



SMITH HANCOCK

# INSOLVENCY NEWSLETTER

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## Director Penalty Notices: New South Wales Court of Appeal Decision Favourable to the Tax Office

A company of which the tax payer was a director withheld amounts on account of tax from the salary entitlements of its employees but failed to remit those amounts to the Commissioner of Taxation ("the Commissioner"). The Commissioner subsequently gave notice by way of a Director Penalty Notice ("DPN") to the director of the company. The Commissioner was required to take this action at least fourteen (14) days before commencing proceedings against the director personally to recover the amount of the DPN (refer Section 222AOE of the *Income Tax Assessment Act 1936*).

By way of defence, the director stated that she had not received the DPN and therefore was not liable. In the judgment delivered on 27 October 2006 the District Court of New South Wales found on the balance of probabilities that the DPN had not been delivered and dismissed the Commissioner's claim.

The Commissioner appealed to the New South Wales Court of Appeal. In a judgment delivered on 10 December 2007, the Court of Appeal overturned the District Court's decision.

Before the Court of Appeal's decision, the Commissioner accepted that a DPN, sent to a director by ordinary prepaid post was "given" to the intended recipient at the time the DPN would have been delivered in the ordinary course of post and that the director had fourteen days after the date of delivery in the ordinary course of post to cause the company to comply with the DPN and achieve remission of the penalties.

The Commissioner now accepts the decision of the Court of Appeal that a DPN sent by post to the director's address (as found in the Australian Securities and Investments Commission ("ASIC") records) will be "given" to the intended recipient at the time the DPN is **posted**. Accordingly, where compliance with the DPN does not occur within fourteen (14) days after the DPN is **posted** to the

director, the Commissioner will regard penalties claimed in the DPN as being recoverable from that director.

Your clients must now, more than ever, strictly comply with the fourteen (14) day time period set out in a DPN to avoid personal liability for the outstanding debt (*DC of T v Meredith*).

It is also critical that the directors of a company who are at risk of receiving a DPN ensure that they receive mail sent to the address listed on the ASIC register. If they are not receiving the mail because they have moved, or the address details are not correct, then that may result in the DPN not being received by the director, and render the director liable for the full amount of the debt recorded in the DPN.

## Liquidators Rights in Family Law Property Proceedings

The right of a Liquidator in Family Law property proceedings is an area of uncertainty for many accountants and commercial lawyers. For example, many may not be aware that the *Family Law Act 1975 (Cth)* ("the FLA") gives the Family Court the power to set aside an instrument which is made to defeat an Order of the Family Court. This includes dispositions made by a spouse's bankruptcy trustee.

However, of more practical relevance to Liquidators is the recently introduced Part VIII A of the FLA.

The following article contributed by Mr John Weaver, Solicitor, Cumberland Frank Commercial & Litigation Lawyers, may be of interest to you and your clients.

### *Part VIII A of the Family Law Act*

*Part VIII A* was introduced in December 2004. The provision is fairly new and its application has not been subject to extensive judicial analysis.

Under s90AE of the FLA the Court is authorised to make orders in Family Law property proceedings under s79 which bind third parties, including Liquidators.

The provisions of *Part VIII A* were introduced to

apply to all creditors of the parties to the marriage, whether they are family, friends or financial institutions. For example, the Court may adjust the proportion of debt the husband or wife owes to a creditor, or that the liability for a debt belongs solely to either party.

However, these powers are circumscribed. The exercise of the power must be both reasonably necessary and appropriate. Further, the third party concerned must be accorded procedural fairness before such an order is made.

Most importantly, the Court must foresee that, at the time of making an order affecting the rights of a third party, the order will result in the debt concerned not being paid in full.

Above all, such an order must be "just and equitable".

In simple terms, *Part VIII A A* gives a Liquidator the right to intervene in Family Law property proceedings and recover assets of a marriage on behalf creditors.

### **Ibbott & Ibbott [2008]: A "win" for the Liquidator**

In the recent decision of *Ibbott & Ibbott & Anor [2008] FMCAFAM 38*, the Court made an order under Part VIII A A that the wife receive all the property of a marriage *after the payment of the parties various debts, particularly the debts owed to S Pty Ltd (emphasis added)*.

The husband and wife had been married for twenty (20) years. The husband operated a business, S Pty Limited, in which he was the sole director. S Pty Limited went into liquidation.

The Court accepted the evidence of the wife that the husband had wasted most of the money made by the business "...through his own profligacy and gambling..."

The wife commenced proceedings against her husband for a share of the proceeds of the sale of the family property, a motor vehicle and the household goods that were in her possession.

The Liquidator intervened in the proceedings and sought to recover \$191,033.00 from the husband and wife as a debt owed by both.

While the Court accepted the wife's evidence of a gross power imbalance, evidenced by incidents of family violence, FM Brown held that;

*"...if the order sought by the wife is made, the effect*

*will be that the company will not pay its...debt in full. I do not think that such an outcome would either be just or equitable..."*

Therefore, FM Brown made an order under Part VIII A A that the wife was entitled to all the assets of the marriage after the debts to S Pty Limited had been paid.

Arguably, a "win" for the Liquidator.

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## **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 2009.



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