Employee entitlements and corporate insolvency and reconstruction

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1 Issues raised

The claims of employees of an insolvent, or potentially insolvent, corporation for outstanding wages, accrued annual leave, superannuation, redundancy payments and other entitlements have been the subject of significant litigation, legislative amendment and community discussion in recent years. This paper considers recent developments in this area.

First, the paper considers the priority position held by employee creditors as against other unsecured creditors, including some comparison with the position in other jurisdictions. It then summarises the position of employees with respect to secured creditors, and addresses the stalled or abandoned proposed reform aimed at giving employee creditors priority over all secured debts.

The issue of directors' duties to employees is addressed, with a focus on steps taken in this respect in other jurisdictions and on the legislative change directed to rendering directors liable for transactions designed to reduce the recoverability of employee entitlements.

The increasing presence of two players in the employee entitlement context, the Commonwealth government and the union movement, is also considered. The GEERS safety-net, by which the Commonwealth in effect guarantees certain employee entitlements, is a most significant development.

A case study of the Ansett administration has been included to give a practical context to recent developments, as are observations as to the role played by employee interests in other recent insolvency/reconstruction contexts.

2 Employees in corporate insolvency — an overview

2.1 Priority amongst unsecured creditors

(a) Introduction

Priority creditor status is the primary form of protection conferred upon employees in the event of corporate insolvency in the majority of international jurisdictions.[2]

Employees have long been considered worthy of special protection if a company becomes insolvent. This has been seen to be appropriate because employees are less able to manage the risk of the loss they suffer if their employer becomes insolvent. Whilst shareholders can diversify their investment portfolio to eliminate or hedge against risk, and creditors may diversify their customer base or seek guarantees or security, employees typically only have one employer and they are accordingly exposed to that employer for the entirety of unpaid wages, superannuation, leave or redundancy entitlements with very little capacity to reduce that risk. Further, it is suggested that the personal and social costs of business failure fall disproportionately on employees.

However true this analysis may be, it favours full-time employees over perhaps equally vulnerable smaller trade creditors and other workers such as 'independent' contractors or subcontractors, many of whom now work for only one employer and, while not entitled to the benefits of full-time employment, may be just as vulnerable in the case of an insolvency.[3]

Employee priority is a departure from the *pari passu* principle that (in theory) is a fundamental principle of corporate and personal insolvency.

[2] Employees are given priority in insolvency in Argentina, Belgium, Brazil, Canada, China, Czech Republic, Denmark, France, India, Ireland, Italy, Japan, Malaysia, The Netherlands, New Zealand, South Africa, Sweden, the United Kingdom and the United States: Insol International (2005), *Employee Entitlements*. See also the *International Labour Organization Convention (No 173) concerning the Protection of Workers' Claims in the Event of the Insolvency of their Employer*, Australian Treaty Series 1995 (No 13), arts 5 and 8, which requires that debts to employees be given priority in an insolvency. On 8 June 1995, the treaty entered into force for Australia.

[3] Contractors' exposure to insolvency largely depends on the trading terms they can demand from their 'client': see the Independent Contractors' Association of Australia submission to the Parliamentary Joint Committee on Corporation and Financial Services Report '*Corporate Insolvency Laws: A Stocktake*' at para 10.26 of the committee's report. Strict payment terms and enforcement of those terms can minimise exposure to bad debts, including debts for services of a nature similar to wages.

(b) The Australian position: section 556 of the **Corporations Act** *2001 (Cth)*

In Australia, employee entitlements are given priority over the majority of other unsecured creditors in insolvency under s 556(1) of the *Corporations Act 2001* (Cth). Employees are entitled to priority payment in corporate insolvency of all unpaid wages, superannuation contributions, leave entitlements and retrenchment payments. Employee entitlements are not first-ranking. They rank after secured creditors, expenses properly incurred by the liquidator, costs in respect of winding up applications in involuntary liquidation, expenses for which an administrator is entitled to be indemnified, debts properly incurred by an official manager,[4] the costs of various reports and audits required by the Act, fees of the liquidator and any other relevant authority and expenses incurred by a committee of inspection.

In contrast to other jurisdictions (see section (d) below), priority amounts payable to employees under the Australian insolvency regime are not capped. This means that where there are sufficient funds available, employees are able to receive priority payment for *all* wages, superannuation contributions, leave entitlements and retrenchment payouts owing to them. The only limitations relate to 'excluded employees'.[5]

(c) Deeds of company arrangement

As a practical matter, the priority position of employees is also entrenched in Part 5.3A. This is because whilst a deed of company arrangement could dislocate the winding-up priority, if it does so to the disadvantage of any unsecured creditor or group without their agreement, it is likely to be terminated or varied.[6]

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[4] Where the winding up began within 2 months after the end of a period of official management of the company.

[5] Excluded employees are employees who were directors during the 12 months prior to the date winding up is taken to have begun under the Act and relatives of such employees.[5] They are only entitled to $2,000 priority for unpaid wages and superannuation contributions, $1,500 for unpaid leave and no priority for unpaid retrenchment entitlements for the days in which they are deemed to be excluded employees.

[6] Whilst a deed can alter the winding up priority regime and whilst it is clear that discrimination between creditors may also occur, it is suggested that where that alteration or discrimination results in a creditor or group of creditors being in a worse position than on a winding up, an application to terminate or vary

The focus in Part 5.3A on attempts to continue the business (see s 435A(a)) can also be seen to advantage employees, as their interest in continued employment often outweighs their interest in recovery to meet liabilities, and their debts are often substantially contingent on redundancy. Thus, if the business continues, they have continued employment and low or no outstanding debts. If it fails, they are owed substantial obligations, which have priority.

(d) Other jurisdictions[7]

The majority of other jurisdictions which afford employee entitlements priority ranking in liquidation limit the amounts that employees are able to claim as priority unsecured creditors. If employees are owed anything above the set limit, they rank as normal unsecured creditors for that amount. In New Zealand, each employee is entitled to a maximum of $15,000 total priority ranking. In addition, employees are only entitled to claim unpaid wages for the four months preceding insolvency as a priority debt. In the United Kingdom there is no fiscal limit on employee entitlement priority, but wages are limited to wages earned in the four months preceding insolvency, unpaid pension contributions from the employer to a maximum of twelve months, unpaid employee contributions to a maximum of four months and redundancy payments are afforded no priority at all. In the United States of America each employee is entitled to a maximum of US $4,650 in priority ranking and only entitlements which accrued in the 90 days prior to the filing of the bankruptcy petition are claimable with priority.

These fiscal and temporal limitations are an attempt to reconcile the *pari passu* concept with the provision of some level of priority for employees. While employees are vulnerable and worthy of protection, it can be perceived as unfair that one class should have the potential to receive all of the money owed to them at the expense of others who receive less or nothing at all in some cases.

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would be very difficult to resist: see *Lam Soon Australia Pty Ltd (administrator appointed) v Molit (No 55) Pty Ltd* (1996) 70 FCR 34 at 49; 22 ACSR 169 at 183; *Sydney Land Corporation Pty Ltd v Kalon Pty Ltd (No 2)* (1997) 26 ACSR 427 at 430. The 'default' position is that the winding up priorities apply: s 444A(5), reg 5.3A.06 and para 4 of Schedule 8A.

[7] The information in this section is derived from Insol International (2005), *Employee Entitlements*.

A tabulated summary of the position in New Zealand, the UK and USA is set out in appendix 1 to this paper.

2.2 Priority vis-à-vis secured creditors

(a) Generally

The priority position of employees in insolvency still results in a ranking behind secured creditors. Employees rank before creditors with a floating charge over an insolvent company's assets where the assets of the company are insufficient to meet priority creditor payments: s 561 and s 9.

It has been contended that priority over floating charges may be a barren comfort for many employees. As Philip Crutchfield (a Melbourne barrister and academic specialising in insolvency) noted in his evidence to the Parliamentary Joint Committee on Corporation and Financial Services,[8] courts have held that charges over the book debts of a company may be considered fixed and not floating.[9] In many trading companies, a fixed charge over the book debts of the company means that only the stock is subject to a floating charge. If that stock is itself the subject of Romalpa clauses or is held on consignment, the floating charge will be over nothing.[10] It is possible to hold fixed charges over future property, stock-in-trade and raw materials where they are adequately described.[11] If the company concerned has chiefly fixed assets, such as a mine, a fixed security will operate to defeat the interests of all unsecured creditors, including priority creditors, in their entirety.[12]

[8] See Parliamentary Joint Committee on Corporation and Financial Services Report, '*Corporate Insolvency Laws: A Stocktake*' (2004), paras 10.36 -10.37.

[9] See *In re Spectrum Plus Ltd (in liq)* [2004] Ch 337; [2004] EWCA Civ 670; [2004] EWHC 9 (Ch); contra *Agnew v Commissioner of Inland Revenue* [2001] AC 710 (Privy Council). The matter is on appeal to the House of Lords. Cf *Siebe Gorman & Co Ltd v Barclays Bank Ltd* [1979] 2 Lloyd's Rep 142; *Whitton v ACN 003 266 886 Pty Ltd (controller apptd) (in liq)* (1996) 42 NSWLR 123; *Re Bond Worth Ltd* [1980] Ch 228.

[10] For a more detailed discussion of this problem, see David Noakes, 'Measuring the impact of strategic insolvency on employees', (2003) 11 *Insolvency Law Journal* 91 at 102-104.

[11] *Re Bond Worth Ltd* [1980] Ch 228.

[12] See Parliamentary Joint Committee on Corporation and Financial Services Report, '*Corporate Insolvency Laws: A Stocktake*' (2004), paras 10.36. The Cobar mine insolvency is one example, though in that case the US parent eventually agreed to pay about 85 cents in the dollar to employees and about 29 cents in the dollar to trade creditors in a settlement with the liquidators: see Paula Darvas, 'Employees' rights and entitlements and insolvency: regulatory rationale, legal issues and proposed solutions', (1999) 17 *Company and Securities Law Journal* 103 at 104 fn 5.

