Briefs

INSOLVENCY

Insuring wage robbers

CHRISTOPHER SYMES examines protections for employees' wages and entitlements.

Since company law began, many employees have been left without their wages and other entitlements when their employer companies become insolvent. These employees are unable to demand that they be paid before they perform their services and they are unable to spread their risk. This makes them vulnerable. It is said that many employees receive nothing or paltry amounts like 25 cents in the dollar.[1] The International Labour Organisation (ILO) by a convention in 1949 endorsed the protection of wages in insolvency. In 1992, the ILO updated the Convention so that national laws would provide high ranking for employees' claims (priorities) and provide for the establishment of a guarantee institution to protect employees' wages and other entitlements. In 1994, Australia ratified only the ranking portion of the convention. Australia does this by s.556 of the Corporations Law which provides for employees to be treated as a priority creditor to be paid after secured creditors (for example, banks) and before unsecured creditors (like trade creditors). Recently, in Federal Parliament, this Australian situation was described as a social disaster where employees were robbed of the money they were legally owed.

Typical of much of insolvency law, there are no figures available on the total number of corporate employers that cease while owing funds to their employees and there is currently no way of knowing the amounts owing to employees as a result of this unfortunate situation. However, anecdotal evidence suggests that it is employee entitlements that are most at risk, more so than unpaid wages that amount to usually only a week or two. For example, the Woodlawn mine left 160 workers being owed approximately $6m, the Cobar mine left 270 workers with approximately $6m owing and Sizzler restaurants left 2000 workers with approximately $2m owing (no doubt because of casual and junior employees). The most recent high profile insolvency example is the voluntary administration of Patrick Stevedores whose 1400 employees were owed approximately $19m in current employee entitlements and $14.5m in non-current entitlements.[2]

The solution that has been most recently suggested is contained in a Private Member's Bill put forward this year by Janice Crosio, Federal Member for Prospect (NSW). Her Employee Protection (Wage Guarantee) Bill is designed to require employers to take out insurance to protect the entitlements of their employees were the employer to become insolvent. The reason for this Member's intense interest is that in her electorate the Exicom company closed in 1996 with $17m owed to employees for wages and entitlements. The employees had been employed for up to 20 years as part of AWA (later Exicom) and most of them came from non-English speaking backgrounds and were factory floor workers.

The Crosio Bill would apply to all employers other than the Commonwealth, State, Territory and local governments and to very small companies which have a payroll of less than $7800. All other employers would be required to hold wage protection insurance. A failure to hold such insurance would result in a maximum penalty of 150 penalty units (currently $16,500). However, employees would still be protected even if their employer did not hold the insurance as the Insurance and Superannuation Commission (ISC) would be the nominal insurers, covering the employees of such offenders and the very small employers.

The Bill provides that information needs to be given by employers to employees about the insurance, insurers need to notify the ISC about policies that are issued, and the ISC is permitted to give information to employees. The Bill provides that the ISC administers the entire scheme including the collection of periodic returns, and the ISC may establish a bad risk cross-subsidisation scheme under which bad risks would be fairly apportioned between all approved insurers.

The criticisms of the Crosio Bill include the Bill's attempt to cover both individual and corporate employers. This duality adds to the complexity when, in reality, it is likely that most employees are left with unpaid wages from corporate employers not individuals. Another criticism has been the Bill's attempt to define 'wages and entitlements'. Section 556 already has certainty and is far reaching in its treatment of those payments commonly found in awards and contracts of employment. It would seem to be a better course to use a definition based on the existing provision.

The Government has questioned the constitutional power to legislate for this Bill but surely the Corporations power would suffice as long as the Bill was reduced to apply to corporate employers only. The Bill also attempts to define insolvency and this is to its folly. Again, a working understanding already exists in the Corporations Law on the definition of insolvency as provided by s.95A. This Bill should not stray from the present legislative treatment and any social benefit in settling wages and entitlements at an earlier time is marginal.

Another criticism is the choice of using insurance over other guarantee institutions such as Funds. Insurance involves setting rates which are probably based on claims experience and will, therefore, initially be inaccurate. This could be unfair and give unequal treatment to some industries and smaller companies. Also the ISC is unlikely to be experienced in the issues that surround insolvent companies as it would be cast in an unfamiliar role.

Uncertainty also exists over whether the insurance scheme will treat excluded employees (that is, the directors and their relatives) in any different way as it is silent in this regard. Currently, s.556 treats them differently by placing a ceiling on their wages and other entitlements.

