



SMITH HANCOCK

INSOLVENCY NEWSLETTER

November 2006

Employee Entitlement Protections Boosted

On 22 August 2006, the Minister for Employment and Workplace Relations, Mr Kevin Andrews, announced a further enhancement to the General Employee Entitlements and Redundancy Scheme ("GEERS").

GEERS was introduced by the Federal Government to assist those employees who have lost their jobs as a result of their employer's insolvency or bankruptcy, and the assets of their former employer are insufficient to meet employee entitlements.

The recent enhancement announced by the Minister will see unpaid redundancy pay available under GEERS being doubled from eight (8) weeks to a maximum of sixteen (16) weeks.

Employees may be eligible for GEERS assistance if:

- A liquidator or trustee in bankruptcy has been appointed to their former employer.
- They have outstanding employee entitlements owed by their former employer.
- Their employment:
 - was terminated by an Insolvency Practitioner, for example an Administrator or Receiver and Manager; or
 - They resigned following the appointment of an Insolvency Practitioner; or
 - They resigned or their employment was terminated within six (6) months before the appointment of an Insolvency Practitioner.

Generally, claimants are ineligible to receive a GEERS advance if:

- They were subcontractors or contractors, rather than employees.
- Their former employer is continuing to trade under the control of an Administrator, a Receiver and Manager or the employer is subject to a Deed of Company Arrangement, a Personal Insolvency Arrangement or Debt Agreement.

- They lodged their claim more than twelve (12) months after their employment was terminated or the date on which their former employer became bankrupt or entered into liquidation, whichever is the later.
- They were employed by a partnership and not all partners are subject to bankruptcy.
- The Insolvency Practitioner expects there will be funds available to pay Eligible Entitlements within 16 weeks of the date GEERS receives the claimant's form.
- The claim is for reimbursement payments, bonus payments or commissions which are paid less than quarterly or are dependent upon future sales.

Claimants may now be entitled to:

- Unpaid/Underpaid wages
- Unpaid Annual Leave
- Unpaid Long Service Leave
- Unpaid Pay In Lieu of Notice
- Unpaid Redundancy pay up to a maximum of 16 weeks.

Those employees who earn more than the GEERS maximum annual wage (\$98,200 for 2006/2007) at the date that their employment ceased will have their GEERS advance calculated as if they earned that limit. The maximum annual wage is indexed annually.

Employees who are directors or principals of the employer, or a relative of a director or principal may be entitled to receive up to a maximum of \$2,000 for unpaid wages and \$1,500 for unpaid leave entitlements. Unpaid superannuation contributions are not covered by GEERS.

Director's Penalty Notices: Details Obtained from ASIC Database

Under Sections 222AOB and 222AOC of the Income Tax Assessment Act 1936, company directors are liable

to pay an amount equal to the unpaid amount of the company's liability under a remittance provision if the company's liability remains unpaid after the due date.

The Commissioner of Taxation ("Commissioner") must give 14 days notice before recovering the unpaid amount of the company's tax liability. The Notice issued by the Commissioner is also commonly known as a Director Penalty Notice ("DPN").

A DPN is forwarded to the residential address of a director (as per the public records maintained by the Australian Securities & Investments Commission ("ASIC")). To avoid personal liability, a director must do one of four things within 14 days of the date of the DPN:

1. Discharge the debt;
2. Make an arrangement with the Commissioner to pay the debt;
3. Appoint a Voluntary Administrator; or
4. Appoint a Liquidator.

In a recent case the NSW Court of Appeal has unanimously held that the DPN's issued by the Commissioner, which contained the director's address obtained from ASIC's public database, satisfied the giving of notice requirements.

The respondent in this case was a director of a company, which had since been deregistered, which failed to pay certain amounts of PAYG tax. These monies were withheld from employees but not remitted to the Australian Taxation Office.

Three notices were sent by the Commissioner in relation to recovering the penalty arising from the unpaid PAYG tax. These notices were sent to the director's last known address obtained from a search of ASIC's database.

The earlier decision of the District Court held that merely obtaining the details of the director's address from ASIC's public database was insufficient for the purposes of s.222AOF (how notice may be given). The District Court found that the Commissioner was required to search the company's ASIC return or notice from where the director's address was extracted.

In its unanimous decision, the Court of Appeal concluded that the relative notices were properly given to the director by sending them by post to the address that appeared on the ASIC database.

Court ref: *DFC of T v Nercessian* [2006] NSWCA 268 (Mason P, Santow JA and McColl JA), 29 September 2006.

Footnote

This is a timely reminder that subject to S.205B(4) of the *Corporations Act, 2001* a company must lodge with ASIC notice of any change of the personal details of a director, alternate director or secretary within twenty-eight (28) days after the change.



SEASONS GREETINGS

As this will be our last Newsletter before the end of the calendar year the Partners and staff of Smith Hancock would like you to accept our best wishes for Christmas and for a happy, healthy and prosperous 2007.

If you would prefer to receive our newsletters by e-mail, please do one of two things:-

- (i) Send an e-mail message to shs@shs.com.au with the words "Newsletter" in the subject line, and provide your name and firm details in the message;
- (ii) return this page of the newsletter to us by facsimile on 9689 2888 after completing the following details

Name: _____

Firm: _____

E-mail: _____

On receipt of your reply, we will delete your name from the "hard copy" mail list, and send you future newsletters by e-mail.



SMITH HANCOCK

Level 4, 88 Phillip Street
Parramatta NSW 2150
Telephone 02 8844 8866
Facsimile 02 9689 2888
Email: shs@shs.com.au
Web: www.smithhancock.com.au



Liability limited by a Scheme
approved under Professional
Standards Legislation