

new employee entitlements

in business insolvency

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In the event of an employer's insolvency, employees may have accrued rights and entitlements such as unpaid wages and accrued long service leave. Under the section, the employee's right to claim against an employer for a debt due and unpaid is converted into a right to prove for the debt in a winding up. However, despite employees having a statutory priority to recoup amounts owing ahead of other classes of creditors, in a large number of cases there are not enough funds remaining to pay the employees' debts in full and the employee ends up losing out. There have been some extremely high profile cases recently which have led to the Government enacting new legislation and setting up a new support scheme designed to partially underwrite unpaid employee entitlements. The most publicised case was the collapse of National Textiles, headed by the brother of Prime Minister Howard.

employee entitlements support scheme

With effect from 1 January 2000, the Commonwealth Government has established an *Employee Entitlements Support Scheme* ("The Scheme") to provide a national safety net for the purposes of protecting employees' entitlements whose employment has been terminated as a result of an employer's insolvency.

It is intended that the Scheme be funded by the Commonwealth Government and participating States and Territories. At this point, the Commonwealth is providing its 50% share of the funding which is sourced from general taxation revenue. However no State has yet entered into a Memorandum of Understanding¹ to participate in the Scheme and contribute its 50% funding for former employees whose place of

employment was in its jurisdiction. As a result employees are presently only receiving 50% of their "safety net" entitlements under the Scheme.

Eligible Claimants under the Scheme

An eligible claimant is a person:

- who was lawfully employed (ie. was not a contractor) in Australia ; and
- who is not an "excluded employee" (ie. an employee who was a shareholder or executive director of the former employer, a relative of such a director, or a relative of the former employer); and
- whose employment has been terminated by his/her employer or insolvency practitioner in lieu of their employer on or since 1 January 2000 because the employer has become insolvent or has otherwise been under external administration; and
- who is owed certain employee entitlements by the former employer.

An employee's estate is also eligible to receive payments under the Scheme.

Payments for which employees are eligible

Employees will be eligible for a maximum of 29 weeks pay for unpaid entitlements as follows:-

- Up to 4 weeks unpaid wages;
- Up to 4 weeks annual leave accrued in the 12 months prior to the date of termination but not taken;
- Up to 5 weeks pay in lieu of notice;
- Up to 4 weeks redundancy pay; and
- Up to 12 weeks long service leave.

There will be a \$20,000.00 cap on the amount any individual may receive from the Scheme.²

Procedure for application

An employee who satisfies the relevant criteria will be required to complete and lodge an application form with the Department of Employment, Workplace Relations and Small Business ("DEWRSB")³.

Employees are entitled to apply for payment at any time within 12 months after their employer becomes insolvent.

corporations law amendment (employee entitlements) act 2000

The purpose of this Act (which came into force on 30 June 2000) is to introduce amendments to the Corporations Law which increase the protection for employees by recognising that one of the primary responsibilities of employers is that they must meet their employees' entitlements in circumstances where they become insolvent.

The protection for employee entitlements is achieved in 2 ways:

1. by extending the existing duty to prevent insolvent trading by directors; and
2. by introducing a new criminal offence which targets agreements and transactions entered into for the purpose of avoiding payment of employee entitlements and requires court-ordered payment of compensation by those involved.

Extension of existing duty on directors not to engage in insolvent trading

Prior to these amendments the *Corporations Law* already contained a prohibition on insolvent trading by directors pursuant to Section 588G:

This section applies if:

- (a) a person is a director of a company at the time when the company incurs a debt; and
- (b) the company is insolvent at that time, or becomes insolvent by incurring that debt, or by incurring at that time debts including that debt; and
- (c) at that time, there are reasonable grounds for suspecting that the company is insolvent, or would so become insolvent.

However, prior to these amendments Section 588G did not encompass situations where a company confers a financial benefit on another party rather than incurring a debt. However, the amendment to Section 588G(1A) addresses this issue by deeming that a company incurs a debt when it enters into an uncommercial transaction such as conferring a financial benefit on another party without market value consideration.

Further, directors who breach the duty knowingly, intentionally or recklessly may be prosecuted under existing provisions of the *Corporations Law*. The relevant duty is also part of the civil penalty regime of the

Corporations Law, under which directors may be subject to a court order to pay compensation for the breach. This compensation would be available to be distributed amongst all company creditors on liquidation, including its employees.

Protection of employee entitlements from agreements and transactions entered into with the intention of defeating those entitlements

A new Part 5.8A has been introduced into the *Corporations Law* to protect employee entitlements from agreements and transactions that are entered into with the intention of defeating the recovery of those entitlements.

Whilst a breach of the new offence provision would need to be proved beyond reasonable doubt in order for a person to be convicted and fined and/or sentenced, it would only be necessary for a court to be satisfied of a breach of the offence provision on the balance of probabilities for it to make an order that the person pay some or all of the outstanding employee entitlements of the insolvent employer.⁴

conclusion

Australian insolvency legislation has provided employees with increasing levels of protection. But from a wider policy perspective, the level of the safety net is still quite low given the potential costs to business of funding

such a broad-based scheme. Certainly the Labor Opposition was of the view that the reforms did not go far enough to protect employee rights, but in the end Labor agreed to pass the legislation. The introduction of the *Employee Entitlements Support Scheme* and the amendments to the *Corporations Law* attempts to achieve the requisite balance between competing policy objectives. On the one hand there is a need to provide a solid safety net for employees and to discourage the misuse of company funds by directors, and on the other hand there is the need to design a scheme that does not hinder commercial activity or impose a high cost burden on business through the direct imposition of insurance-type premiums.

NOTES

- 1 The Northern Territory has agreed to participate in the Scheme, but it has not entered into a Memorandum of Understanding.
- 2 The Hon Peter Reith MP 'Federal Government Progresses Safety Net for Workers whose Employers are Insolvent', Parliament House Memorandum, 9 April 2000
- 3 These can be obtained by contacting the hotline on 1300 135 040.
- 4 Corporations Law Amendment (Employee Entitlements) Bill 2000

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