(b) Stalled/abandoned reform

The Commonwealth Government announced a proposal in 2001 to place employees' entitlements before the interests of all secured creditors of large corporations in a winding-up.[13] By late June 2003, it had announced that draft legislation embodying the proposal was expected by September-October 2003. That legislation has not been placed before the Parliament.

The Parliamentary Joint Committee on Corporation and Financial Services Report '*Corporate Insolvency Laws: A Stocktake*' considered the proposal. Concerns about the proposal expressed to the Committee included the following:

- It would encourage lending to holding companies without employees, whereby subsidiary or related 'employee companies' were created that were deliberately left without other assets.
- It would encourage further proliferation of contractor, rather than employment, relationships, and further casualisation of the workforce.
- It would increase the costs of lending as banks sought to increase lending margins to cover the increased risk to which they were exposed.
- It would reduce the availability of finance and the tolerance of banks in times of a liquidity crisis.
- There would be definitional questions as to what is or is not a 'fixed security' or a 'large corporation'.

Interestingly, not all of the unions' submissions favoured the proposal.[14]

The Joint Committee Report recommended that the Government's proposal not be adopted, suggesting the focus be on ensuring directors and managers of companies

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[13] See Parliamentary Joint Committee on Corporation and Financial Services Report, '*Corporate Insolvency Laws: A Stocktake*' (2004), paras 10.27-10.31 and the sources cited therein.

[14] The AMWU criticised the proposal, preferring the concept of trust funds for employees' entitlements: Australian Manufacturing Workers' Union, *Parliamentary Joint Committee on Corporations and Financial Services Inquiry into Australia's insolvency Laws: Submission to Senate Select Committee* (2003). In contrast, the submissions from the Australian Workers' Union and the Australian Council of Trade Unions (ACTU) supported the proposal. The ACTU submission referred to the fact that a first priority for employee entitlements had been suggested by the Australian Institute of Company Directors in a policy paper: see Dick Warburton and Ian Dunlop, 'Working Without a Safety Net' (2000), at <http://www.companydirectors.com.au/0fra/e/fe0.html>; Australian Council of Trade Unions, *ACTU Submission to the Inquiry into Australia's Insolvency Laws* (2003) at [40].

take greater responsibility in meeting the costs of employee entitlements in the event of business failure.[15]

[15] Parliamentary Joint Committee on Corporation and Financial Services, '*Corporate Insolvency Laws: A Stocktake*' (2004), Recommendation 42.

3 *Directors' duties to employees*

3.1 Australia

(i) Generally

In Australia, directors of a corporation owe their duties to the corporation. They are generally not required to consider the interests of employees when making corporate decisions, save to the extent that circumstances might require consideration of the interests of creditors generally as an aspect of considering the interests of the company if insolvency threatens (see section (iii) below). Otherwise, the only direct obligation they are under in relation to employees is to ensure that the corporation is not in breach of employment laws, occupational health and safety requirements and its general duty of care. Decisions made by directors which cause the corporation to be in breach of such duties can be a breach of the directors' duty to act properly and with care.[16]

In its 1989 *Report on the Social and Fiduciary Duties and Obligations of Company Directors,* the Senate Standing Committee on Legal and Constitutional Affairs recommended that legislation be enacted to allow directors to take employees' interests into account when making decisions for the corporation. This recommendation has not been implemented and has been criticised on the basis that in order to change the current law, directors would have to be entitled to prefer the interests of employees over the interests of the corporation.[17] Differing views in this area may be said to polarise around attitudes to decisions such as *Parke v Daily News Ltd* [1962] 1 Ch 927.

(ii) Insolvent trading

Personal liability for directors who trade whilst insolvent is a regulatory mechanism designed to protect unsecured creditors in general.

[16] See H Ford, R Austin and I Ramsay, *Ford's Principles of Corporations Law* (11th ed, 2003) [8.120].
[17] H Ford, R Austin and I Ramsay, *Ford's Principles of Corporations Law* (11th ed, 2003) [8.120]. In relation to whether interests other than those of the shareholders ought to be considered by directors, see Len Sealy, 'Directors' 'wider' responsibilities: problems conceptual, practical and procedural' (1987) 13 (3) *Monash University Law Review* 164.

A significant limitation upon the impact of these provisions in the employee context is that often the bulk of the employee entitlements do not accrue until employment is terminated. As Campo notes, 'while a director or holding company may allow a company to trade well beyond the point when it can afford to fund redundancy and accrued leave entitlements, seldom will an action for trading while insolvent arise'.[18]

(iii) Creditors generally

Under existing Australian authority, when insolvency threatens, consideration of the interests of the company incorporates consideration of the effect on creditors.[19] In *Spies v R,* Gaudron, McHugh, Gummow and Hayne JJ described the duty as follows:[20]

> 'Where a company is insolvent or nearing insolvency, the creditors are to be seen as having a direct interest in the company and that interest cannot be overridden by the shareholders. This restriction does not, in the absence of any conferral of such a right by statute, confer upon creditors any general law right against former directors of the company to recover losses suffered by those creditors … the result is that *there is a duty of imperfect obligation owed to creditors,* one which creditors cannot enforce save to the extent that the company acts on its own motion or through a liquidator'.

Generally, attempts to enforce a 'duty to creditors', properly to be seen as an aspect of the directors' duty to the company in the particular circumstance of possible or actual insolvency, face considerable obstacles.

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[18] Robbie Campo, 'The Protection of Employee Entitlements in the Event of Employer Insolvency: Australian Initiatives in the Light of International Models' (2000) 13 *Australian Journal of Labour Law* 1, 27. Two recent legislative amendments have attempted to strengthen the insolvent trading provisions. One is found in s 588G(1A). This subsection provides, *inter alia*, that a non-debt uncommercial transaction be deemed a debt for the purposes of the section. A related development is the inclusion of s 588FDA by virtue of the *Corporations Amendment (Repayment of Directors' Bonuses) Act* 2003 (Cth), prompted by the payment to One.Tel directors Jodee Rich and Brad Keeling of $6.9 million bonuses in the same year the company lost $291.1 million: see the discussion of s 588FDA in David Noakes, 'Measuring the impact of strategic insolvency on employees', (2003) 11 *Insolvency Law Journal* 91 at 111. That provision provides for liquidators to recover transactions made for the benefit of a director or close associate of a director where a reasonable person in the company's position would not have entered into the transaction, having regard matters including the costs and benefits to the company and any contingent obligations.

[19] See, eg, *Walker v Wimborne* (1976) 137 CLR 1,7; *Addstead Pty Ltd v Liddan Pty Ltd* (1997) 25 ACSR 175.

[20] (2000) 201 CLR 603, 636 (emphasis added).

(iv) Part 5.8A of the **Corporations Act** *2001 (Cth)*

As a result of several high profile corporate collapses in the 1990s, the Federal Government enacted a new Part 5.8A into the *Corporations Act* 'specifically aimed at protecting workers left with unpaid entitlements following corporate collapse'.[21] It is clear from the Second Reading Speeches given in Parliament that the Commonwealth government justified these measures as a direct response to high-profile corporate failures in 1998 and 1999,[22] particularly those that might be deemed 'strategic insolvencies'.[23] But the legislation itself is narrow in its scope and application. It is doubtful whether, assuming jurisdiction, the legislation would have successfully applied to many, or indeed any, of those failures. The Patricks dispute is, perhaps, the exception.

The structure of the Part is as follows:

- Section 596AA sets out those entitlements the subject of the legislation,[24] as well as those whose entitlements are protected by it.[25]
- Section 596AB prohibits a person from entering into agreements or transactions with the intention of, or with intentions that include the intention of, either preventing the recovery of the entitlements of employees of a company or of significantly reducing the amount of the entitlements of employees of a company that can be recovered.
- A breach of section 596AB may be a criminal offence, punishable by 1000 penalty units or imprisonment for 10 years: s 1311, Schedule 3.
- By section 596AC, actions for compensation may be brought against persons (including company directors) for contravention of s 596AB by either the

[21] D Noakes, 'Recovering Employee Entitlements and Uncommercial Transactions in Insolvency' (2000) 1 *Insolvency Law Bulletin* 20, 20.
[22] Commonwealth, *Parliamentary Debates*, House of Representatives, 17 February 2000, 13723 (Joe Hockey, Minister for Financial Services and Regulation); Commonwealth, *Parliamentary Debates*, Senate, 16 March 2000, 12978 (Senator Richard Alston, Minister for Communications, Information Technology and the Arts). The rest of the Parliamentary debates make that clear as well. Among the multitude of company insolvencies referred to in the Parliament were those of the Patrick Stevedores, Ansett, National Textiles, Fabric Dyeworks, the Grafton meatworks, Scone meatworks, Linda Industries, the Oakdale and Selwyn mines and Braybrook textiles.
[23] See David Noakes, 'Measuring the impact of strategic insolvency on employees', (2003) 11 *Insolvency Law Journal* 91, esp at 92-93.
[24] Wages, superannuation contributions; amounts due in respect of injury compensation; amounts due under an industrial instrument relating to an employee's leave of absence and retrenchment payments.
[25] Excluded employees, for example, are protected only to the extent of their s 556 priority.

liquidator or the employees personally (either with the liquidator's approval or leave of the court).[26] Actions can also be taken against companies or persons not a party to the transaction, a move aimed at preventing circumvention of the legislation through company group structures or non-related parties.[27] Compensation extends to loss or damage caused by the contravention.

- Other provisions prevent double recovery for the same offence.

