Directors' Liability for Unpaid Employee Entitlements: Suggestions for Reform Based on their Liabilities for Unremitted Taxes

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Abstract

Law and economics theory holds that employees are less able to protect themselves against the non-payment of their entitlements than taxation authorities. However, over the past 15 years, the Federal Government has introduced legislation giving the Commissioner of Taxation extensive rights to recover unremitted taxation instalments from directors personally, in place of the statutory priority in a winding up that the Commissioner previously enjoyed. In contrast, the legislation introduced to allow recovery from directors of unpaid employee entitlements has proved totally ineffective, due to the requirement to prove a subjective intention to deprive employees.

This article will argue that the employee entitlement recovery provisions should be adapted from those enjoyed by the Commissioner of Taxation. The latter have the effect of strongly encouraging directors of failing companies to seek voluntary administration to avoid personal liability. This article will maintain that similar legislation with respect to employee entitlements would ensure better recovery for employees while maximising the chances of the company and the jobs being saved. It will also recommend the retention of the General Employee Entitlements and Redundancy Scheme ('GEERS') to provide a further measure of compensation for employees, in the event that directors divest themselves of assets.

1. Introduction

The separate legal entity of a company and the corporate veil which protects its officers and shareholders from bearing liability for corporate debts form the bedrock of incorporation and our modern economy. Nonetheless, it has long been the case, at common law and under statute, that the corporate veil can be lifted to impose liability on directors for unsatisfied corporate liabilities in certain circumstances.

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Although there is a range of laws imposing liability on directors for a variety of personal and corporate failings, this article will contrast the recovery rights of the Commissioner of Taxation with those of employees for the recovery of unremitted taxes and unpaid employee entitlements respectively. There are good reasons why it is important that these two types of payments are made. The first is to ensure that the parties are compensated. It is a long standing principle of taxation law that the revenue base must be protected, and employees lack the ability to protect themselves financially against corporate insolvency as, theoretically at least, some other cohorts of creditors can. The second is to deter directors from making use of unremitted taxation instalments and unpaid employee entitlements as emergency working capital as the company faces insolvency. For these reasons, legislation has been enacted in the last 15 years to impose personal liability on directors for these unmet corporate liabilities.[1]

With regard to taxes, directors' liability appears to be extensive and harsh, and it exists in addition to a considerable range of other measures designed to deter the undesirable behaviour and ensure recovery of unremitted taxation payments. The statutory priority in a winding up enjoyed by the Commissioner of Taxation over other creditors was removed in 1993 and replaced by a strict regime imposing liability on directors, which works as an effective means of encouraging directors to place failing companies into voluntary administration.[2]

In contrast, the claims of employees against directors are extremely difficult to establish, and therefore provide no such incentive. Laws passed in 2000 are virtually impossible to enforce because of a requirement to prove a subjective intention on the part of directors to deprive employees of their entitlements.[3] While employees do enjoy some degree of protection under other provisions, those rights, when looked at as a whole, are considerably more limited than the range of rights available to the Commissioner of Taxation.

The importance of protecting employee entitlements should not be underestimated. The laws passed in 2000 were in response to a series of corporate collapses, which left thousands of employees deprived of many millions of dollars of entitlements.[4] The more well known of these include Ansett Airlines,[5] Oakdale Collieries, Grafton Meatworks, Cobar Mines and National Textiles. The restructure of Patrick Stevedores also threatened employee entitlements.[6] Since

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1 In relation to unremitted taxes, the legislation is the *Insolvency (Tax Priorities) Legislation Amendment Act* 1993 (Cth), with the relevant provisions now located in Div 8 (ss 222AFA–222AMB) and Div 9 (ss 222ANA–222AQD) of Pt VI of the *Income Tax Assessment Act* 1936 (Cth). In relation to employee entitlements, the legislation is the *Corporations Law Amendment (Employee Entitlements) Act* 2000 (Cth), which inserted Pt 5.8A into the *Corporations Act* 2001(Cth) (hereinafter referred to as the *Corporations Act*), and also amended Pt 5.7B of that Act.

2 Above n1. These laws are discussed extensively in Part 3: Present Recovery Rights.

3 Above n1. These laws are discussed extensively in Part 3: Present Recovery Rights.

4 Lost benefits include accrued wages, annual leave, long service leave, accrued sick leave, payment in lieu of notice and severance pay.

5 See further Samantha Kinsey, 'A Triumph of Labour Over Capital: Employee Entitlements in Insolvency in the Wake of the Ansett Collapse' (2002) 10 *Insolvency Law Journal* 132.

the passing of the legislation, Australia has seen the collapse of One.Tel and HIH, as well as the international failures of Enron and WorldCom.[7]

This article makes the case for legislative reform of the provisions dealing with directors' liability for unpaid employee entitlements. Many prior authors have acknowledged the difficulties faced by employees,[8] and the inadequacy of the present legislative response to those difficulties,[9] with a range of recommendations for addressing them.[10] However, the alternative policy prescription suggested by this article is based on a 'law and economics' analysis of the particular vulnerability of employees, who lose both their jobs as well as the amounts owing to them, and their inability to protect themselves against this dual loss.

