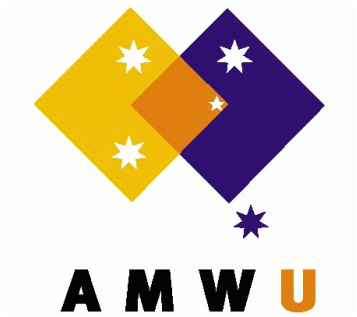
AUSTRALIAN MANUFACTURING WORKERS' UNION



Submission to the Inquiry into the Exposure Draft of the Corporations Amendment (Insolvency) Bill 2007 and related draft regulations

Parliamentary Joint Committee on Corporations and Financial Services

February 2007

Introduction

1. The Australian Manufacturing Workers' Union (AMWU) welcomes the opportunity to make a submission to the Inquiry of the Parliamentary Joint Committee (the Committee) into the "Exposure Draft of the Corporations Amendment (Insolvency) Bill 2007" and related draft regulations ("the draft bill").

2. The full name of the AMWU is the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union. The AMWU has a membership of approximately 130,000 members who work in every State and Territory of Australia. Our members are employed in the private and the public sectors, in blue collar and white collar positions, and in a diverse range of industries, vocations and locations.

3. The AMWU supports the submission of the Australian Council of Trade Unions (ACTU) to this Inquiry. Further to those submissions, we wish to address in particular the relationship of these amendments to the access employees will have to their entitlements as a result of the draft bill and, more particularly, the continued difficulties employees will have in accessing the entitlements they have earned despite these proposed amendments.

Evident deficiencies of the proposed amendments

4. The AMWU remains concerned that if the aim of these proposed amendments are to facilitate the protection of employee entitlements in administration and liquidation, then these amendments fail. Unfortunately, a core premise of the proposed amendments is deficient: that the Federal Government General Employee Entitlements and Redundancy Scheme (GEERS) is a satisfactorily functioning method by which employees are assured their entitlements. It is not. For the amendments proposed in the draft bill to be sufficient or effective in preserving and protecting employee entitlements, GEERS would need to act to bring forward and guarantee all of the employee entitlements at risk when an employer is placed into administration or liquidation.

5. The explanatory statement to the draft bill[1] outlines the particular difficulties of employees brought about by the administration or liquidation of their employer.[2]

[1] The Treasury, Corporations and Financial Services Division, *Explanatory Statement – Exposure Draft – Corporations Amendment (Insolvency) Bill 2007*, November 2006.

Employees' needs are immediate – their commitments and responsibilities do not allow them to wait for their income and entitlements to be distributed in accordance with a deed of company arrangement.[3] An employee does not have the capacity to write off their entire income as a bad debt.

6. The explanatory statement outlines that GEERS is a limited safety net – limited to terminated employees of insolvent employers. Therefore *some* of the types of employees who are creditors in a deed of company arrangement (DOCA) will have some of their immediate and pressing need met by GEERS. The proposed amendments then seek to ensure that the priorities of employees' entitlements in a DOCA are protected, and that they are unable to be amended except by majority vote. This should help ensure that the structure of a DOCA matches the requirements of GEERS for those eligible terminated employees. It does not, however, solve the problems of those employees who *are* subject to a DOCA but who have *no* access to GEERS.

7. If the proposed amendments rest upon the assumption that GEERS will operate to protect employees who are subject to a DOCA, then that is a false premise. If the proposed amendments assume that terminated employees eligible for GEERS are the only employees who have immediate need for their entitlements upon the administration of their employer, then that is a false premise. If the proposed amendments do not proceed on either of those assumptions, then these amendments are inherently insufficient to alleviate the disadvantage suffered by employees of companies in administration.

Why GEERS is inadequate

8. That employee entitlements are qualitatively different in character to the entitlements of non-employee creditors (secured or unsecured) is evidenced by the relationship between the employer and the employee. The employee is an involuntary creditor of the employer.[4] Reward for work is almost uniformly provided in arrears, when characterised as either wages/salary or leave. Security for that credit is also unavailable to the employee. The employee suffers from a structural disadvantage to other creditors simply due to the nature of their relationship with the employer, and it is this structural disadvantage which is

[2] Ibid at 3.13-3.14
[3] Ibid at 3.22
[4] Ibid at 3.22.

reflected in the priority given to employee entitlements over other creditors – further secured by the proposed draft bill.