The problem with these provisions, and in particular s 596AB, is that it is necessary to demonstrate that the directors of a company entered into a transaction or agreement *with the intention* of preventing or significantly reducing the amount of entitlements of employees that can be recovered.[28] The onus of proof in such circumstances is not reversed, nor is the offence one of strict liability.

Proving such an intention is a difficult task. Ford, Austin and Ramsay observe that the proof of intention required under Part 5.8A is broadly similar to that applying to transactions entered into to defeat creditors (s 588FE(5)).[29] Section 596AB is explicit in providing that one need not establish that reducing the entitlements of employees was the only purpose of the acts leading to the breach. It is sufficient that it be one of the purposes.[30] It has been suggested that 'it has in the past proved relatively easy for people associated with companies that subsequently become insolvent to argue that there were sound commercial reasons for moving assets or restructuring the company or group, and that frustrating creditors was not an aim.'[31] The Part 5.8A provisions can be contrasted with the objective standard for civil liability for trading while insolvent (s 588G(2)(b)).[32]

[26] *Corporations Act* 2001 (Cth) ss 596AF-596AI.
[27] See Commonwealth, *Parliamentary Debates*, House of Representatives, 17 February 2000, 13724 (Joe Hockey, Minister for Financial Services and Regulation).
[28] See generally Robbie Campo, 'The Protection of Employee Entitlements in the Event of Employer Insolvency: Australian Initiatives in the Light of International Models' (2000) 13 *Australian Journal of Labour Law* 1, 26.
[29] HAJ Ford, RP Austin and Ian Ramsay, *Ford's Principles of Corporations Law* (looseleaf, Service 46, May 2005) para 27.483. The test of intention relevant to s 588FE(5) is discussed in *Barton v Federal Commissioner of Taxation* (1974) 131 CLR 70 at 374, *Re World Expo Park Pty Ltd* (1994) 12 ACSR 759 at 771.
[30] Cf *Caddy v McInnes* (1995) 131 ALR 277.
[31] Michael Gronow, 'Insolvent corporate groups and their employees: The case for further reform', (2003) 21 *Corporations & Securities Law Journal* 188 at 199.
[32] See Commonwealth, *Parliamentary Debates*, House of Representatives, 9 March 2000, 14302-14303 (Kelvin Thomson); Commonwealth, *Parliamentary Debates*, House of Representatives, 15 March 2000, 14809 (Bob Sercombe); *Corporations Act* 2001 (Cth) ss 588G, 1317FA.

The significant costs involved in litigation may deter a liquidator or employees from undertaking the risky path of attempting to discharge the high burden Part 5.8A imposes.[33] A particular concern is so-called 'phoenix' companies, where the insolvent companies are deliberately denuded of assets before going into liquidation. In that situation, the liquidator will typically have little by way of funds with which to pursue litigation against the former directors.[34] This may be an area where unions could become more active in litigation, though at least one commentator has doubted that unions will spend scarce resources on a difficult-to-prove Pt 5.8A proceedings.[35]

If the impact of the legislation is to be gauged by reference to the number of cases in which it has been invoked against a director, it cannot be seen as a success. Cases dealing with, or even mentioning, any of the new provisions are virtually non-existent. We have found one example of a (misguided) attempt to bring an action under s 596AB in the case law.[36] Section 596AI was also referred to in passing by the New South Wales Court of Appeal in *Rich & Silbermann v The Australian Securities and Investments Commission*[37] as an example of one of a number of provisions concerning civil penalty orders. We have found no further references in the case law.

3.2 Other jurisdictions

(i) New Zealand and the United Kingdom

Legislative provision for the consideration of employees by directors exists in New Zealand. Section 132 (1) of the *Companies Act 1993* (NZ) provides that:

> [n]othing in section 131 of this Act [statutory duty to act in good faith and in the best interests of the company] limits the power of a director to make provision for the

[33] Robbie Campo, 'The Protection of Employee Entitlements in the Event of Employer Insolvency: Australian Initiatives in the Light of International Models' (2000) 13 *Australian Journal of Labour Law* 1, 26.
[34] A problem highlighted in Parliamentary Joint Committee on Corporation and Financial Services Report, '*Corporate Insolvency Laws: A Stocktake*' (2004), Chapter 8.
[35] Christopher Symes, 'Will there ever be a prosecution under Part 5.8A?' (2002) 3(1) *Insolvency Law Bulletin* 17 at 18.
[36] *The Creditors Of Antal-Air Pty Ltd (Administrator Appointed) v Australian Securities & Investments Commission* [2004] FCA 1090; see also the appeal, in *Creditors of Antal-Air Pty Ltd v Antal-Air Pty Ltd* [2004] FCAFC 303.
[37] [2003] NSWCA 342

> benefit of employees of the company in connection with the company ceasing to carry on the whole or part of its business.

The legislature in the United Kingdom has gone one step further, enacting a positive obligation on directors to take into account the interests of employees throughout the trading life of the company, rather than merely in insolvency. Section 309 of the *Companies Act 1985* (UK) provides:

> (1) The matters to which the directors of a company are to have regard in the performance of their functions include the interests of the company's employees in general, as well as the interests of its members.
>
> (2) Accordingly, the duty imposed by this section on the directors is owed by them to the company (and the company alone) and is enforceable in the same way as any other fiduciary duty owed to a company by its directors.
>
> (3) This section applies to shadow directors as it does directors.

The UK provision, in maintaining the relevant duties as are duties owed to the company, does not have as dramatic an effect on directors' focus as some might wish. [38] It would, it is suggested, provide directors with a potential defence 'in the event of their making a decision that favours the employees at the shareholders' expense'.[39] Much of the criticism of the UK provision has been based on the fact that the duty is not enforceable against the directors by the employees. Len Sealy has described the section as 'either one of the most incompetent or the most cynical pieces of drafting on record.'[40]

(ii) The position in the United States

The current United States' corporate governance regime for publicly listed corporations is an immensely complex hybrid of rules and regulations from three major sources: federal legislation (including Securities Exchange Commission

[38] See, Andrew Clarke, 'The Relative Position of Employees in the Corporate Governance Context: an International Comparison' (2004) 32 *Australian Business Law Review* 111, 120.
[39] Andrew Clarke, 'The Relative Position of Employees in the Corporate Governance Context: an International Comparison' (2004) 32 *Australian Business Law Review* 111, 120. Compare Sealy, *op cit*.
[40] Len Sealy, 'Directors' "wider" responsibilities: problems conceptual, practical and procedural' (1987) 13 (3) *Monash University Law Review* 164 at 177.

regulations); state legislation and exchange listing standards.[41] The iconic failures of corporations such as Enron and WorldCom resulted in intense scrutiny of and changes to the corporate governance regime in the United States by way of the *Corporate and Auditing Accountability, Responsibility, and Transparency Act* 2002 (known as the *Sarbanes-Oxley* Act). Although employees suffered significant losses in the recent spate of corporate collapses, the *Sarbanes-Oxley Act* did not impose any duty on directors to consider the interests of employees.

Employees of insolvent corporations in the United States can to rely on the 'trust fund doctrine', which was described by the Texas Supreme Court as follows:[42]

> 'When the corporation is hopelessly insolvent, and there is no reasonable or well founded hope for a continuation of its business, and these facts are known to its officers and directors, then all of the assets of the corporation become a trust fund in the hands of the directors, to be administered by them as trustees or agents for the equal benefit of all of the creditors of the concern …'

The existence of a fiduciary relationship means that a 'breach of that [fiduciary] duty gives rise to a cause of action against the officers and directors which can be prosecuted directly by the creditors'.[43] The application of the trust fund doctrine is controversial and its ambit is not entirely clear. The New York Supreme Court stated that it 'has often been repudiated as a fiction unsound in principle and vexing in business practice'.[44] Arguments against the creation of a fiduciary duty existing between directors and creditors can be made on the basis that it 'would allow inappropriate interference in corporate management by creditors. It would also create unwarranted threats of director liability by raising conflicting duties to stockholders and creditors and impede responsible director action to preserve the corporation for the benefit of both stockholders and creditors, as well as other parties interested in the corporation's welfare'.[45]

[41] See generally, Robert Thompson, 'Collaborative Corporate Governance: Listing Standards, State Law and Federal Regulation' (2003) 38 *Wake Forest Law Review* 961.
[42] *Lyons-Thomas Hardware Co v Perry Stove Manufacturing Co,* 24 S.W. 20.
[43] *Fagan v La Gloria Oil and Gas Co,* 494 S.W.2d 624, 628.
[44] *Reif v Equitable Life Assurance Society of the United States,* 197 NE 278, 280.
[45] Norwood Beveridge, 'Does a Corporation's Board of Directors owe a Fiduciary Duty to its Creditors?' (1994) 25 *Saint Mary's Law Journal* 589, 621.

(iii) The Canadian position

Employees in some provinces of Canada are able to pierce the corporate veil and claim unpaid entitlements from the directors of the insolvent company personally. Typically, directors can be personally liable for up to six months of unpaid wages and vacation pay owed to employees. Liability only applies in relation to services performed during the period of the directorship, and may be subject to other limitations. For instance, in Ontario, a director is not liable unless:

- the corporation has been sued for the debt within six months after it became due and the employees have been unable to collect from the corporation;

or

- the corporation has gone into liquidation, been wound up or declared bankruptcy.

Further, directors must be sued for the debt while they are still directors or within one year after they ceased being directors.[46]

This approach probably confers little protection upon employees of large corporations after insolvency, where it might be expected that the personal assets of the board members are unlikely to cover any significant proportion of unpaid employee entitlements. It may influence behaviour before insolvency, but not all of these influences would be necessarily positive. This sort of liability might make it difficult for corporations to lure appropriate candidates to the board, especially for corporations in financial difficulty. It might also lead to decisions driven by the desire to minimise personal exposure and an increase in the attractions of conservative, risk-averse approaches.