The suggested reforms are modelled on the laws relating to directors' personal liability for unremitted taxes, to act as an encouragement for directors to put financially struggling company into voluntary administration. The imposition of personal liability on directors for unpaid employee entitlements is not due to the loss of the entitlements per se but is justified by the fact that directors have failed first, to make adequate provision prior to insolvency for the payment of those entitlements, and secondly, to take the appropriate remedial steps which are of maximum benefit to employees. As in the case of unremitted taxation instalments, liability is not absolute but is designed to provide a powerful incentive to directors to adopt the measures specified.

This proposed method of protecting employees addresses their dual losses by allowing the opportunity for their jobs to be saved and for them to receive as much as possible of their entitlements.[11] Voluntary administration gives the company a chance to trade out of its difficulties and is the form of insolvency administration

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6 The facts of this case are set out in detail in Graeme Orr, 'Conspiracy on the Waterfront' (1998) 11 *Australian Journal of Labour Law* 159 at 159–163. See further Michael Reynolds 'The *Corporations Law Amendment (Employee Entitlements) Act* 2000 (Cth): To What Extent Will It Save Employee Entitlements?' (2001) 1 *Queensland University of Technology Law and Justice Journal* 134.

7 Corporate failures are not new. Clarke and Dean discussed the repeated waves of company collapses over the past fifty years. 'The news making 1960s failures of Reid Murray, HG Palmer, Stanhill Consolidated and Latec Investments were followed in the 1970s by Minsec Cambridge Credit Corporation, Mainline, Gollins and Associated Securities Limited, and then in the 1980s by the collapses of Bond Corporation, Adsteam, Westmex, Hooker Corporation, Rothwells and Linter.' Frank Clarke & Graeme Dean, 'Corporate Collapses Analysed' in CCH Australia Limited (ed), *Collapse Incorporated: Tales, Safeguards and Responsibilities of Corporate Australia* (2001) 71 at 72. Other major well known failures include Pyramid Building Society, Harris Scarfe, Qintex, Tricontinental, National Safety Council of Australia, State Bank of Victoria, Compass Airlines and Estate Mortgage.

8 These include: Ronald B Davis, 'The Bonding Effects of Directors' Statutory Wage Liability: An Interactive Corporate Governance Explanation' (2002) 24 *Law and Policy* 403; D Bruce Gleig, 'Unpaid Wages in Bankruptcy' (1987) 21 *University of British Columbia Law Review* 61; Arturo S Bronstein, 'The Protection of Workers' Claims in the Event of the Insolvency of Their Employer: From Civil Law to Social Security' (1987) 126 *International Labour Review* 715; Robert Howse & Michael Trebilcock, 'Protecting the Employment Bargain' (1993) 43 *University of Toronto Law Journal* 751; and Paula Darvas, 'Employees' Rights and Entitlements and Insolvency: Regulatory Rationale, Legal Issues and Proposed Solutions' (1999) 17 *Company and Securities Law Journal* 103.

which is most likely to lead to the rescue of the business and the preservation of jobs. By avoiding the 'fire sale' mentality common to liquidation, it maximises the return to all creditors, including employees, by an orderly disposal of assets if the company or its business cannot be saved. Voluntary administration is discussed further below in Part 4.

This article is divided into five parts. Part 2 will consider the economic issues behind the arguments that the Commissioner of Taxation and employees should be paid their entitlements. Imposing personal liability acts as a deterrent for directors from treating both types of unpaid liability as the company's own money, although it could be maintained that the Commissioner of Taxation does not need to recover compensation in the same way that employees do. Part 3 will outline the various forms of entitlement recovery which these two presently enjoy. Part 4 will examine the form and appropriateness of the directors' liability provisions against a background of the other means available to protect the Commissioner of Taxation and employees, and will consider a range of options to deal with the need for compensation and deterrence.

While no single option is without its drawbacks, Part 4 will recommend maintaining the present GEERS regime which compensates employees for lost entitlements. It will also recommend an amendment to the employee entitlement legislation along the lines of that which applies in relation to unremitted taxation instalments. This will impose effective personal liability on directors for the dual purpose of deterring them from using unpaid corporate liabilities as emergency working capital at times of impending insolvency, and to encourage them to seek voluntary administration, for the benefit of all cohorts of creditors. Part 5 will conclude.

2. *Economic and Juridical Considerations*

The rationale for rules that ensure the Commissioner of Taxation and employees are paid the amounts owed to them by companies is compensation and deterrence.[12] In relation to taxation payments, it is important to protect the

9 See Joellen Riley, 'Bargaining for Security: Lessons for Employees from the World of Corporate Finance' (2002) 44 *Journal of Industrial Relations* 491; David Noakes, 'The Recovery of Employee Entitlements in Insolvency' in Ian Ramsay (ed), *Company Directors' Liability for Insolvent Trading* (2000) 129; Kevin Davis & Geoff Burrows, 'Protecting Employee Entitlements' (2003) 36 *Australian Economic Review* 173; Celia Hammond, 'Insolvent Companies and Employees: The Government's Year 2000 Solutions' (2000) 8 *Insolvency Law Journal* 86; Steve O'Neill, *Corporate Insolvencies and Workers' Entitlements* (2002) Parliament of Australia Parliamentary Library <http://www.aph.gov.au/library/intguide/econ/insolvencies.htm> accessed 13 June 2007; Ian Bickerdyke, Ralph Lattimore & Alan Madge, 'Safeguards for Workers' Entitlements' (2001) 8 *Agenda* 155; Adrian Murray, 'Protecting Employee Entitlements from Foul Play: Reform of Insolvency Law in Australia', (Working Paper No 28, Centre for Employment and Labour Relations Law, The University of Melbourne, 2003); 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* 236.

