

We welcome you to the spring edition of our newsletter, which will focus on the protection of employee entitlements in insolvency administrations.

We hope you find the following of interest. If you have any questions regarding the article then do not hesitate to contact us.

## Protecting Employee Entitlements

### 1. INTRODUCTION

The General Employees Entitlements and Redundancy Scheme ("GEERS"), administered by The Department of Employment and Workplace Relations ("DEWR"), was established by the Federal Government to protect the entitlements of employees made redundant due to insolvency effective from 12 September 2001. Improvements to the scheme were implemented on 1 November 2005 and then again on 1 November 2006, the effect of which was to improve access to GEERS, enhance the eligible entitlements available under the scheme and to introduce a number of operational changes.

Many stakeholders and most employees in the insolvent administrations under our control have little or no knowledge of GEERS and the benefits that are payable under the scheme. The purpose of this newsletter is to briefly summarise how the scheme operates, the eligibility requirements, eligible entitlements and the impact it is now having in insolvent administrations.

### 2. OPERATIONAL PROCEDURES

The administration of GEERS is designed to compliment the statutory role of Insolvency Practitioners by assisting employees, as priority creditors, to receive early payment of some of their outstanding entitlements.

In each of our administrations, we provide potential claimants with a Claim Form and Fact Sheet and encourage them to return the Form to our office for collation so they can be forwarded to DEWR.

DEWR will then review the information contained in the Forms and prepare a summary of the claims taking into account eligibility requirements. This summary is forwarded to the Insolvency Practitioner who is required to verify the validity of each employee's claim. Once the claims are settled, the required monies are advanced to the Insolvency Practitioner in order that the entitlements, net of tax, can be paid to the employees.

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### 3. ELIGIBLE EMPLOYEES

Employees are normally eligible to claim under GEERS if:

- they were an employee of a company to which a provisional liquidator or liquidator has been appointed, or
- they were an employee of a person who is bankrupt, or
- their employment was terminated due to the appointment of an Insolvency Practitioner defined to include provisional liquidator or liquidator, administrator or deed administrator, bankruptcy trustee, controller, including a receiver & manager (if the company subsequently goes into liquidation), and
- they are owed eligible entitlements by their employer, and
- they reside in Australia.

Employees may also be entitled to claim under GEERS if:

- they resigned following the appointment of an Insolvency Practitioner, or
- they resigned or their employment was terminated up to six months prior to the date of the appointment of an Insolvency Practitioner, or
- their employment was terminated before the appointment of an Insolvency Practitioner but they have been reinstated by a court or tribunal.

Persons/employees are not eligible to claim if:

- they are contractors, subcontractors or agents.
- they were employed by a partnership and not all of the partners are bankrupt.
- the Insolvency Practitioner expects that there will be monies available within 16 weeks of his or her appointment to pay the entitlements.

- their claim is received more than 12 months after either the termination of their employment or the date of the appointment of an Insolvency Practitioner, whichever is the later.

### 4. ELIGIBLE ENTITLEMENTS

The eligible entitlements that can be claimed by employees are those that are payable as a priority under Section 556 of the Corporations Act or provable under Division 1, Part VI of the Bankruptcy Act. They consist of the following;

- unpaid wages for the 3 month period prior to the appointment of an Insolvency Practitioner.
- unpaid annual leave.
- unpaid long service leave.
- unpaid pay in lieu of notice for amounts where the employment instrument provides for a minimum period of notice.
- unpaid redundancy pay up to a maximum of 16 weeks for claims that occur subsequent to 22 August 2006 otherwise the limit is 8 weeks.

These entitlements exclude superannuation, reimbursement payments, non-ongoing payments, bonus payments and/or non-ongoing or irregular commissions.

Employees who earn more than the GEERS specified maximum annual wage, will have their entitlements calculated as if they earned that wage. The maximum annual wage, which is indexed each year, is set at \$101,300 for the year ended 30 June 2008.

Employees who are excluded employees within the meaning of Section 556 of the Corporations Act, ie a director or relative of a director, cannot claim unpaid wages in excess of \$2,000 or annual leave or long service leave in excess of \$1,500.

## 5. SUPERANNUATION

As stated above, superannuation entitlements are excluded under GEERS. However pursuant to Section 556(1)(e) of the Corporations Act and Sections 109(1)(e), 109(1B) and 109(1C) of the Bankruptcy Act, superannuation or the Superannuation Guarantee Charge (payable to the Australian Taxation Office) is afforded a priority on distributions to creditors with such claims ranking equally with unpaid wages.

This will only benefit employees where there are sufficient monies available after costs to enable a dividend to be paid. Furthermore, in the case of the Bankruptcy Act, the amount of monies that can be paid in priority pursuant to Section 109(1)(e) is limited by statute.