[46] See <http://strategis.ic.gc.ca/epic/internet/incilp-pdci.nsf/en/cl00693e.html>.

4 The General Employee Entitlements and Redundancy Scheme (‘GEERS’)

4.1 What the scheme is

The Commonwealth government has implemented taxpayer-funded safety-net schemes for employee entitlements. The current scheme of general application is the General Employee Entitlements and Redundancy Scheme (‘GEERS’). GEERS is a very important development that essentially makes the government the guarantor (to a limited but significant extent) of employees’ entitlements.

The genesis of the scheme was a Ministerial Discussion Paper released by Peter Reith in August 1999.[47] It discussed the prospect of a Government-funded safety-net or the alternative provision of a compulsory insurance scheme for employee entitlements. The safety-net was preferred, and the Employee Entitlements Support Scheme (‘EESS’) was born. That scheme applied to terminations due to insolvency between 1 January 2000 and 11 September 2001.

Originally intended to be equally funded by state governments, the EESS provided for the payment of:

- up to four weeks’ unpaid wages;
- up to 4 weeks’ annual leave;
- up to 5 weeks’ pay in lieu of notice;
- up to 4 weeks’ redundancy pay; and
- up to 12 weeks’ long service leave.

The EESS was based on a maximum annual wage of $40,000 and a maximum payout of $20,00 per employee. After the first year, on average, $4354, or 60 per cent of the average $7200 in lost employee entitlements, was nominally covered by the EESS.

[47] Peter Reith, ‘The protection of employee entitlements in the event of employer insolvency’ (Ministerial Discussion Paper, August 1999.

However, since the state governments did not contribute, only half of this amount was paid to workers.[48]

The GEERS scheme that replaced the EESS is far more comprehensive in its coverage. Under the scheme, employees of insolvent corporations (whose employment was terminated after 12 September 2001) are eligible to claim some of their entitlements from GEERS. More specifically, employees who have a legal entitlement by virtue of legislation, an award, a statutory agreement or a written contract of employment are entitled to claim under the GEERS regime:

- all unpaid wages including unpaid amounts in respect of paid leave already taken and allowances such as shift allowance and overtime (excluding bonuses);
- all unpaid annual leave including annual leave loading;
- all unpaid pay in lieu of notice;
- up to 8 weeks' redundancy pay; and
- all long service leave.

Payments under GEERS are restricted in a number of ways. First, payments made under GEERS are subject to an annual income cap ($75,200 for 2001-2002, $81,500 for 2002-2003, $85,400 for 2003-2004 and $90,400 for 2004-2005).[49]

Secondly, 'employees' for the purposes of the scheme do not include contractors, excluded employees, or (in most cases) employees who have resigned from their employment.[50]

4.2 How the scheme works

Like the EESS before it, GEERS is not the subject of specific legislative authorisation. It has been introduced administratively and is regulated by the

[48] Tony Abbott, 'Employee Entitlement Support Scheme: Year One Activity Report' (January 2001), at <http://www.dewr.gov.au/ministersAndMediaCentre/abbott/eessreport.asp>.
[49] The amount is annually indexed in line with movements in the rate specified in s 170CC(3)(b) of the *Workplace Relations Act 1996* (Cth).
[50] Employees who show that they resigned because of non-payment or underpayment of wages may be considered 'constructively' dismissed and therefore eligible.

Department of Employment and Workplace Relations ('DEWR'). Claims must be lodged within 12 months after an employee's employment was terminated. Once assessed, DEWR makes a payment directly to the relevant insolvency practitioner, who then deducts taxes and pays the amounts due to the employees. The theory is that DEWR then stands in the shoes of the employee, by virtue of s 560 of the *Corporations Act* 2001 (Cth), to the extent of the amounts advanced.

Section 560 provides that, where a company pays employees for their priority entitlements under s 556 out of money advanced by a person for the purpose of making the payment, the person by whom the money was advanced has, in the winding up of the company, the same right of priority of payment as the employees. DEWR requires that any deed of company arrangement reflect the priority regime under ss 556 *and 560*.[51] If the deed fails to do so, DEWR will not be able to stand in the shoes of the employees to whom it has already made payments and will not have priority.[52] Advances of this nature to administrators do not fall under s 443A.[53]

One commentator has described these arrangements as 'worrying' and 'clearly inadequate and unaccountable'.[54] The GEERS Operational Arrangements make it plain that there is no 'express or implied undertaking that the Commonwealth will provide funds in circumstances covered by GEERS' and that '[w]hile the Commonwealth will normally provide funds, they are not bound to do so either generally or in any individual case.'[55] Employees have no recourse to independent review (only to a higher official within DEWR) or to redress in the courts. The scheme can be changed without parliamentary scrutiny.[56]

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[51] Department of Employment and Workplace Relations, General Employee Entitlements and Redundancy Scheme Operational Arrangements, at para [7.2]. The Operational Arrangements can be viewed at <http://www.workplace.gov.au/workplace/Category/SchemesInitiatives/EmployeeEntitlements/GEERS/GeneralEmployeeEntitlementsandRedundancySchemeOperationalArrangements.htm>

[52] *Re ACN 050 541 047 Ltd* [2002] NSWSC 586.

[53] *Re Ansett Australia Ltd (Administrators appointed) and Mentha (as Administrator)* [2001] FCA 1806; (2002) 40 ACSR 389 (Commonwealth SEESA priority application).

[54] Samantha Kinsey, 'A triumph for labour over capital: employee entitlements in insolvency in the wake of the Ansett collapse' (2002) 10 *Insolvency Law Journal* 132 at 141, 142.

[55] Department of Employment and Workplace Relations, General Employee Entitlements and Redundancy Scheme Operational Arrangements, at paras [16.1]-[16.2].

[56] Samantha Kinsey, 'A triumph for labour over capital: employee entitlements in insolvency in the wake of the Ansett collapse' (2002) 10 *Insolvency Law Journal* 132 at 142.

4.3 Extent of financial contributions by the government

The Ministerial Discussion Paper released in August 1999 outlined the costs envisaged by the government in a safety-net scheme for workers' entitlements to provide 'a fair and reasonable level of protection', such as eventually became GEERS. The report assumed administration costs of running a scheme at around 10% and recovery of paid amounts from employers through the subrogation of employees' claims at around 15% of the total of claims paid. On that basis, the overall costs to government of implementing a scheme would be 'in the order of $100 million per annum'. The average payout was estimated to be $6,784.[57] By the time of the implementation of GEERS, the cost estimate had been altered to around $60 million per annum.[58]

The table below summarises financial information derived from the DEWR Annual Reports about government expenditure under the GEERS scheme. The table below also includes the comparable data for a related scheme, the Special Employee Entitlement Scheme for Ansett ('SEESA'), aimed exclusively at the Ansett insolvency, which is the subject of more detailed discussion in the case study in Part 8 below.

[57] Peter Reith, 'The protection of employee entitlements in the event of employer insolvency' (Ministerial Discussion Paper, August 1999) at 9. The discussion paper can be viewed at <http://www.dewrsb.gov.au/ministersAndMediaCentre/reith/discussionPapers/emp_insolvency.asp>.

[58] Tony Abbott, 'Even better arrangements to protect employee entitlements' (Press release ABB84/01, 20 September 2001).

	2001-2	2002-3	2003-4	2004-5 (estimated)[59]	2005-6 (budgeted)[60]
Paid ($ 000)					
EESS	13,500	1,460	63	n/a	n/a
GEERS	44,100	63,125	60,307	60,957	68,124
SEESA	300,200	35,491	5,619	80,449	5,919
Recipients					
EESS	6,194	675	22	n/a	n/a
GEERS	4,402	8,700	9,243	n/a	n/a
SEESA	11,852	1,138	547[61]	n/a	n/a
Insolvent businesses paid					
EESS	666	99	1	n/a	n/a
GEERS	232	923	1,219	n/a	n/a
SEESA	4	n/a	n/a	n/a	n/a
Recoveries ($ 000)					
EESS	875	5,233[62]	5,191	n/a	n/a
GEERS	674			n/a	n/a
SEESA	0	0	172,667	n/a	n/a
Number of recoveries from insolvent businesses					
EESS	53	136	n/a	n/a	n/a
GEERS	11		n/a	n/a	n/a
SEESA	0	0	n/a	n/a	n/a

[59] These are estimated figures, derived from the current DEWR budget.
[60] These are budgeted figures, derived from the current DEWR budget.
[61] This includes 540 people already paid some benefits in previous years.
[62] Figures for recoveries refer to both GEERS and EESS for 2002/2003 and 2003/2004.

Based on these figures, for the period 1 July 2001 to 30 June 2004, the Commonwealth government spent approximately $182,555,000 under the EESS and GEERS and recovered $11,973,000, or approximately 6.56 per cent of what it spent. In the same period, the Commonwealth government spent approximately $341,310,000 under the SEESA and recovered $172,667,000, or approximately 50.59 per cent of its expenditure.

4.4 Some concluding comments

It is a matter of considerable significance that the government is acting as, in effect, the guarantor of employee entitlements. As Hughes notes, taxpayers 'may legitimately wonder why they are being asked to meet the obligations of sharp or incompetent operators.'[63]

That concern was not forgotten in the Ministerial Discussion Paper that led to the implementation of GEERS. It stated:

> It is imperative that a government-funded safety net not provide unethical employers with an excuse to avoid meeting their legal obligations. To avoid that, the government could take on the legal rights of the unpaid workers against the former employer (and its directors and related companies), to the extent of payments made to employees under the safety net, and vigorously pursue those claims through the courts.[64]

Later the paper expressed the view that the government 'has to be careful about paying private debts with someone else's taxes'.[65]

The government, vigorously pursuing employees' claims, has been, it seems, only able to recoup 6.56 per cent of the entitlements it has provided as a safety-net (excepting Ansett).