10 See below Part 4: Examination of Recovery Rights and Recommendations for Change, Section C.

11 Gleig, above n8 at 62.

Commonwealth's revenue base. In relation to employee entitlements, the position of employees as vital corporate stakeholders, coupled with their inability to protect themselves against insolvency as, arguably, some other creditors can, demands their protection. In addition, for both types of unpaid debts, the important deterrent effect of the imposition of personal liability on directors, as a check against the temptation to behave irresponsibly when a company faces insolvency, can, in certain circumstances, justify legislation.

It can be argued that there is a naturally occurring divergence of interest between companies and their creditors. Each wants to give as little as possible and get as much as possible from their dealings.[13] Resolving this divergence involves the process of balancing their rights and liabilities, which takes place at two stages. The first stage happens *ex ante* in the market when parties negotiate and contract the terms of their obligations and entitlements; the second stage is the *ex post* redistribution of those rights and obligations where the courts or legislators deem necessary.[14]

Law and economics theory holds that there are a number of measures by which creditors can protect themselves against the risk of non-payment. As a result of this ability to self-protect ex ante, it could be argued that creditors should not be given additional rights *ex post* to recover compensation, beyond the enforcement of their contractual entitlements. These self-protection measures include diversification, charging a premium to protect against the risk of non-payment, seeking security from the company or its directors, and having access to information on the financial solvency of the company.

The term 'diversification' refers to the technique by which the risk of default by one party is minimised by dealing with a number of different parties. The non-payment of one debt is a small, easily absorbed loss rather than a catastrophic blow to the creditor which may lead to the creditor's own liquidation or bankruptcy. In addition, creditors can be protected against the risk of non-payment by the terms of the contracts that they negotiate, for example by charging more for their goods and services. Frank Easterbrook and Daniel Fischel have observed that '[a]s long as these risks are known, the firm pays for the freedom to engage in risky activities … The firm must offer a better risk-return combination to attract investment.'[15] Wishart asserted that:

> Creditors charge interest for the service they render. Built into that fee is compensation for the risk of loss they bear. The greater the risk of loss, the more is charged to compensate for that risk. Creditors cannot complain that insolvency as such has caused them loss because they have contracted to bear that risk, and have built compensation for bearing it into the cost of credit. If creditors do not charge for the probability of certain events happening, they should not be

12 In relation to taxation, see below Part 3 A(i); in relation to employee entitlements, see below Part 3 B (ii).

13 Alison Grey Anderson, 'Conflicts of Interest: Efficiency, Fairness and Corporate Structure' (1978) 25 *UCLA Law Review* 738 at 738.

14 Id at 741.

> supported in their foolishness. They should not survive to charge less than wiser people.[16]

Obtaining security is another manner in which creditors can safeguard against the risk of non-payment of their debt. Ways of obtaining security include requiring personal sureties from company directors, mortgages, fixed and floating charges over the company's assets, retention of title clauses and covenants restricting the company's ability to sell or further pledge its assets.[17]

Access to information about the company's financial position is another important means of creditor self-protection. Directors, shareholders, banks and other secured creditors are all privy, to varying degrees, to information that enables them to see the warning signs of corporate failure and act to protect their interests. Usually, the legal instruments which provide security to creditors also afford them a vital source of information about the company's financial performance, through contractual provisions imposing reporting obligations on the borrower and allowing the lender to appoint accountants to look into the company's affairs when concerns arise.[18]

The Commissioner of Taxation is arguably not in need of additional forms of *ex post* compensation, apart from his or her contractual rights of recovery from the taxpayer company, because he or she is a creditor who can protect himself or herself against the risk of non-payment through some of the measures described above. Most significantly, the risk of significant revenue shortfalls from non-payment by particular company taxpayers has been diversified away by virtue of the fact that taxation money is owed by a huge number of parties.[19] When governments set income tax rates, they have the ability, subject of course to political pressures, to set rates which include a premium to compensate for non-payment by some taxpayers.

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15 Frank Easterbrook & Daniel Fischel, *The Economic Structure of Corporate Law* (1991) at 50. See also Ross Grantham, 'Directors' Duties and Insolvent Companies' (1991) 54 *Modern Law Review* 576 at 579. Posner also commented that 'the interest rate on a loan is payment not only for renting capital but also for the risk that the borrower will fail to return it.' Richard Posner, 'The Rights of Creditors of Affiliated Corporations' (1976) 43 *University of Chicago Law Review* 499 at 501. However, Keay noted research by Cheffins (published in Brian Cheffins, *Company Law: Theory, Structure and Operation* (1997) at 501) which establishes that 'there is little evidence that creditors charge a higher interest rate when dealing with a limited liability company, compared to other creditors.' Andrew Keay, 'Directors' Duties to Creditors: Contractarian Concerns Relating to Efficiency and Over-Protection of Creditors' (2003) 66 *Modern Law Review* 665 at 689.

