



SMITH HANCOCK

INSOLVENCY NEWSLETTER

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Director's Liability under Workers Compensation Legislation

The *Workers' Compensation Act, 1987* (NSW) contains a number of provisions relating to personal liability of directors in the event the corporation is deregistered, wound up or unable to pay its debts. The three (3) circumstances in which a director may be personally liable are summarised below:

- Where injured workers' of an employer are paid compensation by the Workcover Authority of NSW ("the Authority") in the event the employer is uninsured or where the employer is not known. In this instance, the employer (or its directors) could be liable for reimbursing the Authority for the amount paid (Section 145A).
- Where an employer fails to obtain or maintain a policy of insurance in respect to any period required by legislation, the Authority may recover from the employer (or its directors) a sum equal to up to twice the amount of the premium that would have been payable on the issue of the policy of insurance to the employer in respect to that period. (Section 156B).
- Where the employer evades payment of a correct premium by providing false or misleading information to the insurer. In this instance, the Authority may order the employer to supply relevant records or information so that the correct premium can be calculated by the insurer. The Authority may also estimate the premium due in the event that insufficient information is provided by the employer and/or insufficient records are maintained to determine the wages paid in calculating the correct premium due. (Section 175A)

The Authority's recovery power in this instance is similar to Section 156B noted above, in that up to twice the amount of the premium plus a late payment fee may be recovered from the employer (or its directors).

There are exclusions available if it could be established

that the person was not a "culpable director" at the relevant time the corporation contravened any of the above provisions.

As a result, it is important that your clients are maintaining and retaining sufficient books and records to verify wages paid by an employer during any particular Workers' Compensation Policy period. It is also important that adequate Workers' Compensation Insurance is in place at any point in time the company is trading and employing staff (including working directors).

The fact that a company has been wound up/deregistered will not protect a director from personal liability for the company's workers' compensation liabilities.

Employer Jailed for Failing to Withhold Tax

On 3 July 2006, a Queensland employer was sentenced to 3 - years jail by the District Court in Cairns, QLD for failing to withhold more than \$600,000 in tax from the wages of 44 workers.

Mr John Voyka was found guilty on five (5) counts of defrauding the Commonwealth. Despite having been notified by the Australian Taxation Office in July 1995 that the workers were employees rather than subcontractors and that tax must be withheld and remitted to the Taxation Office, Mr Voyka made cash-in-hand payments to 44 employees between September 1995 and June 2000.

A joint investigation by the Australian Federal Police, Centrelink and Immigration in 1999 revealed his failure to comply with this direction. Mr Voyka also breached Workers Compensation, Superannuation and Centrelink requirements.

The Tax Commissioner, Mr Michael D'Ascenzo said that the Tax Office will examine PAYG Withholding, Superannuation and Fringe Benefit Tax relating to more than 4,000 employers during the current financial year to assist them in meeting their obligations. Source: ATO Media Release Nat 2006/22.

Corporate Insolvency Reform - Further Developments

Towards the end of 2005, the Federal Government announced a series of reforms to improve the operation of Australia's Insolvency Laws.

Part of these reforms included the establishment of the Assetless Administration Fund ("AA Fund") and the ASIC Enforcement Program targeting misconduct by officeholders of assetless companies. ASIC has recently launched Stage 2 of the AA Fund and complimentary enforcement program.

The AA Fund finances primarily investigations and reports by Liquidators into the failure of companies with few or no assets, when it appears to ASIC that they may be able to take enforcement action as a result of the Liquidator's investigation and report. A particular focus of the AA Fund is to curb fraudulent phoenix activity.

Stage 1 focused on funding Liquidators to investigate and report when director disqualification proceedings (banning proceedings) may have been appropriate.

Stage 2 extends funding from the AA Fund to finance liquidators to investigate and prepare reports when Court proceedings for breaches of the Corporations Act 2001 ("the Act") may be warranted.

As well as continuing to fund potential director banning matters, the ASIC Stage 2 guide covers a much broader range of other matters including:

- Breaches of director duties (Section 180-184). Of particular interest are breaches related to phoenix activity.
- Continuing to take part in the management of a company whilst disqualified (Section 206A).
- Failure by a director to take reasonable steps to ensure that the company maintains adequate books and records (Pts 2M.2, 2M.3 and Section 344).
- Unauthorised use of director's powers following the winding up of a company (Section 471A).
- Insolvent Trading (Section 588G).
- Fraud, misrepresentation or theft of property (Section 590), and
- Entering into Agreements or Transactions to avoid employee entitlements (Section 596AB).

The Federal Government announced in the May 2006 Budget that unspent monies of \$1 million from the AA Fund 2005/2006 allocation will be carried over to the 2006/2007 financial year. This equates to approximately \$4 million being available for funding during 2006/2007.

The AA Fund will enable liquidators to further investigate the conduct of companies where it appears the prosecution of delinquent directors is warranted.

Smith Hancock has the experience and resources to investigate and resolve most financial problems your clients may encounter.

If any of your clients are experiencing difficulty please do not hesitate to contact us. The initial consultation would be without cost or obligation to your client.

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