[63] Christopher Hughes, 'Towards pinstriped unionism: protecting employee entitlements through securitisation' (2000) 12 *Bond Law Review* 7, 15.
[64] Peter Reith, 'The protection of employee entitlements in the event of employer insolvency' (Ministerial Discussion Paper, August 1999) at 8.
[65] Ibid at 13.

One effect that GEERS may have is to create a creditor with both a real interest, and the requisite financial backing to pursue, the enforcement of claims of employees in an insolvency.

GEERS does not apply to superannuation contributions. Employee representatives see this as a significant deficiency.[66]

Recent legislative amendments that require companies to pay employees' superannuation contributions to the Australian Tax Office at least quarterly (rather than annually) may address this issue to some extent.[67] The risk of the use by some businesses of those contributions as if they were company funds, before becoming insolvent, is somewhat diminished. Something similar in the broader context of employee entitlements is being attempted in the NEST scheme, discussed in Part 6 below.

[66] Eg Australian Manufacturing Workers' Union, *Parliamentary Joint Committee on Corporations and Financial Services Inquiry into Australia's insolvency Laws: Submission to Senate Select Committee* (2003); Australian Council of Trade Unions, *ACTU Submission to the Inquiry into Australia's Insolvency Laws* (2003) at [46].

[67] See, generally, the *Superannuation Guarantee (Administration) Act* 1992 (Cth) Parts 3 and 4.

5 The changing role of unions?

5.1 Pinstriped unionism

One prominent feature of recent insolvency litigation has been the involvement of the union movement in actions designed to protect employees and their access to entitlements or to continued employment, a development that has been described as 'pinstriped unionism'.[68] Christopher Hughes argues that the Patrick Stevedores dispute 'represented a milestone in the debate over workers and insolvency', in part because of the Maritime Union of Australia engaged a commercial silk and used the provisions of the Corporations Law to defeat, in large part, employer action directed at industrial law.[69]

Since then, legal action taken by the union movement has been significant in other corporate insolvency or reconstruction situations. One example is the Ansett administrations, others are found in the One.Tel administration and in *McEvoy v Incat Tasmania Pty Ltd*.[70]

5.2 McEvoy v Incat Tasmania Pty Ltd

This case concerned the effect of receivership on the accrued entitlements of employees. The Incat group, a designer and builder of large catamarans, defaulted on its loan agreements to a secured lender, the National Australia Bank. The bank appointed a receiver and manager to six of the Incat companies. The receiver continued the operations of the companies and accordingly continued the employment of most of the workforce. Some staff were sacked. The bank eventually recovered its debt and the receiver was to retire. The receiver was left with around $17 million to satisfy outstanding obligations incurred during the course of his receivership.[71]

A claim was made on that $17 million on behalf of the retained employees. The retained employees sought to argue, based on a construction of s 443 and s 558, that

[68] Christopher Hughes, 'Towards pinstriped unionism: protecting employee entitlements through securitisation' (2000) 12 *Bond Law Review* 7.
[69] Ibid at 10, 28.
[70] [2003] FCA 810; (2003) 130 FCR 503.
[71] *McEvoy v Incat Tasmania Pty Ltd* [2003] FCA 13 at [4]-[5]; (2003) 130 FCR 503 at 505.

their employment had been terminated at the point the receiver was appointed, thereby entitling them to employee entitlements accruing on termination, such as redundancy payments, even though they physically remained in employment with the company that had employed them before the receivership.

Finkelstein J first considered the common law view of the effect of a receivership on the continuation of a contract of employment. 'Surprisingly', he found, 'the law is still in a state of uncertainty.'[72] His Honour then reviewed the legislative history of s 433 of the *Corporations Act* 2001 (Cth), pursuant to which the claims had been brought, and the authorities considering it. The applicability to a receivership of s 558 was also considered.

Section 558(1) of the *Corporations Act* relevantly provides that where a contract of employment with a company being wound up was subsisting immediately before the relevant date, the employee under the contract is entitled to payment under section 556 as if his or her services with the company had been terminated by the company on the relevant date. The employees/unions relied upon a Queensland decision to argue that s 558 also applied to the case of a receivership,[73] thereby allowing employees priority entitlements as if they had been terminated, whilst retaining their employment with the company.

Finkelstein J rejected the argument as a matter of statutory interpretation in the light of the provisions' legislative histories.[74]

It might be said that the claim by the retained employees was an opportunistic one. It is difficult to justify paying termination benefits to employees who had retained their jobs throughout.[75]

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[72] Ibid at [6]; 130 FCR at 506.
[73] *Re Office-Co Furniture Pty Ltd (Receiver and Managers appointed)* [2000] 2 Qd R 49.
[74] See *McEvoy v Incat Tasmania Pty Ltd* [2003] FCA 13 at [24]-[27]; (2003) 130 FCR 503.
[75] Compare *Amcor Ltd v Construction, Forestry, Mining & Energy Union* (2005) 73 ALJR 703; [2005] HCA 10. In that case, the union sought an interpretation of an industrial instrument that would allow employees an entitlement to severance payments after a corporate restructure, despite the fact that the employees were still employed (by a new company). The union's interpretation was considered unfair and was rejected (though see Kirby J's dissent at [68]-[77]).

A consequence of Finkelstein J's decision, acknowledged by His Honour, is that employees whose contracts are terminated by the receiver are not entitled to priority payment of leave and other entitlements accruing but not yet due on the date of the receivership. Finkelstein J acknowledged that that result is inconsistent with the purpose of the statutory scheme.[76] It discriminates against those employees sacked in a receivership rather than as a result of a winding up, with no apparent theoretical justification.

5.3 One.Tel

Union involvement in the One.Tel administration included successful action in the Industrial Relations Commission by the Community and Public Sector Union to apply for an interim award for One.Tel employees to include a provision for redundancy payments.[77] This was in spite of the fact that most employees were not union members and by their individual contracts they were not entitled to redundancy payments. The award was made, and payments in accordance with it were recommended by the administrator and agreed to by creditors at the creditors' meeting that decided to wind up the company.[78]

[76] *McEvoy v Incat Tasmania Pty Ltd* [2003] FCA 13 at [24]-[27] at [24], [27]; (2003) 130 FCR 503.
[77] *Community and Public Sector Union v One.Tel Ltd (administrator appointed)* (2001) Australian Industrial Relations Commission PR 904915.
[78] See the discussion of this case at Louise Floyd, 'Enron and One.Tel: Employee entitlements after employer insolvency in the United States and Australia (Australian renegades championing the American dream?)' (2003) 56 *Southern Methodist University Law Review* 975 at 993-995.

6 The National Security Entitlement Trust (NEST)

The NEST is an industry trust fund established 'to provide protection and portability' of workers' entitlements.[79] It describes itself in the following terms:

> NEST is an independent not for profit trust facility established to receive employer contributions towards employee entitlements such as annual leave, long service leave, redundancy and severance pay, and others following agreement between the parties or an industrial award governing their relationship. The trustees consist equally of employer and employee representatives with an independent Chairman. Under its trust deed, NEST is empowered to invest contributed funds at interest in approved securities. The trust's income funds administration and is then distributed to either employers, employees or, at the [employers'] direction, applied to future obligations to contribute. By this means, an element of self-funding of employee entitlements is provided**.**[80]

The board of directors of NEST is made up of representatives of employers, an equal number of representatives of unions, and an independent chair[81] (currently The Honourable Marcus Einfeld). Investments are made into securities according to certain criteria, designed to preserve the original capital amount invested.[82]

The Employee Entitlements defined in the NEST Trust Deed consist of:

> 'Any dollar amount payable to a Member under an Industrial Agreement to which that Member has a right and which is identified as such in the Industrial Agreement including the following entitlements:
>
> (a) annual leave and annual leave loading,
>
> (b) sick leave,

[79] National Entitlement Security Trust, 'National Entitlement Security Trust — Q & A', available at <http:www.amwu.asn.au/nest_q_&_a.pdf>
[80] National Entitlement Security Trust, 'Schedule 7 of Taxation Laws (Amendment) Bill (No 4) 2003 amending The Fringe Benefits Tax Assessment Act 1986: Submission to Senate Select Committee'.
[81] National Entitlement Security Trust Deed dated 1 June 2002, cl 3.
[82] For example, investments of the fund must have an independent credit rating by a recognised credit agency of 'A' or better, no borrowing is allowed from the fund or on behalf of the fund and no more than 5% of the total assets of the fund are to be invested in an entity controlled by an entity (or an associate of that entity) that makes contributions to the fund: see National Entitlement Security Trust Deed dated 1 June 2002, Schedule 3.

(c) long service leave,

(d) redundancy,

(e) severance or

(f) any other amount from time to time payable by an Employer to a Member accepted by the Trustee.'[83]

According to material supplied by NEST, employer contributions are tax-deductible.

The advantage of a scheme such as this is that, assuming the financial propriety of the trust's investments, employee entitlements are secured. The chief disadvantage is that funds contributed, including sums that would ordinarily be considered contingent liabilities (such as redundancy payments), are no longer able to be accessed by the companies concerned in their everyday operations. Of course, that is the point of the scheme.[84]

There is no publicly available information, at the time of writing, on the amount of funds under management by NEST or the number of employees or employers contributing to the scheme. What is certain is that NEST has strong union support.[85] It may be an emerging feature of employee entitlements protection in Australia.

[83] National Entitlement Security Trust Deed dated 1 June 2002, cl 32.

[84] A useful discussion of 'specific purpose funds' to protect employee entitlements is found in Michael Gronow, 'Insolvent corporate groups and their employees: The case for further reform', (2003) 21 *Corporations & Securities Law Journal* 188 at 193-194.