9. However, the priority given to employees in recovering their entitlements does not resolve for employees the inherent difficulties they find when they face an employer in liquidation or administration. Those disadvantages relate primarily to the urgency of the need for recovering their wages and entitlements in a situation where an employee finds themselves not only without payment that was due to them but without their means of income in the immediate future – where a company is in liquidation they are immediately unemployed. An unemployed person not only needs timely payment, they need full payment of that to which they are entitled in order that they can meet the housing, food and family costs for which they are responsible. As the explanatory statement to the exposure draft notes, employees are unable to diversify risk and write off bad debts as other creditors might.[5]

10. For these reasons, a higher priority in recovering entitlements has been accompanied by the Federal Government's GEERS scheme since 2001. For the priority of employees entitlements in liquidation to be effective in alleviating the disadvantage that employees suffer, a scheme such as GEERS must also be effective to bring forward and to meet in full the entitlements of those employees. However, GEERS is insufficient for such a purpose. Consequently, the priority status of employees in liquidation and receivership is also ineffective in alleviating employees' disadvantage.

11. GEERS exists by virtue of policy of the Federal Government.[6] Its details, its administration, and the extent of the "guarantee" it represents for employee entitlements, are by whim of the executive. There is no legislative basis for the scheme – it is not subject to any of the scrutiny which the legislative process represents, it does not provide any of the certainty or security which an instrument subject to the parliamentary process would. It can be changed at the stroke of a pen of the relevant Minister – little assurance for an employee whose employer and employment have crumbled before them.

[5] Id.
[6] Department of Employment and Workplace Relations (DEWR), "General Employee Entitlements and Redundancy Scheme – Operational Arrangements, 1 November 2006", at p.4.

12. It is the submission of the AMWU that to the extent that the legislative scheme outlined in the draft bill depends for its effectiveness on GEERS, the embodiment of GEERS in an executive order is too tenuous an instrument upon which employees should depend. If employees are to be assured that their entitlements are protected and accessible through deed of company arrangements – accompanied by GEERS – then all of that assurance should be embodied in legislation, and not be subject only to the whim of the Minister.

13. The reliance of the draft bill upon the effective functioning of GEERS is misplaced for a further reason. The proposed amendments seek to restrict the ability to amend a deed of company arrangement (DOCA), to give greater certainty to employees that their priority will be protected without the need to initiate expensive court proceedings. Whilst that is laudable – though the union is concerned that the proposed legislation is unclear as to the precise way a "majority vote" is proposed to allow waiver of the priority - there is a larger flaw in the effectiveness of the priority of creditors.

14. As the explanatory statement notes,[7] approximately 40 per cent of external administrations take the form of a voluntary administration. These proposed amendments seek to ensure the priority of employee entitlements is to be the default position in the case of a voluntary administration. However, GEERS is not available in the case of voluntary administration[8] - despite GEERS being the only method currently available to ensure that the particular difficulties of employees are alleviated in the case of liquidation or administration. In 40 per cent of external administrations, employees will be left without their entitlements, awaiting the technical and time consuming administration process to take place.

15. Even in the remaining 60 per cent of external administrations, the limitations of GEERS render reliance upon it unsatisfactory for employees. The redundancy cap of GEERS is at sixteen weeks, irrespective of the employment contracts, awards or agreements of employees affected. Often industrial arrangements, such as redundancy entitlements will be the result of employees trading off wage rises, their hours of work and other entitlements for redundancy. GEERS is ignorant of any of those arrangements above sixteen weeks redundancy – regardless of the length of an employee's employment. Similarly, the maximum

[7] At 3.31
[8] DEWR, supra at note 6 at p.6.

annual wage upon which GEERS payments are calculated is also capped arbitrarily by the scheme – regardless of the industrial instrument under which an employee is engaged. GEERS also ignores the superannuation entitlements of employees.

16. It is only upon liquidation that GEERS is available. This is despite the difficulties of employees - which necessitate a scheme like GEERS existing – occurring when an employer is in administration or otherwise in receivership. Similarly, employment must cease before GEERS comes into operation – despite employees who continue to work during voluntary administration often being in as much need of their past unpaid wages and entitlements as terminated employees. GEERS is not a comprehensive system by which employees can be assured their entitlements will be met and that the employees can meet their own responsibilities.

