



SMITH HANCOCK

INSOLVENCY NEWSLETTER

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“Garnishee Notices” issued by the Australian Taxation Office.

The Commissioner of Taxation has a number of options to collect outstanding taxation debts, including the issue of demand letters, Director Penalty Notices and entering into a repayment plan with the debtor. The ultimate enforcement action by the Commissioner against a corporate debtor is the commencement of winding up proceedings that may lead to the appointment of an Official Liquidator.

Another debt collection strategy being used more frequently these days is the issuing of a Notice pursuant to section 260-5 of Schedule 1 of the Taxation Administration Act 1953 to any entity (including a person) owing money to the taxpayer to pay that money to the Commissioner (also known as a “garnishee notice”).

A garnishee notice may be issued by the Commissioner for any debts owed to the Australian Taxation Office, including penalties, etc.

The effect of the Commissioner serving a garnishee notice is that it creates a statutory fixed charge in favour of the Commissioner over the moneys that are payable by the entity to the taxpayer. The charge does not require registration with the Australian Securities & Investments Commission and if served prior to the appointment of an Administrator or Liquidator, is generally not void against that appointment.

Lets consider the following example:

- ABC Pty. Limited (“ABC”) is a debtor of the Commissioner;
- Bank Limited holds a registered fixed and floating charge over all the assets and undertakings of ABC;
- The directors of ABC have personally guaranteed the repayment of ABC’s debt to the Bank;
- As a result of ABC’s poor compliance with its taxation obligations, the Commissioner issues garnishee notices to several of ABC’s largest debtors.

Whilst the issuing of the garnishee notice does not provide the Commissioner with an absolute priority, it

may in the above example if the Bank’s charge over debtors is a floating charge. That is, the Commissioner will be entitled to the debtors before the Bank!

The directors in the above example may become somewhat nervous if ABC does not have the ability to discharge the debt owed to the Bank and the Bank subsequently seeks to enforce the personal guarantees provided by the directors.

Invariably, following the serving of a garnishee notice by the Commissioner, the directors only then seek the assistance of their professional advisors.

Clearly, it is important for directors of companies with outstanding debts owed to the Commissioner to determine if the company is in a position to discharge its debts as and when they fall due.

Whilst the issuing of Director Penalty Notices by the Commissioner and failure to comply with certain Instalment Arrangements with the Commissioner may result in personal liability of directors, directors that have provided a financier with security should promptly consider the company’s position if the company begins to fall behind with taxation obligations.

In too many cases, the partners of Smith Hancock have met with directors for the first time only after the Commissioner has commenced enforcement action. Encourage your clients to seek prompt advice if they fall behind in their obligation to the Australian Taxation Office.

Corporate Insolvency Reform – An Update

In 2006 the Federal Government released draft legislation aimed at improving Australia’s insolvency laws. The draft legislation includes the following:

- Extending the timeframes for convening meetings in a Voluntary Administration;
- Deeds of Company Arrangements must abide by the priorities set out in the Corporations Act 2001 unless a majority in value and number of the affected creditors agree to the changes;
- Allowing electronic communication of notices;

- If a company changes its name within six months of an Administration, the former name is to be disclosed;
- If the Chairman chooses not to exercise his or her casting vote then the resolution being voted upon will be lost. Furthermore the Chairman's reasons for exercising a casting vote (or choosing not to exercising a casting vote) must be recorded in the minutes;
- Allowing creditors to nominate an alternative liquidator at the proposal meeting of creditors in a voluntary administration;
- A "Statement of Independence" is to be provided to creditors when giving notice of the first meeting in an Administration;
- The Companies Auditors and Liquidators Disciplinary Board to be given greater powers and flexibility.

In a recent article written by the Honorable Chris Pearce MP, Parliamentary Secretary to the Treasurer, it is envisaged that the legislation will be introduced in the Winter sittings in 2007 and enacted later this year. The legislation will commence by proclamation with a suitable date to be considered.

ASIC Prosecutions – An Update

You may recall from a previous newsletter that the Federal Government introduced the Assetless Administration Fund ("AAF"), which finances unfunded liquidators to provide reports that may lead to director bannings or prepare reports when Court proceedings for breaches of the Corporations Act 2001 ("the Act") may be warranted.

The Australian Securities & Investments Commission ("ASIC") which administers the AAF will receive \$23 million over four years to fund the above matters.

Since the commencement of the AAF, 30 directors have been banned for misconduct associated with company failures and phoenix activities. To date ASIC has also approved 10 applications for funding for reports on possible breaches of the Act, with an average funding amount dedicated to the liquidator of \$72,500.

Notwithstanding the introduction of the AAF, ASIC announced on the 16 April 2007 that over the previous three months 144 company officers have been prosecuted in relation to some 279 contraventions of the Act.

Services Offered by Smith Hancock

Smith Hancock is a specialist Chartered Accounting practice, focusing on corporate reconstruction and insolvency.

In addition to the traditional formal insolvency appointments such as Voluntary Administrations, Receiverships and Liquidations, we undertake cost cutting reviews, business reconstruction advice, investigating accountants reports, partnership/shareholder disputes, plus many other related services.

Please telephone or email us if you have a matter in which you consider we may be able to assist.

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