[85] Union board members include representatives of the Australian Manufacturing Workers' Union (AMWU), Communications Electrical and Plumbing Union (CEPU), the Australian Workers' Union (AWU), the Liquor Hospitality and Miscellaneous Workers' Union (LHMU), the Construction Forestry Mining Energy Union (CFMEU) and the Textile, Clothing and Footwear Union of Australia (TCFUA).

7 Financial reporting of employee entitlements

All reporting entities in Australia are required to comply with the Australian Accounting Standards.

The relevant accounting standard for employee benefits is Australian Accounting Standards Board Standard 119 ("AASB 119").[86] Under AASB 119, employee benefits such as salaries, bonuses, holiday and sick pay, non-monetary fringe benefits and employer superannuation contributions are recognised as expenses in the period in which the employee has rendered service and unpaid benefits in these categories are recognised as liabilities. As such, corporate liability for these types of employee benefits are reflected on the balance sheet and are taken into consideration in determining whether a company is solvent.

The position in relation to termination/redundancy benefits is that, under the accounting standard AASB 119, a company shall recognise termination benefits as a liability when *and only when* it is demonstrably committed to either:

- terminate the employment of employee(s) before the normal retirement date; or
- provide termination benefits as a result of an offer made in order to encourage voluntary redundancy.[87]

As a result, a corporation which is threatened by insolvency might not be able to provide for termination payments. When the corporation becomes insolvent and employment contracts are terminated *en masse*, redundancy payments suddenly appear as an additional liability on corporate balance sheets.[88]

Perhaps this issue could be addressed by disclosure of a contingent liability, but the general accounting standard on that topic, AASB 137, does not apply where the more

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[86] The current version of AASB 119 was released in July 2004. An amended version, published in December 2004, will only take force in January 2006. There is no material difference between the two standards for the purposes of this discussion.
[87] AASB 119 further specifies that an entity is 'demonstrably committed' when it has a detailed formal plan for termination and is without possibility of withdrawal.
[88] This is consistent with the analysis in *Edwards v Attorney-General* (2004) 60 NSWLR 667 at 684; [2004] NSWCA 272 at [90].

specific AASB 119 does. The authors have no expertise in this area. In view of the potential size of termination liabilities and their priority, some disclosure ought to be required, even for companies where there is no perceived threat of insolvency. The superannuation actuary took this approach for many years in the Ansett defined benefit superannuation schemes.

8 Employee entitlements — a case study: Ansett

8.1 Ansett's collapse, the Commonwealth guarantee, and the replacement of the first administrators at the instance of the employees

On 12 and 14 September 2001 administrators were appointed to Ansett Australia Ltd and all but one of the companies in the group of which it was a member. The appointments were under Part 5.3A of the *Corporations Act 2001* (Cth). The administrators initially appointed were from the firm PricewaterhouseCoopers. They determined to cease all airline operations at 2 a.m. on Friday 14 September 2001.

On the same day, 14 September 2001, the Prime Minister announced that the Commonwealth government intended to protect the employees of the Ansett group and made a commitment that their entitlements to wages, leave and payment in lieu of leave, as well as for redundancy pay up to the 'community standard' of eight weeks, would be met by the Commonwealth to the extent that those entitlements were not able to be met from the assets of the Ansett group.

On 17 September 2001 a number of applicant employees, supported by their unions, applied in the Federal Court for the removal the administrators and for other relief.[89] The application for removal was made on the ground that the administrators had a conflict of interest as a result of an association between PricewaterhouseCoopers in New Zealand and the Ansett group's parent company, Air New Zealand Ltd. The application was also motivated, at least in part, by union concern as to both the decision to cease airline operations and the manner of its implementation. Employees had first become aware of the decision to cease flight operations when they arrived for work on the morning of Friday 14 September 2001 to find the doors locked.

The administrators who were initially appointed determined that they ought to resign. In order to ensure that there was no gap between their resignations and a new

[89] *Re Ansett Australia Ltd (Administrator Appointed); Rappas v Ansett Australia Ltd (Administrator Appointed)* [2001] FCA 1348; 39 ACSR 296.

appointment, Goldberg J, made orders under sections 448C, 449C, and 447A of the *Corporations Act 2001* (Cth) which had the effect of appointing Mark Mentha and Mark Korda to most of the companies in the Ansett group upon the resignations of the administrators initially appointed.

On that application, Goldberg J also made orders under section 447A altering the operation of Part 5.3A so as to permit designated union representatives to vote on behalf of employees union members who did not attend the section 436E meeting in person or by proxy. The order was made because the dispersal of the employees and the tight timetable provided for by the legislation meant that it was not feasible to collect proxies in the ordinary way. His Honour found that the consequence of proceeding in the usual way would be that a body of creditors would not have the opportunity to make their views known and to participate in the first meeting.

8.2 Initial assessment of Ansett's financial position and the nature and significance of the employee claims

The major creditors as assessed by the new administrators in the early days of their appointment were as follows:[90]

Employee entitlements	$686 million
Credit Lyonnais (an aircraft lessor)	$420 million
Unpresented airline tickets	$300-$400 million
National Australia Bank	$82 million
Air New Zealand group	$81 million
Caltex and BP	$16 million
Telstra	$16 million

This assessment did not make allowance for frequent-flier claimants. At that time it was believed that the obligation to Credit Lyonnais would be substantially reduced as a result of the sale of aircraft. No wages were owing employees, as outstanding

[90] See *Re Ansett Australia Ltd and Mentha (as Administrator) (No V 3045 Of 2001); Re Hazelton Air Charter Pty Ltd and Humphris (as Administrator) (No V 3046 Of 2001)* [2001] FCA 1439; 39 ACSR 355 at 359.

wages had been paid in full utilising an advance from Air New Zealand of $32 million. The estimate at that time of the Commonwealth government's total exposure under the 'guarantee' was $351 million. A very substantial additional claim by one of the superannuation trustees emerged later.

There were no secured creditors of any significance, although there were significant potential claims by aircraft lessors. The great bulk of the employee entitlement claims were for contingent claims for redundancy payments. These payments would be entitled to priority in liquidation under section 556(1)(h). Given the significant barriers to dislocation of this priority under a deed executed pursuant to Part 5.3A, the position of the employees became somewhat analogous to the position of a secured financier under a floating charge as the employees had, as a practical matter, 'first call' on the proceeds of realisation.

The employees numbered approximately 16,000 people and the extent to which they could influence the progress of the administration would reflect the extent to which they acted together. The 12 unions who represented the great majority of the employees and the Australian Council of Trade Unions devoted considerable time and resources to the task of collecting proxies, voting at meetings, appearing in the numerous court applications, and consulting with the administrators.

As indicated, the employee claims, which were of such significance in the administration, were substantially redundancy claims. This position was further exacerbated by a significant claim by certain of the superannuation trustees which subsequently emerged and which potentially added a sum substantially in excess of $100 million to the priority employee entitlements. The superannuation funds' actuary had, for some years, been noting the fact that an entitlement to retrenchment benefits on a large scale would place the funds in a position where there was a deficiency and had been calculating that potential deficiency and noting that calculation in his reports to Ansett without requiring it to be taken into account in calculating employer contributions.

8.3 Continued trading

The new administrators embarked upon a determined effort to maximise the chances of at least a significant part of the Ansett business continuing in existence, as provided for in section 435A.

On 4 October 2001 they reached a substantial settlement with the parent company, Air New Zealand Ltd, and the former Ansett directors, which was approved by the Federal Court[91] and which, amongst other things, gave them working capital for a course of action then referred to as 'Ansett Kick-Start'. This involved the continued operation of a scaled-down airline with a view to sale. Significant progressive redundancies of employees began in the latter part of 2001.

On 8 November 2001 the administrators entered into a sale agreement with a company named Tesna Holdings Pty Ltd. A creditors' meeting on 29 January 2002 approved the sale to Tesna. The sale encountered problems. The administrators continued to trade at a loss. In February 2002 they sought a direction from the Federal Court[92] that they might properly and justifiably continued to operate the business during the month of February at a loss in the expectation, or hope, that the sale would go ahead. That direction was refused on the ground that there was no relevant controversy and that the decision was a commercial decision for the administrators. The Tesna sale was never completed and flying operations ceased on 4 March 2002.

The employee creditors, substantially through the agency of the 12 unions and the ACTU, were strong supporters of the administrators' approach. They overwhelmingly voted in favour of the Tesna sale. They appeared in the Court applications and generally gave support to the course proposed by the administrators. Perhaps significantly, the support was qualified or even equivocal on the application relating to the settlement and subsequent release of Air New Zealand and the Ansett

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[91] See *Re Ansett Australia Ltd and Mentha (as Administrator) (No V 3045 Of 2001); Re Hazelton Air Charter Pty Ltd and Humphris (as Administrator) (No V 3046 Of 2001)* [2001] FCA 1439; 39 ACSR 355.
[92] *Re Ansett Australia Ltd (Administrators appointed) and Korda (as administrator)* [2002] FCA 90; 40 ACSR 433.

directors.[93] Their approach to both continued trading (at a loss) and the sale to Tesna was, at least in part, characterised by an over-riding concern to save jobs. At the various creditors meetings employee creditors who spoke, including union representatives, emphasised this consideration, and ensured that creditors who expressed contrary views were left in no doubt as to the strength of their convictions in this respect.

8.4 The Commonwealth 'guarantee'

The scheme which gave effect to the Prime Minister's 'guarantee' of September 2001 became known as 'SEESA', the Special Employee Entitlement Scheme for Ansett. The relevant legislation was the *Air Passenger Ticket Levy (Collection) Act* 2001 (Cth). The Act was assented to on 27 September 2001 and commenced on 1 October 2001. It provided for the payment of a levy on all air passenger tickets and empowered the Workplace Relations Minister to determine in writing the terms of a scheme for payment of entitlements of Ansett employees. Finalisation of the terms of the scheme was not without difficulty. The first such determination was completely scrapped and replaced.