## 6. THE IMPACT OF GEERS IN INSOLVENCIES

Insolvency Practitioners play a major role in the operation of GEERS. DEWR acknowledges that there may be points of tension for Insolvency Practitioners in carrying out this role particularly in circumstances where the employee records are inadequate and/or there are insufficient monies to meet the costs of administering and distributing the GEERS advance to employees. If there is a lack of funds, DEWR will pay an administration fee to the Insolvency Practitioner, however, this fee will not always cover the costs incurred.

More importantly, pursuant to Section 560 of the Corporations Act and Section 109(2) of the Bankruptcy Act, on making a payment to an Insolvency Practitioner, DEWR is entitled to the same right of priority under the respective Acts as the employees, as if the employees had not been paid. In simple terms, this means that when an Insolvency Practitioner declares and pays a dividend in his or her administration, DEWR stands in the shoes of the employees and is paid in priority to unsecured creditors.

As you will observe from the table on page 4, the amount budgeted by DEWR is in excess of \$86 million for this financial year, thus making DEWR one of the largest priority creditors in Australia. This is beginning to impact on insolvent administrations.

DEWR is currently trialing a pilot programme under which funding may be provided to Insolvency Practitioners to pursue causes of action which may result in more funds becoming available to creditors and particularly DEWR in its capacity as a priority creditor. The types of actions that may be funded include insolvent trading, unfair preferences payments and uncommercial loans.

DEWR is particularly interested in funding liquidators to investigate and ensure that receivers comply with their obligations in correctly apportioning proceeds from the sale of secured assets between the fixed and floating component of the charge under which they were appointed.

The relevance of this is that pursuant to Section 561 of the Corporations Act, priority employee claims rank in priority to the claim of the secured creditor in so far as it relates to the assets that are subject to the floating component of the charge. We understand that DEWR has had some success in funding claims of this nature.

DEWR also demands that its rights be protected in Deeds of Company Arrangement and Personal Insolvency Agreements. If the Deed or Agreement does not meet the requirements of DEWR, then claims or advances may be withheld until such time as appropriate changes to the Deed or Agreement have been made.

In our experience, DEWR in its capacity as a priority creditor, has not taken an active role in meetings convened by Insolvency Practitioners. This could very well change in the future.

## 7. THE COST OF GEERS

Presented hereunder is a table showing the amounts paid and to be paid under GEERS, amounts recovered together with the number of persons who have benefited from the scheme.

	2007-08	2006-07	2005-06	2004-05	2003-04	2002-03	2001-02
	\$,000	\$,000	\$,000	\$,000	\$,000	\$,000	\$,000
	Budgeted Estimate	Estimated Actual	Actual	Actual	Actual	Actual	Actual
GEERS Payments	86,487	85,446	49,243	66,700	60,307	63,124	44,950
No. of recipients	N/A	N/A	7,790	9,329	9,243	8,700	4,582
Total recoveries	N/A	N/A	26,015	12,054	5,191	Nil	673

Note 1: The figures for the year ended 30 June 2002 have been extracted from the Auditor General Performance Audit – Employee Entitlements Support Schemes Report.

Note 2: The figures for the 4 years ended 30 June 2006 have been extracted from the Annual Reports issued by DEWR.

Note 3: The Annual Report for the year ended 30 June 2007 has not yet been issued. The figures for the 2 years ended 30 June 2008 have been extracted from the DEWR Portfolio Budget Statements for the 2008 financial year.

Note 4: Recoveries are monies received by DEWR by way of dividend from insolvent administrations.

The only comment we make in relation to the table is the significant increase in payments that are expected in the 2007 and 2008 financial years. The explanation is that the changes to the scheme in 2005 and 2006 had the effect of increasing both the number of claimants and the amounts payable.

## 8. CONCLUSION

In the event that you require further information in relation to the operation of GEERS or should you require advice in relation to any insolvency related matter, whether it be corporate or personal, then do not hesitate to contact us.

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This newsletter is general in nature. It was not intended, nor was it possible, to summarise herein all the clauses of the Operational Arrangements issued by DEWR effective 1 November 2006. Consequently, the brevity of this newsletter could lead to misinterpretation. Those requiring further information on GEERS whether it be in relation to eligible claimants, eligible entitlements, or otherwise, should access the GEERS website at <http://www.workplace.gov.au/workplace/Programmes/EmployeeEntitlements/GEERSV2> or the OBP website at [www.obp.com.au](http://www.obp.com.au) which contains, under Creditor Info, a GEERS link. No responsibility can be accepted for those who act on the contents of this newsletter without first seeking advice from DEWR or O'Brien Palmer.

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