16 David Wishart, 'Models and Theories of Directors' Duties to Creditors' (1991) 14 *New Zealand Universities Law Review* 323 at 336. Wishart also made the point that the imposition of a duty on directors to act in the interests of various stakeholders in the company, such as creditors, 'fails the test of economics. It does not cope with the idea of remuneration for risk – that the law should find which party most efficiently deals with uncompensated risk', at 338.

17 Posner, above n15 at 504.

18 John D Adams & Norman Jones, 'Distressed Businesses: Preventing Failure' in CCH Australia Limited (ed), *Collapse Incorporated: Tales, Safeguards and Responsibilities of Corporate Australia* (2001) 185 at 189–90.

In addition, the Commissioner is likely to have early warning of the financial difficulties of the taxpayer company when payments are late in being made. Therefore, while the argument is made that liability should be imposed on directors for the purpose of providing compensation to protect the revenue base, the imposition of liability is arguably more relevant in deterring directors from using unremitted taxation instalments as emergency working capital in times of looming insolvency, rather than in recovering those amounts of taxation from the errant directors.[20]

Employees, on the other hand, who are technically 'voluntary' creditors, face special difficulties. Davis and Burrows estimate that employees' accrued entitlements 'probably exceed $50 billion, an amount equal to total lending by all finance companies'.[21] Ansett employees were owed $686 million upon its insolvency.[22] In the case of National Textiles, the employees were owed approximately $11.1 million in unpaid wages, accrued leave entitlements and redundancy payments.[23] Oakdale Collieries' employees were owed $6.5 million.[24] In 2003, the Australian Council of Trade Unions ('ACTU') estimated that around 19,000 employees lose up to $500 million in unpaid entitlements each year.[25]

Unlike other creditors, employees generally do not have the ability to diversify their risk.[26] For the vast majority of employees, all of their human capital is invested in a single company. In times of high unemployment, employees may be faced with a difficult decision between unemployment and a financially unstable

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19 This point was made in the Harmer Report, which was the catalyst for the taxation reforms discussed in this article. The Harmer Report noted the Report of the Senate Standing Committee on Constitutional and Legal Affairs *Priority of Crown Debts* (Canberra: AGPS, 1978) which referred to estimates by the Commissioner of Taxation for the financial year 1976–1977. It showed that while financial receipts of taxation were $15,884 million, the amount of tax to which the Crown could have claimed priority in a winding up was $10 million, or approximately 0.06 per cent of the total amount. Australian Law Reform Commission, *General Insolvency Inquiry* Report No 45 (1988) (the Harmer Report) at [735].

20 However, given the ability of directors to divest themselves of personal assets to 'judgment proof' themselves against such suits, both to avoid providing compensation and thus in turn avoiding the deterrent effects of personal liability, criminal liability becomes a relevant consideration here. This will be discussed further below in Part 4: Examination of Recovery Rights and Recommendations for Change.

21 Davis & Burrows, above n9 at 173. Campo noted that '[t]he Woodlawn mine left 160 workers owed $6 million, the Cobar mine left 270 workers with $6 million in unpaid entitlements, the Sizzler chain of restaurants left 2000 primarily casual and part time workers with $2 million in unpaid entitlements, Exicom left its 680 workers $17 million out of pocket, Braybrook Manufacturing left 70 workers owed $1.3 million, 157 Rockhampton and Yeppoon nurses were left with $1.4 million owing', above n9 at 243.

22 Justice Simon Whelan & Leon Zwier, 'Employee Entitlements and Corporate Insolvency and Reconstruction' (Research Paper, Centre for Corporate Law and Securities Regulation, University of Melbourne, 2005) at 33 <http://cclsr.law.unimelb.edu.au/research-papers/Protection%20of%20employee%20entitlements%20_final_1.pdf> accessed 10 August 2008.

23 Riley, above n9 at 495; David Noakes, 'Corporate Groups and the Duties of Directors: Protecting the Employee or the Insolvent Employer?' (2001) 29 *Australian Business Law Review* 124 at 126–130. The Federal Government eventually paid their entitlements under a Deed of Company Arrangement.

employer. While senior employees can seek added remuneration in exchange for running the risks associated with possible financial instability, not all employees are in this favourable position, and the ones who are most likely to need the protection of the law are also the ones least likely to be able to negotiate for additional compensation. They also generally lack the ability to seek security, as a bank or substantial trade creditor could, over the company's assets.[27]

A lack of information about the company's financial position, both before and during their contract of employment, exacerbates the difficulties caused by the inability of employees to protect themselves.[28] The contention that creditors have the ability to self-protect through contract is predicated on an 'efficient markets' hypothesis, that is, 'that all relevant information will be available to the market and that the market will rapidly, if not instantaneously, digest all information as it becomes available.'[29] Yet even the proponents of this theoretical outlook are prepared to admit that markets do not always work efficiently.[30]

Increases in the risk profile of a company after an employment contract is negotiated are also problematic. Directors and corporate managers can engage in behaviours and strategies, such as taking on risky projects, refinancing or reorganising the corporate entity, which add to the likelihood that employees will not recover their full entitlements.[31] Indeed, the ability of some creditors to protect themselves, for example, with charges over company assets or loan covenants, increases the risk to weaker parties who cannot negotiate such protection.[32] The use of 'quasi-securities' such as negative pledges and retention of title clauses not only bolster the position of secured lenders, they can also obscure the company's true position for other creditors, including employees.

