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*Insolvent Trading Established from failure
To keep Books & Records*

Background

Section 588E of the Corporations Act 2001 provides that in respect to proceedings for recovery of property for the benefit of creditors of an insolvent Company that certain presumptions can be made ie;

Section 588E(4)(a) &(b) of the Act provides *“that where a Company has failed to keep financial records as required by Section 286(1)”* or where a Company *“has failed to retain financial records in relation to a period for the seven (7) years as required by Section 286(2)”*, it can be presumed to have been insolvent for the period.

Section 286 provides that a Company **must** keep written financial records that *“correctly record and explain its transactions and financial position and performance”* and *“would enable true and fair financial statements to be prepared and audited”* and *“must be retained for 7 years”*.

Recent Decision in Substance Technologies Pty Ltd (2019) NSWSC612

In this matter the Liquidator had brought proceedings against the Directors for Insolvent Trading and Justice Rees considered the operation of Section 588E(4) wherein he held the underlying principal of Section 286 was not only to retain the financial records **but** also those that supported the preparation of the financial statements for the required 7 year period.

In this instance Justice Rees in handing down Judgement in favour of the Liquidator noted some of those contributing factors to the outcome as

- The Directors produced scant records
- The Directors had not lodged Tax Returns or BAS Statements for the prior 3 years
- The Directors had not been co-operative
- The Accountants did not hold any financial records for the final years of operation.

As always, if you or your clients need advice on any business turnaround or insolvency matters do not hesitate to contact us.

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