Consequent upon representations made to the Commonwealth government by the administrators, the government agreed to enter into arrangements with the administrators to enable amounts to be advanced by the Commonwealth to meet employee entitlements. This constituted an extension of the 'guarantee' as originally announced. It was an extension because the Commonwealth was agreeing to fund payments to be made before asset realisations were completed and before any shortfall in meeting employee entitlements was revealed. It will be recalled that there was a Federal election campaign taking place during the latter part of 2001.

The Commonwealth was concerned to ensure that its priority in relation to the recovery of the advances now proposed to be made to meet employee claims as progressive redundancies were made should be the same as the priority of the claims which were met using those advances. There were two significant concerns in this

[93] Ibid, 39 ASCR 355 at 374.

regard. First, there was doubt as to whether the administrators had power to accept advances on these, or any other terms, terms. Secondly, there was doubt as to whether a priority arrangement could be put in place which was not capable of subsequently being subverted by a Deed of Company Arrangement.

The Commonwealth and the administrators prepared a deed embodying the advance funding arrangements and the administrators applied to the Federal Court for a direction that they might properly enter into and give effect to that deed, and also for orders effectively entrenching the Commonwealth's priority position. Those orders were made on 4 January 2002.[94] The orders entrenching the Commonwealth's priority position were made under section 447A. The Court ordered that Part 5.3A was to operate as if section 443A(1)(a) provided that the Commonwealth advances were debts incurred by the administrators in the performance and exercise of their functions and powers, but that the administrators were not to be personally liable beyond their entitlement to an indemnity under section 443D and repayment of the debts was to be given the same priority as if each applicable company had been in liquidation and the debts had the priority provided for in sections 556 and 560.

The application concerning the Commonwealth funding arrangements[95] involved a further participant in the Ansett employee entitlement area. In addition to the representatives of the administrators, the unions and the ACTU and the Commonwealth government, representatives appeared in the latter part of that proceeding on behalf of a number of trustees for Ansett employee superannuation funds. The position of one of those funds, the Ansett Ground Staff Superannuation Plan, became particularly significant. The trustees appeared on this application because they were concerned that there should not be any dislocation of the priority regime provided for in section 556. This was because they were about to institute proceedings making very substantial claims against Ansett companies which, they would assert, would be entitled to priority under section 556(1)(a) or (e).

[94] *Re Ansett Australia Ltd (Administrators appointed) and Mentha (as Administrator)* [2001] FCA 1806; (2002) 40 ACSR 389.
[95] Ibid.

8.5 Institution of the superannuation claims

In January 2002 certain of the superannuation trustees issued proceedings in the Victorian Supreme Court. These proceedings were eventually heard by Justice Warren (as she then was) in July and August 2002 and were determined by her in December 2002.[96] The most significant claim was that made by the trustee of the Ground Staff Plan. The Ground Staff Plan had about 8000 members. It was a defined benefit plan regulated pursuant to the *Superannuation Industry (Supervision) Act* 1993 (Cth) and the *Superannuation Industry (Supervision) Regulations*. The trustee claimed that its members, whose employment was being progressively terminated in large numbers, were entitled to a superannuation benefit known as a 'Retrenchment benefit'. This benefit was considerably more generous that the normal 'leaving service' benefit. The fund could meet normal leaving service benefits but it had not been funded to meet Retrenchment benefits on a large scale. The trustee claimed that Ansett was liable as employee under the Trust Deed and the SIS Regulations to make good the shortfall so as to enable benefits at the Retrenchment benefit level to be paid, and it claimed that this liability was a liability which, in liquidation, would be entitled to priority under section 556.

Estimates of the extent of this liability varied. The extent of the shortfall altered as investment markets moved. Before Warren J in July 2002, the shortfall was said to be $140 million. Towards the end of 2003, when the matter was before Goldberg J, the shortfall was said to be $180 million.

8.6 The DOCA section 556 priority 'dislocation' and the Federal Court superannuation proceeding

A creditors' meeting on 27th of March 2002 approved a Deed of Company Arrangement, which was signed by the administrators on 2 May 2002. At that time the trustees' proceeding was pending in the Supreme Court. The deed provided that certain claims, including that made by the trustee of the Ground Staff Plan in the Supreme Court proceeding, which were defined as 'Top-up Retrenchment Benefit

[96] *Ansett Australia Ground Staff Superannuation Plan Pty Ltd v Ansett Australia Limited* [2002] VSC 576.

Claims', were to be treated as ordinary unsecured claims even if it were held that those claims would be entitled to priority in a winding up under section 556. In other words, the deed might have the effect of rendering nugatory the outcome of the pending proceeding by a vote of the creditors. This prompted the trustee claimants to institute a further preceding, this time in the Federal Court, seeking to have the deed terminated or varied. This proceeding was eventually heard by Goldberg J in November 2003.[97]

In the context of the first meeting, an order made concerning employee voting was noted. An order made in the context of the second meeting is also noteworthy.[98] The administrators successfully applied for orders varying the procedure specified in reg 5.6.12(2) in relation to the notification of creditors for the second meeting. The application was prompted by the number and the dispersal of the employee creditors and the consequent cost of notification. It was supported by the ACTU. The Court was not prepared to relieve the administrators from the notification provisions to the extent sought, but was prepared to utilise the power in section 447A to adapt the procedure so as to meet the practical concerns. An order was made allowing for a significant reduction in the quantity of material required to be mailed to creditors, on the basis that the omitted material would be made available via websites.

The administrators made significant use of dedicated websites throughout the course of the administration. In large part this was prompted by the number and dispersal of employee creditors.

8.7 Litigation of the superannuation claims

To a considerable extent the priority arguments advanced in detail before Warren J in the Supreme Court and foreshadowed before Goldberg J in the Federal Court turned upon matters peculiar to defined benefit superannuation funds, which are of

[97] *Ansett Australia Ground Staff Superannuation Plan Pty Ltd (as Trustee of the Ansett Australia Ground Staff Superannuation Plan) v Ansett Australia Limited (Subject to Deed of Company Arrangement)* [2004] FCA 130.
[98] *Re Ansett Australia Ltd (Administrators appointed) and Mentha (as administrator)* [2002] FCA 2; 40 ACSR 419.

diminishing importance in the modern context. For that reason they will not be set out here.

Warren J determined that the relevant employees were entitled to 'Retrenchment' benefits, and that Ansett was liable to make up the shortfall, but she made a declaration that that liability would not have priority under section 556. On appeal to the Court of Appeal,[99] the declaration on priority was overturned on the ground and that Her Honour had made a declaration which ought not to have been made as it was 'advisory' and merely ancillary to the Federal Court proceeding concerning the Deed of Company Arrangement.

The focus of the litigation then returned to the Federal Court where the arguments on priority remained relevant to the trustee claimants' application to have the Deed of Company Arrangement terminated or varied.

8.8 The superannuation dispute - employee and union attitudes

Employees voted overwhelmingly in favour of the Deed of Company Arrangement. The ACTU intervened in the preceding before Warren J to support the administrators' position resisting priority for the superannuation trustees' claims. The reason for this was that the superannuation trustees asserted priority under section 556(1)(a) or (e). Ordinary employee retrenchment benefit claims (not superannuation benefits) would fall under section 556(1)(h). There were insufficient funds to meet both categories of claim. Thus, if the trustees' claims had priority in winding up and the Deed of Company Arrangement reflected that priority, the trustees' claims would be met at the expense of ordinary retrenchment claims. The employees who supported the deed, and the unions, wished the retrenchment claims to have priority over the superannuation claims. This was largely said to be because dividends on the ordinary retrenchment claims would give the employees access to money immediately.

The extended and costly dispute with the superannuation trustees was a conflict which was, in essence, one between competing employee claims.

[99] *Ansett Australia Ground Staff Superannuation Fund Pty Ltd v Ansett Australia Ltd* [2003] VSCA 117.

8.9 Settlement of the superannuation dispute - the Commonwealth is 'drawn in'

The trial of the proceeding in the Federal Court to terminate or vary the deed commenced before Goldberg J on 12 November 2003 and continued throughout the balance of that month. At the urging of His Honour, a mediation was commenced after the trial had began and was, for several days, conducted concurrently with the trial. Again, substantially as a result of the Judge's urging, officials from the ACTU and the eight unions whose members were in the Ground Staff Plan and from the Commonwealth government participated in that mediation.

It is fair to say that the Commonwealth was initially reluctant to become involved in the proceeding or in the mediation, notwithstanding its significant financial interest in the outcome. By November 2003, the total amount paid out by the Commonwealth under SEESA was $334.9 million. These payments would substantially rank as ordinary retrenchment benefits in a priority regime reflecting section 556and accordingly were vulnerable to be superannuation trustees' claims(cf s 556(1)(h); ss 556(e) or (a)).

The matter was resolved on complex terms of settlement which involved orders under section 447A varying the Deed of Company Arrangement, and which were approved by the Court.[100] The commercial basis of the settlement was made possible by the Commonwealth's agreement to defer the priority to which it was otherwise entitled under the funding arrangements referred to earlier in relation to a sum of $67 million. This concession by the Commonwealth enabled the parties to agree on variations to the Deed of Company Arrangement which produced an acceptable outcome to the parties to the dispute without altering the position of non-parties, in particular ordinary unsecured creditors.

[100] *Ansett Australia Ground Staff Superannuation Plan Pty Ltd (as Trustee of the Ansett Australia Ground Staff Superannuation Plan) v Ansett Australia Limited (Subject to Deed of Company Arrangement)* [2004] FCA 130.