Benefits of an alternative

17. There are more fundamental reasons why GEERS is an unsound basis upon which public policy, and these proposed amendments, should rely. The AMWU remains opposed to taxpayers assuming the risk for poorly managed business operations. Entitlements which have accrued to employees should have funds provided for that purpose, rather than being subsumed into a company's working capital. A means by which this can be achieved is though the use of an independent employee entitlement trust fund.

18. The use of a suitable trust fund scheme for employee entitlements protects those entitlements, leaving them available in full for employees upon administration or liquidation of their employer. It also avoids many of the problems that are said to arise from prioritising employees as creditors in preference to other unsecured creditors. The explanatory statement outlines some of the negative policy outcomes of this prioritisation: non-employee creditors face a higher risk, thus discouraging investment; employees still need to seek to place a company into liquidation rather than other administration in order to obtain their entitlements. This ends their ongoing employment and places other unsecured creditors at further risk of non-recovery, creditors who have already been deprioritised by the necessity to improve the priority of employees.

19. To reiterate, where employees are classed as unsecured involuntary creditors, the AMWU certainly supports assurance of their priority by the draft amendments proposed. Nonetheless, it is plain that some of the wider disadvantages concomitant on that policy are avoided through the use of a suitable employee entitlement trust fund scheme – effectively removing employees from the pool of creditors with debts to be met.

20. In addition, benefits accrue to employers through participation in such a scheme. For example, given that employees no longer need to be classed as creditors, employers gain preferred creditor status with financial institutions as their potential liabilities are diminished. As well, a trust fund scheme may become self-funding over time as the investment return of the trust can fund future entitlement commitments. These benefits are in addition to a diminished likelihood of an employer being liquidated, as employee-creditors will more likely vote to trade through administration because recovery of their entitlements will not be contingent on liquidation.

21. Further, employee entitlements can become portable across employers – provided a trust fund scheme is generalised across industry and the economy. This assists in preventing the phenomenon of “phoenix companies” impacting upon recovery of employee entitlements.

22. The employment relationship is not one wherein the employee chooses to grant credit to an employer. They earn an entitlement such as long service leave or annual leave or redundancy or notice of termination, but do not receive it until well after that entitlement is earned. The employment relationship forces creditor status upon an employee – but a trust fund can remove much of the complication brought about by including employees within creditor priorities. Ceasing to categorise accrued employee entitlements as credit diminishes risk to employees and to other unsecured creditors. The externalisation of that risk from company management is minimised. The disadvantages of the amendments proposed in this draft bill are diminished – to a great extent, the amendments would be an unutilised safety net. The union certainly does not oppose the safety net, we simply submit that methods are available to diminish its necessity.

23. Models for such trust schemes are available. The National Entitlements Security Trust (NEST) is one – a national industry trust fund, controlled by an independent

board of trustees, which guarantees full entitlements without a cap, provides for portability and is not funded by the taxpayer. The Australian Construction Industry Redundancy Trust (ACIRT) is another. It is the firm belief of the AMWU that this provides a more sound and sustainable basis for the protection of employee entitlements than mere priority for employee creditors with sometime support from GEERS.

Conclusions

24. The AMWU does not oppose the measure in the draft bill which seek to enhance the priority of employees in deed of company arrangements. It is our submission that this change unfortunately remains insufficient to alleviate the immediate and pressing needs of employees upon their employer becoming subject to a DOCA.

25. Recommendation 44 of the Corporations and Financial Services Joint Committee Report, *Corporate Insolvency, a Stocktake* implored the Government to explore measures such as insurance schemes and trust funds to assess their effectiveness in safeguarding employee entitlements. That recommendation remains unfulfilled. The AMWU continues to submit that a national trust fund scheme is an entirely effective means by which employee entitlements can be protected. Indeed, such a scheme would alleviate the need to involve employees as creditors in deed of company arrangements, in practice removing the need to deprioritise non-employee unsecured creditors.

26. However, until such mechanisms are explored, we support the proposed amendments to more securely prioritise employees in such deed of company arrangements. We maintain, however, these amendments are insufficient, and a wasted opportunity.

AMWU
2 March 2007