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24 These employees were eventually paid their full entitlements after accessing money from a coal industry fund. Reynolds, above n6 at 137.

25 Explanatory Memorandum accompanying the *Corporations Amendment (Insolvency) Bill* 2007 at 8.

26 Paul Halpern, Michael Trebilcock & Stuart Turnbull, 'An Economic Analysis of Limited Liability in Corporation Law' (1980) 30 *University of Toronto Law Journal* 117 at 149.

27 This may be an option for well-organised large groups of employees. See Riley, above n9 and discussion below in Part 4: Examination of Recovery Rights and Recommendations for Change.

28 Davis commented that 'employees have relatively little information regarding their employer's financial condition and are therefore not in as good a condition to monitor their employer as are other creditors. Although this rationale does not apply to all employees, since senior management will clearly be in the best position to obtain information about the corporation's financial situation, it is applicable to the vast majority of employees who are not privy to corporate financial information. Thus, though some employees are in a better position to monitor the corporation's financial state than its creditors, it is these same employees' actions (as the management of the corporation) that the creditors and shareholders are trying to monitor in order to reduce managerial slack.' Davis, above n8 at 412.

29 Jeffery Gordon & Lewis Kornhauser, 'Efficient Markets, Costly Information and Securities Research' (1985) 60 *New York University Law Review* 761 at 770.

30 Wishart, above n16 at 336. Also Ross Grantham, 'The Judicial Extension of Directors' Duties to Creditors' [1991] *Journal of Business Law* 1 at 2–3.

31 Howse & Trebilcock, above n8 at 756.

32 Keay, above n15 at 688; Judith Freedman, 'Limited Liability: Large Company Theory and Small Firms' (2000) 63 *Modern Law Review* 317 at 351–2.

Rank and file employees lack the ability to constrain post-contractual behaviour or to bargain for *ex post* readjustment of the employment contract. Furthermore, the vulnerability of employees is exacerbated when a company is on the brink of failure. The directors, representing the company's controlling shareholders, may seek to benefit themselves or other companies in the group at the expense of creditors.[33] A viable company may restructure its operations for legitimate business reasons, or deliberately to reduce its liabilities to employees. Upon insolvency, a company may transfer assets to avoid paying employee entitlements. Employees suing as tort creditors are particularly vulnerable in the event of corporate insolvency.[34] This is a particular problem when a holding company has deliberately incorporated an under-capitalised subsidiary to minimise the loss of shareholder funds.[35] As the James Hardie case illustrated, the 'separate legal entity' principle stands in the way of tort victims seeking to recover compensation within corporate groups, in that case necessitated by the underfunding of the Medical Research and Compensation Fund that had been established for this purpose. The Report of the Special Commission of Inquiry into James Hardie identified 'significant deficiencies in Australian corporate law', and raised 'the question of whether existing laws concerning the operation of limited liability or the "corporate veil" within corporate groups adequately reflect contemporary public expectations and standards.'[36] As a result of this finding, the Federal Government has referred the issue to the Corporations and Markets Advisory Committee ('CAMAC') for detailed consideration.[37]

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33 Wishart, above n16 at 333.

34 Injury compensation enjoys a degree of priority for payment in a liquidation under s 556(1)(f) of the *Corporations Act* 2001 (Cth) but it ranks behind the wages and superannuation entitlements of employees. Since these and other higher ranking categories of priority must be paid in full before lower categories are considered, there is a significant risk that injury compensation claimants will not be fully compensated as a result of this priority.

35 This issue has been examined judicially on a number of occasions. In *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549, Rogers AJA said, at 579, '[i]t seems to me reasonable…that different considerations should apply in deciding whether to pierce the corporate veil in actions in tort from the criteria applied in actions in contract or, for that matter, revenue or compensation cases.' In *CSR Ltd v Young* (1998) Aust Tort Reports 81–468, it was held that the holding company, for the purposes of liability, was in the same position as the subsidiary as its control over the activities of the subsidiary was sufficiently strong to conclude that the activities were conducted by the holding company. On the facts, the contrary result was reached in *James Hardie & Co Ltd v Hall* (1998) 43 NSWLR 554. For a sample of the literature on this subject, see: Robyn Carroll, 'Corporate Parents and Tort Liability' in Michael Gillooley (ed), *The Law Relating to Corporate Groups* (1993) 91 at 93; John Farrar, 'Legal Issues Involving Corporate Groups' (1998) 16 *Company and Securities Law Journal* 184; Henry Hansmann & Reinier Kraakman, 'Towards Unlimited Shareholder Liability for Corporate Torts' (1991) 100 *Yale Law Journal* 1879; and David Leebron, 'Limited Liability, Tort Victims, and Creditors' (1991) 91 *Columbia Law Review* 1565.

36 David Jackson QC, *The Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation* (2004) at 571–2.

37 See The Hon Chris Pearce MP, *Reference in relation to the treatment of future unascertained personal injury claims* (12 October 2005) Corporations and Markets Advisory Committee <http://www.camac.gov.au/CAMAC/camac.nsf/byHeadline/Whats+NewTreatment+of+future+unascertained+personal+injury+claims?openDocument> accessed 5 October 2007.