8.10 Conclusions on issues concerning employee claims suggested by the Ansett experience

This brief analysis has not attempted to address all of the legal issues concerning employee entitlements raised by, or as a consequence of, the Ansett administrations. Rather it has focused on those issues raised by the Ansett administrations which may have significance in other contexts.

It is suggested that the issues so identified include the following:

1. Employee retrenchment benefit claims can represent very substantial liabilities, which may be revealed and quantified for the first time after an insolvency administration begins. The priority on winding up of these often unreported obligations increases their potential significance.

2. Where there is no secured debt and where the employee claimants are united and organised they have the capacity to have a very significant influence on the course of an insolvency administration.

3. Employee creditors are more likely to focus on, and to support, a strategy directed towards continuing a business, as opposed to maximising returns, than other creditors. In the Part 5.3A context it might be said that that reflects the legislation.

4. The significance of the quantum, and the liquidation priority, of employee claims has been increased by the Commonwealth government 'guarantee', implemented in the Ansett administrations by SEESA and now generally applicable through GEERS. As occurred in Ansett, the Commonwealth will find it difficult to avoid becoming 'drawn into' insolvency administrations as a result of its position as a 'quasi-employee' claimant. Its position may also increase its sensitivity to the consequences of corporate collapses which leave significant employee claims unmet.

5. The order made enabling union representatives to vote on behalf of their absent members has potential significance. Whilst the order made in Ansett was

confined to the first meeting, and was explained by reference to circumstances peculiar to the first meeting, it may encourage more wide ranging applications in future. In any event, the first meeting is itself very significant in a potentially controversial administration as the identity of the administrator or administrators is determined or confirmed. This decision can alter the course of an administration.

6. Where there are substantial employee claims, flexible practical procedures may be needed in order to ensure that the employee claimants are dealt with appropriately. Under Part 5.3A, extensive power to adapt procedures to do that does exist.

9 Role played by employee interests in other recent contexts

9.1 Generally

The ACTU, employees and their advisers have recently been exposed to large corporate collapses including Ansett, Pasminco, One-Tel, HIH and others.

Practitioners in the area have noticed that the approach of those representing employee interests has changed from a traditional industrial relations strategy as a means of exerting influence to a ‘corporations law strategy’, often seeking to utilise employees’ number and value as creditors to preserve businesses or secure entitlements or both. The employee representatives better understand the *Corporations Act* in general and its operation in relation to voluntary administration in particular.

The increased awareness manifests itself practically in the following ways:

- The ACTU and unions are actively cultivating relationships with insolvency practitioners.
- Employees are retaining insolvency practitioners to represent them in corporate failure.
- Employees are nominating themselves to join committees of creditors.
- Employees now appreciate that they may represent a majority in number of creditors in an administration.
- Employees are better organised for voting and play a key role prior to and at the first creditors’ meeting and subsequently the second creditors’ meetings.
- Employees are scrutinising insolvency administrations including the potential for erosion of assets available to meet employee entitlements during that period by the practitioner trading on at a loss.
- Employees play a role in curtailing the costs of the administration and negotiating fees.
- Employees utilise the media to exert their influence.

- Employees are analysing allocation of costs to ensure that fixed asset realisations are not attributed to floating asset realisations.

We have already set out in some detail an overview of the Ansett administrations. Set out below are some other recent illustrations of the above.

9.2 Pasminco - Employee Stakeholders

The administrators, on the day of their appointment, met with the secretary of the ACTU to discuss the appointment and to seek employee support. Within the first week of the Pasminco administration, the administrator wrote to each employee and informed each employee that his or her job was safe and his or her entitlements secure. The administrators went on a ‘national road show’ to directly present to all employees a ‘business as usual’ plan and to give assurances. These ‘road shows’ were conducted three or four times during the course of the administration. Employees were represented on the committee of creditors. The Pasminco intranet contained specific updates directed to employees. The administrators ensured that the Pasminco assets could be pooled to ensure that all employee entitlements would be paid in full.

9.3 Newmont Yandal Operations Limited — employee voting power

In 2003 Newmont Mining Corporation (US) proposed deeds of company arrangement to keep its Australian subsidiaries, Newmont Yandal Operations Group (formerly Joseph Gutnick’s Great Central Mining Group), in existence and to provide a better return for those companies’ creditors than that which would be attained in a winding up. The largest number of creditors of that group were the employees. The employees actively supported the DOCAs and appeared in the Supreme Court of New South Wales as interested parties to help facilitate their implementation. Their presence in court was, at certain points, very influential in the outcome.

9.4 James Hardie and the MRCF – ACTU role

The ACTU actively pursued a strategy to cause James Hardie NV, a corporate entity without any legal liability to meet the financial obligations of its former subsidiaries Amaca Pty Ltd and Amaba Pty Ltd, to conditionally agree in principle to do so. Their approach reflected a greater understanding of the corporations law in general and the limitations of the meaning of ‘creditors’ (ie. not including future contingent claimants) in particular. It reflects a growing willingness of the ACTU to intervene in corporate issues using a mixed strategy of political influence, media, industrial relations tactics, and the threat of corporations law claims.

10 Response to the issues raised

The priority rights of employees in Australia to recover in a winding-up are comparatively advantageous to employees in their scope by international standards.

The Commonwealth is now, in effect, guarantor for a significant level of employee priority claims.

Contractors and employees other than full-time employees are in a significantly less advantageous position.

Employee protection has not been addressed by any material amendment to the scope of directors' duties.

The capacity and inclination of claimants to pursue legal remedies to protect or recover employee entitlements has progressively increased in recent years. One factor in this has been greater involvement by unions in insolvency administrations, corporate reconstructions and in related litigation or threatened litigation. In future, the Commonwealth is likely to be 'drawn in' to an increasing role in these areas.

Significant employee obligations may appear as liabilities and be reported for the first time only after an insolvency or administration begins.

Appendix 1

Country	Type of entitlement	Priority	Fiscal limitation	Temporal limitation
New Zealand	Wages	Equal 4th ranked priority after properly incurred liquidator's expenses, costs of winding up application and out-of-pocket expenses of liquidation committee: see *Companies Act* 1993 (NZ), Schedule 7.	$15,000 (in total)	4 months preceding commencement of liquidation
	Leave entitlements	Equal 4th ranked after properly incurred liquidator's expenses, costs of winding up application and out-of-pocket expenses of liquidation committee.	$15,000 (in total)	No limit
	Redundancy payments	Equal 4th ranked after properly incurred liquidator's expenses, costs of winding up application and out-of-pocket expenses of liquidation committee.	$15,000 (in total)	No limit
	Superannuation / pension	-	-	-
United Kingdom	Wages	Ranked after insolvency practitioner's expenses and remuneration and secured	-	4 months preceding commencement of liquidation

Country	Type of entitlement	Priority	Fiscal limitation	Temporal limitation
		interests. Equal-ranking priority over unsecured debts with other preferred creditors (eg Crown Departments and the Inland Revenue)		
	Leave entitlements	Equal-ranking priority over unsecured debts	-	-
	Redundancy payments	-	-	-
	Superannuation / pension	Unpaid employer contributions:	-	Unpaid employer contributions: 12
		Equal-ranking priority over unsecured debts		months preceding commencement of liquidation
		Unpaid employee contributions (deducted from wages, but unpaid): Equal-ranking priority	-	Unpaid employee contributions: first 4 months deducted, but unpaid
United States of America	Wages	Pre-petition: Second-ranking unsecured creditors after bankruptcy administrative expenses.	US $4,650 (in total)	90 days before filing of bankruptcy petition
		Post-petition: highest-ranking unsecured priority	-	-
	Leave entitlements	Leave accrued prior to termination: Second-ranking	US $4,650 (in total)	90 days before filing of bankruptcy petition

Country	Type of entitlement	Priority	Fiscal limitation	Temporal limitation
		unsecured creditors after bankruptcy administrative expenses.		
	Redundancy	Pre-petition severance benefits: Second-ranking unsecured creditors after bankruptcy administrative expenses.	US $4,650 (in total)	90 days before filing of bankruptcy petition
	Superannuation / pension	Second-ranking unsecured creditors after bankruptcy administrative expenses.	US $4,650 (in total)	90 days before filing of bankruptcy petition

What are the Rights and Entitlements of Employees? If youâ€™re owed money by the insolvent company, you should claim it through the insolvency practitioner, who is the independent professional who administers the insolvency. In some instances i.e. if a company rescue is being attempted or the business is being sold, you might be asked to continue working.Â Unpaid contributions by employees are paid for the 12 months before the insolvency. In terms of contributions by employers, the The Department for the Economyâ€™s Redundancy Payments Service (RPS) will pay the least of: Contribution arrears for the 12 months before the insolvency. A sum equal to 10% of the employeeâ€™s total wages for the 12 months before the insolvency. These solutions include providing for employee entitlements prior to insolvency, safeguarding employee entitlements through â€˜superpriorityâ€™, and designing special solutions to address losses of entitlements within corporate groups. This chapter is followed by some concluding thoughts. How the Research Was Conducted. 21 D Noakes, â€˜Recovering Employee Entitlements and Uncommercial Transactions in Insolvencyâ€™ (2000) 1 Insolvency Law Bulletin 20, 20. 22 Commonwealth, Parliamentary Debates, House of Representatives, 17 February 2000, 13723 (Joe Hockey, Minister for Financial Services and Regulation); Commonwealth, Parliamentary Debates, Senate, 16 March 2000, 12978 (Senator Richard Alston, Minister for Communications, Information Technology and the Arts).Â Since then, legal action taken by the union movement has been significant in other corporate insolvency or reconstruction situations. One example is the Ansett administrations, others are found in the One.Tel administration and in McEvoy v Incat Tasmania Pty Ltd.70. 5.2 McEvoy v Incat Tasmania Pty Ltd.