managing their cash flow. And often one of the things for companies is to pay their debts a little bit lighter, which of course is income for another organization. I'm just wondering what you're hearing about how those things can be balanced up for organisations in managing their cash flow in this really difficult time.

Samantha Kinsey 9:05

It's such a good question, because, I mean, we're hearing it on the news where tenants are just saying to the landlord, yeah, I'm just not paying my rent. And that's what they're saying. And where is the landlord going to get a new retail tenant from in this environment to replace them if they're not paying rent? It is something that is definitely happening out there in the market. The challenge with that is that everyone is as you say, they're all in it together. Everyone's cash flow is constrained, and everyone's looking to to spread what they've got as far as possible. The other thing that's interesting, that came in in one of the recent reforms is the government has actually made it more difficult to collect on debts. So statutory demands, for example, which is a tool often used when someone has a creditor who's not paying them and they think That creditor might be insolvent to use, usually what you can do is you can issue a statutory demand, if you've got a debt of say \$2,000. And if that amount isn't paid within 21 days, then the company is deemed to be insolvent and can be wound up. So often that's used to put pressure on companies that are not paying their debts as and when they fall due. But as part of the government package, they've changed the period of time at which debts have to be outstanding for that process to occur to six months from 21 days to six months, and from two grand up to 20 grand. So in terms of the ability of companies to collect on debts is difficult, and there's probably limits to what can be achieved I think realistically in the

current environment. So it probably means you know, for a lot of debts and are out there already. You might have to as a company, wait six months to realistically collect on that.

Helga Svendsen 10:58

Right. So in managing that cash flow are looking at the business overall. Obviously, it's not just thinking about expenses and what could be managed there. But there may be some of the revenue that you're expecting that may not be arising and there's not going to be much you can do about that.

Samantha Kinsey 11:12

Well, I think that's right in respect of existing debts, to the extent that you have customers who are procuring services going forward. There's obviously options there in terms of putting that customer on cash on delivery, or requiring payment up front before work is done. They are all things that are now being talked about a lot more than usual.

Helga Svendsen 11:34

Oh there was a lot of changes in all of this. So I did hear a colleague say the other day that and I'm not sure what the upside or what the better way of this this equation is, but that she thought that a result of the COVID-19 crisis may be that there will be more insolvencies and wind ups of companies at the end of it that there will be deaths. I'm not sure if that's a good thing or a bad thing. Obviously, we don't want them to. More dare to say that but there will be this real hump in organizations going to the wall from it. This gives obviously some directors a bit of relief around that. But in your dealings with organizations, what advice you're giving to them like we've heard some of them around managing the cash flow, restructuring going into that hibernation, if possible. What other advice have you got for directors of organizations in managing this as best they can.

Samantha Kinsey 12:24

Something to bear in mind about formal insolvency processes is that they're not always a liquidation and a shutting up shop. So what can be done through a voluntary administration process is if for example, you're a retail chain, you have four stores that are profitable, three that are not, and you've got some lease liabilities, for example, in respect of the three that are not and some other liabilities associated with those stores, that you actually want to shut down with a view to carrying on with a profitable part of your business. You can use administration processes to try to help you, right size, that business in a way that saves the good parts and cuts out the bad parts and allows you to continue trading at the end. So one of the things that I'm speaking to some directors about is really having a look at the processes that are available. I think a lot of directors are particularly directors who haven't experienced a period of distress before. They look at those sorts of processes

as being very much a last resort, something they never want to experience. But actually, if you're focused on your best interest duty, and thinking about what is in the best interest of the company, then you might be asking yourself, well actually, am I better off preserving the capital that I've got now? And rather than going into hibernation, all round actually thinking about what a formal administration process would look like? Why, and how that might be used to restructure the business in a way that is positive and puts it in a good position, post COVID- 19. That's something that I think a lot more directors are thinking about and should be thinking about as they continue trading on.

Helga Svendsen 14:21

Again, excellent advice about maybe some of the more constructive and positive way of getting through it rather than thinking it will just end up and going to the wall.

Samantha Kinsey 14:30

But I think how much insolvency activity we end up seeing will probably be a factor of how long this goes on for you. So my colleagues in China, my firm has a big Chinese component to it. They are all now going back to work and businesses in China. My colleagues there tell me now 70% BAU again. So what is it now it's now end of March. They have what six weeks ahead of us in terms of responding to these health crisis, and they're going back to work now, that's positive, it might be the case that there's a second wave and they all stop again, and everything's dismal. But at the moment, things are looking pretty positive in terms of China's potential to recover from this, at least what I hear anecdotally. So if we are all getting back to work, June, July, businesses are opening again, you know, in China in the shopping center that my office is located in in Shanghai, restaurants are open again, you know, in lovely normal activities are occurring again, if that's what we see here, perhaps we won't see the broad scale scope of insolvency activity that some are anticipating will happen.

Helga Svendsen 15:54

So you've talked us through some of the changes in relation to directors duties in relation to insolvency And also some of those changes in relation to dates and calling in debts. Is there anything else in these in this current update that directors should be aware of?

Samantha Kinsey 16:11

I think the critical thing for directors out of the current updates, really is to keep listening to the updates and keep reassessing the situation. As you know, many, many boards meet infrequently. And this is a time and directors receive reporting infrequently. And this is a time where actually board meetings, many, many companies will need to be occurring weekly, and sometimes even more frequently than that, as directors are constantly assessing the very dynamic situation. That's

another thing that I think is important for directors to bear in mind if they used to operating on a different schedule that these are extraordinary times and these sort of, you know, I describe it It's a bit of a wartime schedule a board activity that will be a lot more active than what they used to.

Helga Svendsen 17:06

This has been an incredibly useful conversation, I think for our listeners around what some of those changes might be. What are the main points you want people to take away from the conversation that we've had today?

Samantha Kinsey 17:17

I think the main points for directors, you know, a lot of directors are feeling quite down in the current situation. So, you know, one thing I would say to directors is, you're not alone. Everyone's in the same position dealing with the same challenges. And no one saw these coming, nor or they'd be expected to so I would say to all directors, don't give yourself too much of a hard time and be kind to yourself in these really difficult times. The other thing I would be saying to directors really I think is the key thing is just to be constantly vigilant around what's happening in your business, require the business to be keeping you absolutely up to date, as to everything that's happening on the cash flow front on the employee front, be vigilant about what the government is announcing in terms of packages that are available and have a plan and constantly reassess whether it's the right thing for your company and in the best interest of your company to keep pursuing that plan. And that's the best you can do and keep a good record as we were discussing earlier with everything you're doing. And you know, that's the best you can be doing in the current situation.

Helga Svendsen 18:30

Thank you so much for joining me a pretty short notice to give us this update. I imagine there might be some further updates to some of the laws in the future. So I'm hoping I might be able to call on you again to give the take on board communities, some of your pearls of wisdom about this.

Samantha Kinsey 18:45

My pleasure. I've heard some scuttlebutt about a few more that are in the winds but I'll stay mum on that. For the time being.

Helga Svendsen 18:54

Once we reading about them in the media. I'll be back on to you and see if we can update the community. Thank you so much for your time today. It's been fabulous. Useful I'm sure people will get a lot out of our conversation today.

Samantha Kinsey 19:03

My pleasure.