Grantham argued that normally 'the short-term gain from high-risk activity is more than offset by the long term loss of lender confidence',[38] but that the self-interest of directors which might normally compel them to act responsibly and in the best interests of creditors dissolves on approaching insolvency. Shareholders also lose their incentive to control management's treatment of creditors.[39] The problem is particularly acute for directors of small companies, who do not always have reputational incentives. In small companies, the directors are more likely to be the controlling shareholders and act as such. In large corporations, management is generally separated from ownership, and directors may have a greater incentive to act cautiously to retain their remuneration, reputations and the ability to act as directors of other companies.[40]

Imposing personal responsibility on directors for improper behaviour, therefore, plays an important role in deterring undesirable behaviour and addresses the moral hazard occasioned by the separate legal entity principle. It encourages directors either obey the law or to protect themselves against liability by some other means. This may include taking more care to maintain adequate capitalisation of the company so that creditors are paid by, or can sue, the solvent company rather than the directors themselves. Alternatively, they may seek insurance on behalf of the company or themselves.

Imposing liability or punishment on the company alone may be insufficient especially where an undercapitalised company owned by a sole shareholder will be happily abandoned to liquidation.[41] Vanessa Finch noted that '[p]ersonal liability may leave risk evaluation and spreading to those individuals who are the best acquirers of information concerning corporate risks, levels of capitalisation, internal control systems and insurance.'[42] Given the range of company sizes, risk profiles and individual circumstances, it would be extremely difficult for government to legislate appropriately and adequately for required levels of insurance or capitalisation. The imposition of personal liability 'permits managers to select the optimal strategy for covering risk from among insurance, self-insurance or risk-reduction though the control of the firm activities.'[43]

The imposition of liability on directors *ex post* acts in a similar manner to the giving of a security *ex ante*. In the context of the Canadian legislation which imposes liability on directors for unpaid employee entitlements, Davis concluded that making directors personally liable for certain debts gives 'a creditor, who is a relatively poor monitor, … a voice in the interactive model of corporate governance.' This forces directors to 'act as monitors on behalf of the employees on pain of personal liability for the credit that the employees extend to the corporation, if it is unable to satisfy their claim from its own assets.'[44]

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38 Grantham, 'Judicial Extension', above n30 at 1, citing Posner, above n17 at 504.

39 Wishart, above n16 at 334.

40 Keay, above n15 at 669 (footnotes omitted). See also Howse & Trebilcock, above n8 at 757.

41 See Vanessa Finch, 'Personal Accountability and Corporate Control: The Role of Directors' and Officers' Liability Insurance' (1994) 57 *Modern Law Review* 880 at 881–2.

42 Id at 883. [Footnotes omitted.]

43 Ibid.

The imposition of liability gives directors the incentive to put in place corporate governance systems to ensure that the company is in a position to meet its liabilities and that fellow directors are discharging their functions and responsibilities adequately. Davis notes that '[g]iven the predictability of the amounts owing and the timing of the payment for wages, the diligent director can protect herself from liability through careful monitoring of corporate cashflows.'[45] The present rights of the Commissioner of Taxation and employees to recover their entitlements from directors is the subject of the next Part.

3. *Present Recovery Rights*

This Part will outline the various forms of entitlement recovery which the Commissioner of Taxation enjoys in relation to unremitted tax instalments and which apply to employees in relation to their unpaid entitlements. Part 4 will then examine and analyse these rights and make the recommendation that the model adopted in relation to unremitted taxation instalments be adopted in relation to unpaid employee entitlements. It is interesting to note that both sets of provisions allowing recovery by these disparate creditors were introduced within a decade of each other yet their provisions are radically different.

A. *Unpaid Taxation Liabilities*

(i) Imposing Personal Liability on Directors

In 1993, the *Income Tax Assessment Act* 1936 (Cth) ('ITAA36') was amended in relation to amounts owing under a number of tax systems dealing with the collection of tax from third parties and subsequent remittance to the Commissioner of Taxation.[46] These included the Pay as You Earn System, the Prescribed Payments System, the Reportable Payments System, and the Withholding Tax System.[47]

The enactment of these provisions coincided with the removal of the Commissioner's rights of priority in the distribution of a company's assets upon its liquidation in relation to unpaid tax instalments.[48] These amounts were removed as a priority on 1 June 1993.[49] The amended tax legislation enables 'prompt and effective' recovery action to be taken by allowing the Commissioner to make an estimate of amounts owing and to recover the amount of the estimate.[50] Its stated

44 Davis, above n28 at 412–3.

45 Id at 421.

46 *Insolvency (Tax Priorities) Legislation Amendment Act* 1993 (Cth). The provisions are contained in Div 8 (ss 222AFA–222AMB) and Div 9 (ss 222ANA–222AQD) of Pt VI of the ITAA36.

