



SMITH HANCOCK

# INSOLVENCY NEWSLETTER

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## Payment Agreements with the Australian Taxation Office ("ATO")

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Section 222ALA of the Income Tax Assessment Act 1936 ("ITAA 1936") provides that the Commissioner of Taxation may make a written agreement with a debtor to pay specified amounts on specified days for the purpose of discharging a liability under a remittance provision or a liability to pay an estimate.

The ATO's "Receivables Policy" (which can be found on the ATO legal website at <http://law.ato.gov.au>) provides that it would be inappropriate for the ATO to enter into an agreement where available information raises some doubt about the debtor's ability to meet specified payments. If doubt arises, the ATO may request that the debtor arrange for a registered insolvency practitioner to provide a statement verifying the debtor's solvency.

The Receivables Policy also sets out a number of matters that the Commissioner will take into consideration when deciding whether to accept payments by installments. We have listed below some of these matters:

- (i) The information provided by the debtor and other relevant information that may be held (or obtained) by the Commissioner;
- (ii) The circumstances that led to the inability to pay and the effect of requiring immediate payment;
- (iii) The current financial position and other current payment obligations and actions taken by the debtor to rearrange finances or borrow to meet the debt;
- (iv) Arrangements made with other creditors (arm's length or otherwise) to pay debts;
- (v) Compliance with other taxation obligations or commitments (for example, whether lodgments are up to date) and the history of the debtor's prior dealings with the ATO; and
- (vi) Whether there are alternative economic

collection options that may see payment in a shorter time frame (for example, the use of 'garnishee' provisions).

Advisors to corporate debtors contemplating entering into an arrangement with the ATO pursuant to the provisions of 222ALA of the ITAA 1936 should be aware of the personal liability consequences for directors of non compliance. Section 222AQA(2) of the ITAA 1936 states that:

*"If the company contravenes the agreement by failing to pay a specified amount on or before the specified day, or by contravening a special condition, each person who was a director of the company at any time during the period beginning on the day when the agreement was made and ending on the day of the contravention is liable to pay to the Commissioner, by way of penalty, an amount equal to the balance payable under the agreement."*

The ATO's Receivables Policy provides that the Commissioner will pursue recovery action against any directors of debtor companies who become liable to pay a penalty as a result of the breach of an agreement by the debtor company. However, the Commissioner will consider that action in light of any relevant documentation and evidence provided by a director as a defence.

If your client is contemplating entering into a Payment Arrangement with the ATO, Smith Hancock can provide

- (i) Advice concerning your client's options which may include a formal insolvency appointment; or
- (ii) A report regarding your client's solvency.

## Timing consequences for a distribution to shareholders by a liquidator

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Section 104-25(1) of the Income Tax Assessment Act 1997 ("ITAA 1997") provides that a CGT Event C2 ("Event C2") happens if ownership of an intangible CGT asset ends by the asset being redeemed or cancelled; being released, discharged or satisfied; expiring; or being abandoned, surrendered or forfeited.

Event C2 may be triggered upon a liquidation of a company and as a result, a capital gain or loss may arise.

Taxation Determination 2000/7 provides that a CGT event happens for the purposes of Parts 3-1 (Capital Gains and Losses: General Topics) and 3.3 (Capital Gains and Losses: Special Topics) of the ITAA 1997 when the company is deregistered in accordance with the Corporations Act 2001 ("CA").

In a members' voluntary winding up, the company is deregistered either 3 months after the liquidator lodges with the Australian Securities & Investments Commission ("ASIC") a return of the holding of the final meeting or a date specified by the Court.

As a result, generally the disposal of shares will occur three months after the liquidator lodges with ASIC a return of the final meeting. Therefore, if a final meeting takes place on 1 April 2006, the company will be deregistered on 1 July 2006 (assuming that the liquidator lodges a return of the final meeting on 1 April 2006) and the capital gain or loss will fall into the shareholder's 2007 Income Tax Return (assuming the shareholder has a financial year ending 30 June).

It may be advantageous to some shareholders to delay finalisation of the company's winding up to the last 3 months of its financial year, so that the tax liability arising from the members' voluntary liquidation is deferred to the next financial year.

Our specialist practice areas include formal appointments incorporating members' voluntary liquidations.

## Liabilities of Directors of a Corporate Trustee - Update

The Senate has passed legislation that clarifies the extent of potential personal liability faced by directors of corporate trustees.

The Corporations Amendment Bill (No 1) 2005 repeals Section 197 of the Corporations Act 2001, replacing it with a new section that limits liability.

The change became necessary after the decision in *Hanel & Anor v O'Neill* (2004) 22 ACLC 274, in which the South Australian Supreme Court ruled that directors of corporate trustees could be personally liable in any case where there are insufficient assets to discharge the liabilities of the trust.

The new Section 197 makes trustee corporations and their directors liable to trust creditors where the trustee corporation is not entitled to be fully indemnified out of trust assets solely because of:

- A breach of trust by the corporation;
- The corporation acting outside the scope of its powers as trustee, or
- A term of the trust denying, or limiting, the corporation's right to be indemnified against the liability.

Parliamentary secretary to the Treasurer, Mr Chris Pearce said it was important to clarify the extent of personal liability faced by directors.

*"As a result of Hanel, these directors were effectively treated as guarantors of any liability entered into on behalf of a trust", Mr Pearce said. "This was never the intention of the relevant provision.*

*The Bill will improve certainty for the directors of all corporate trustees, from large superannuation trusts through to trading trusts running a small business."*

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