A wage guarantee insurance such as that in the Crosio Bill would be a most effective way of protecting employees' entitlements. The obvious advantages of the Crosio Bill are that the insurer has assets separate to the insolvent corporate

employer from which employees are paid. There is then no problem of tracing assets through an insolvent company nor delays in pursuing claims through an external administration, such as liquidation. Another benefit is that the insurance scheme uses existing administrative structures such as the ISC. However, it should be noted that there are different models of wage earners protection institutions. The Harmer Inquiry into insolvency in 1988[3] mooted that employers could pay into a Fund at the time of payment of tax, and that payouts to employees could be administered by the already appointed insolvency practitioner (such as the liquidation). In another paper, this author has suggested a fund to be paid by employers.[4] Administration of the fund could be undertaken by the ATO on a cost neutral basis because of the possibility of investment income received from the employer contributions. The levy that was suggested was an equal contribution across all industries and levied per employee. Perhaps a levy could be paid at the time of payment of the company's annual return to the Australian Securities and Investment Commission.

In many other countries these wage earner protection funds or other institutions are commonplace and have been successful in getting employees' entitlements met upon insolvency.

The Crosio Bill has not been supported by the Government and the Opposition has indicated it will want to make amendments. However, it is likely that the Bill could lapse if the Government calls an election. Should Australia have a Labor Government in the near future then there is a strong likelihood of similar legislation being enacted, as guarantee funds form part of the stated policy of both the ALP and ACTU.

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References

1. Holding, P., 'Who Bears the Risk?', (1995) *Law Institute Journal* 789.
2. These are based on the figures referred to by Brennan, McHugh, Gummow, Kirby and Hayne JJ in *Patrick Stevedore v MUA* 72 ALJR 783 at 889.
3. ALRC, 'General Insolvency Inquiry', Report No. 45, para. 723.
4. Symes, C.F., 'The Protection of Wages When Insolvency Strikes', (1997) 5 *Insol.LJ* 196.

INTERNATIONAL LAW

Embassies, asylum-seekers, international law and politics

MYINT ZAN reports and comments on a recent refugee incident in Malaysia.

A British Broadcasting Corporation (BBC) report of 11 April 1998 stated that several people, ostensibly from the Indonesian province of Aceh, had apparently entered the compounds of the Embassies or diplomatic missions of Brunei, France, Switzerland and the United States in Kuala Lumpur, Malaysia. The Indonesians (Achenese) did so with the intention of seeking asylum in those countries. However (at the time of writing), all of the embassies, with the exception of the United States, had expelled the would-be asylum-seekers and handed them over to the Malaysian authorities. It is expected (if it has not already occurred) that they will, in turn, be handed over to the Indonesian authorities. The United States Embassy (at the time of writing) has provided the Achenese refugees temporary protection inside the Embassy compound and is apparently in the process of considering the Indonesians' applications for asylum.

The same BBC news report also mentioned a separate incident in which 500 Indonesians had entered the compound of the United Nations High Commissioner for Refugees (UNHCR) Office in Kuala Lumpur. About 45 out of the 500 have been determined by the UNHCR to have refugee status. In the same broadcast, during an interview with Ms Sidney Jones of Asia Watch of New York, Jones alleged that the Malaysian authorities had sent back *all* of the Indonesians to Indonesia, *including those who have been determined by the UNHCR office in Kuala Lumpur as refugees*. The sending back of the UNHCR-recognised refugees, Jones claimed, violated the international legal principle of *non-refoulement*, which in effect prohibits the expulsion (*refouler*) of those refugees to the frontiers or territories of those countries in which their lives or freedoms are endangered.

A few (selected) international legal and political issues can be extrapolated from the above events and statements.

Are the premises of an embassy a 'suitable' or 'proper' place for asylum or refugee seekers to seek protection? A pragmatic or functional answer would be only if the asylum-seekers are very desperate and have really genuine fears of persecution. In most cases embassies concerned would be very wary of letting the would-be asylum-seekers stay in their compound even for a short period as the actions of the Bruneian, French and Swiss diplomatic authorities in Kuala Lumpur shows.

Right of safe passage

In international law is there a 'right of safe passage' from the embassy premises through the host country's territory to the territory of the asylum-granting state?

In 1950, in a case between Colombia and Peru known as the *Asylum* case,[1] the International Court of Justice (ICJ) stated in effect that as far as South American countries are concerned there is no regional customary international law right wherein a foreign Embassy (in the *Asylum* case Colombia) in a host state (Peru) can demand from the host state that a national of the host state (a Peruvian) who had taken refuge in the foreign Embassy (Colombia) be accorded safe passage through Peruvian territory to Colombia. Lack of consistent and uniform state practice (regional custom) on the subject among South American countries at that time was the major reason for the Court's decision.

Several years after the *Asylum* case was decided, and in the aftermath of the failed Hungarian uprising against Communist and Soviet rule in October 1956, the Hungarian resistance leader Imre Nagy sought and was granted asylum in the Embassy compound of Yugoslavia. Nagy and the Yugoslav Embassy further sought and were promised by the Soviets and Soviet-installed Hungarian puppet government, Nagy's 'safe passage' through Hungary to Yugoslavia. As soon as Nagy left the compound of the Yugoslav Embassy, the Soviets arrested him and later tried and executed him.[2]