47 These were formerly contained in ss 221A–221YAA of Div 2, ss 221YHA–221YHZ of Div 3A, ss 220AA–220AZH of Div 1AA, ss 221YJ–221YY of Div 4, and ss 221YHZA–221YHZZC of Div 3B, all of Pt VI of the ITAA36. The various taxes to which the directors' liability provisions apply are now contained in Div 12 of Sch 1 of the *Taxation Administration Act* 1953 (Cth) (TAA53).

aim was to 'ensure solvency problems are confronted earlier and the escalation of debts will be prevented.'[51]

The object of Division 9 of Part VI of the ITAA36 is to ensure that a company satisfies particular income tax obligations or is promptly placed into voluntary administration or liquidation.[52] It seeks to achieve this by imposing a duty on directors to take specified actions or to face a 'penalty' equal to the company's tax liability.[53] Four actions are specified: to cause the company to comply with its payment obligations, to enter into a payment agreement,[54] to appoint an administrator,[55] or to commence winding up proceedings.[56] The directors are given a written notice specifying details of the unpaid amounts and given 14 days to comply. If this duty is not complied with within this time,[57] the directors are personally liable to pay a penalty equal to the amount of the unpaid tax or estimated amount of unpaid tax.[58]

The liability of a director falls due immediately upon the failure by the company to pay the tax due to the Australian Taxation Office ('ATO') on the prescribed date, if one of the three other options is not taken up. Directors have a continuing exposure, both jointly and severally with the company, for these amounts which arises on the date that the tax liability on the company became due and payable.[59] In addition, directors remain liable as an accessory to the taxation offence.[60]

The imposition of liability on directors is not the only way in which the position of the Commissioner in relation to unpaid taxes is safeguarded. Although the 1993 amendments removed the Commissioner's priority over other creditors in a winding up,[61] provisions of the *Corporations Act* 2001 (Cth) and the *Taxation Administration Act* 1953 (Cth) (TAA53) still give the Commissioner a priority position in a number of ways.

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48 ITAA36 s 221P. The statutory priority of the Commonwealth to receive a priority in corporate insolvencies had been abolished from 1 November 1979 (Act No 134 of 1980) except in relation to tax instalment deductions and withholding tax. Sections 221YU and 221P of the ITAA36. The history of the removal of the provisions is outlined in Christopher Symes, 'Reminiscing the Taxation Priorities in Insolvency' (2005) 1(2) *Journal of the Australasian Tax Teachers Association* 435 at 440–1.

49 This was in accordance with a recommendation of the Harmer Report, above n19 at [741].

50 ITAA36 ss 222AFA(1), 222AGA(1).

51 *Insolvency (Tax Priorities) Legislation Amendment Bill* 1993 (Cth) (Second Reading).

52 Section 222ANA(1) of the ITAA36 provides that '[t]he purpose of this Division is to ensure that a company either meets its obligations under Division 1AAA, 3B, 4 or 8 of this Act or under Sub-div 16B in Sch 1 to the TAA53, or goes promptly into voluntary administration under Part 5.3A of the *Corporations Act 2001* or into liquidation .'

53 ITAA36 ss 222AOB and 222APB.

54 ITAA36 s 222ALA.

55 *Corporations Act* Pt 5.3A.

56 *Corporations Act* s 459A.

57 ITAA36 s 222AOE(b).

58 ITAA36 ss 222AOC or 222APC, 222ANA(2).

59 The defences which are available to directors are discussed below under Part: 4 Examination of Recovery Rights and Recommendations for Change.

(ii) Voidable Transactions

Under the *Corporations Act*, the company's liquidator has the right to claw back from the Commissioner of Taxation any payment made by the company which amounts to a voidable transaction.[62] This would occur, for example, if the company was insolvent but made a payment of certain types of taxation in the previous six months.[63] A person who was a director of the company at the time when that payment of tax was made is liable to indemnify the Commissioner for loss or damage in relation to the voidable transaction order.[64]

As a result of this section, if the directors of an insolvent company make a payment of tax to the Commissioner,[65] they are then liable to reimburse the Commissioner for that amount if the liquidator takes action against the Commissioner to recover the voidable preference.[66]

(iii) Garnishee Provisions

It is also possible for the Commissioner of Taxation to obtain priority of payment over secured and unsecured creditors in certain circumstances through the operation of garnishee provisions. This is achieved by the service of a notice requiring payment from a person or company which holds money on behalf of the company that owes unpaid taxes.[67]

The result of such a notice is the creation a fixed charge in favour of the Commissioner against the taxpayer company's assets rendering the tax office in effect a secured creditor.[68] This negates much of the benefit for unsecured creditors of the Commissioner no longer having priority over unsecured creditors under s 556 of the *Corporations Act*. An additional advantage for the Commissioner is that the

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60 *Crimes Act* 1914 (Cth) s 21B and TAA53 s 8Y. Section 8Y(1) of the TAA53 states: '[w]here a corporation does or omits to do an act or thing the doing or omission of which constitutes a taxation offence, a person (by whatever name called and whether or not the person is an officer of the corporation) who is concerned in, or takes part in, the management of the corporation shall be deemed to have committed the taxation offence and is punishable accordingly.' Defences are available under subs (2): '[i]n a prosecution of a person for a taxation offence by virtue of subsection (1), it is a defence if the person proves that the person: (a) did not aid, abet, counsel or procure the act or omission of the corporation concerned; and (b) was not in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the act or omission of the corporation.'

61 See above n48.

62 *Corporations Act* s 588FF.

63 The types of taxation payments which can be the subject of a voidable transaction order are specified in Sub-div 16-B of Sch 1 of the TAA53. The company's liquidator attains this right to claw back payments when the company giving has given unfair preference. Under the *Corporations Act*, if a company gives an unfair preference under s 588FA(1) while the company is insolvent (s 588FC), which becomes a voidable transaction under s 588FE(2), the court has the power to order a person to pay the amount of the preference to the company under s 588FF(1).

64 *Corporations Act* s 588FGA(2).

65 Pursuant to s 222AOB of the ITAA36, the first of the four options after receipt of the notice under s 222AOE of that Act.

66 *Corporations Act* s 588FF.

67 TAA53 ss 260–5, Sch 1, Sub-div 260–A (formerly s 218 of the ITAA36).

notice avoids the requirement placed on other secured creditors to obtain a judgment or a warrant of execution from the court.

(iv) Liability of the Company's Administrator

A fourth means by which the Commissioner is able to recover unpaid taxation is via the imposition of liability for certain withholding payments on the company's administrator during a voluntary administration.[69] However, the severity of this provision is softened by giving the administrator priority to recover these from the company's assets in a winding up.[70]

(v) Priority under s 556

For the sake of completeness, it should also be noted that a degree of priority for the Commissioner of Taxation remains under s 556 of the *Corporations Act*. During a company's winding up, where the liquidator has been successful in paying employee entitlements from the company's assets pursuant to s 556(1)(e) of the Act, they are required to deduct tax from that payment of wages and remit this to the Commissioner of Taxation.[71]

B. Unpaid Employee Entitlements

(i) Priority under s 556

Currently, employees enjoy a degree of priority in the distribution of the assets of a company when it is wound up. The *Corporations Act* provides priority for wages and superannuation contributions of employees,[72] leave entitlements and retrenchment payments,[73] with limits applicable to directors and their spouses.[74] Employees also have a degree of priority when the company is in receivership or subject to other controllership.[75] However, all of these rank behind a number of categories of administration expenses of the winding up and each must be paid in full before later categories receive anything. Riley commented that 'the first bite of nothing is still nothing'.[76] It is likely, therefore, in many situations that employees will not receive their full entitlements as a result of their statutory

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68 *Clyne v Deputy Commissioner of Taxation* (1981) 150 CLR 1; *Commissioner of Taxation v Donnelly* (1989) 25 FCR 432; *Commissioner of Taxation v Government Insurance Office (NSW)* (1993) 45 FCR 284; *Macquarie Health Corporation Ltd v Federal Commissioner of Taxation* (1999) 96 FCR 238.

69 *Corporations Act* s 443BA.

70 *Corporations Act* s 556(1)(c).

71 *Deputy Commissioner of Taxation v Applied Design Development Pty Ltd (in liq)* (2002) 117 FCR 336.

72 *Corporations Act* s 556(1)(e).

73 *Corporations Act* ss 556(1)(g) and (h) respectively.

74 *Corporations Act* s 556(1A) refers to the 'excluded employee', which is defined in s 556(2) of that Act.

75 *Corporations Act* s 433(3)(c). This section only applies where the receiver is appointed to act on behalf of holders of debentures that are secured by a floating charge, not a fixed charge: *Corporations Act* s 433(2). Priority of employees in a winding up does not extend to other forms of insolvency administration. See Terry Taylor, 'Employee Entitlements in Corporate Insolvency Administrations' (2000) 8 *Insolvency Law Journal* 32 at 34.

priority in a winding up. This contention is supported by the statistics quoted in Part 1 relating to losses of employee entitlements, which prompted the creation of the GEERS regime, discussed below.

(ii) Imposing Personal Liability on Directors

Section 181 of the *Corporations Act* requires directors to act in good faith and in the best interests of the company. Breach of this duty may result in personal liability to compensate the company being imposed on directors.[77] The interests of employees can be considered in performing these duties but only where this would also be in the company and shareholders' interests. Employee concerns cannot be placed ahead of those of shareholders. For example, a company could not make redundancy payments to employees in the context of a business closure where this would reduce the funds available for distribution to shareholders.[78] A fiduciary duty requires directors to take into account creditors' interests when a company is insolvent or facing insolvency,[79] but the cases stop short of establishing a fiduciary duty that is enforceable at the instance of creditors,[80] and even the duty that is enforceable by the company is ill-defined.

As noted above, the past decade has seen a number of prominent corporate failures and restructures which have resulted in large numbers of employees either losing or having threatened their unpaid entitlements to annual leave and long service leave, as well as missing out on redundancy payments prescribed in industrial awards and agreements.[81] The waterfront dispute of 1998 saw a corporate restructure to facilitate the sacking of waterside workers and their replacement with non-union employees.[82] The political reaction to events such as these led to the passing of legislation imposing a measure of liability on directors for unpaid employee entitlements and the implementation of a government funded scheme to cover, at least in part, the unpaid entitlements of employees.[83]

The legislation, the *Corporations Law Amendment (Employee Entitlements) Act* 2000 (Cth), inserted Part 5.8A into the *Corporations Act* and also amended Part 5.7B of that Act. It provides two avenues for recovery of employee entitlements. The first is s 596AB(1), which states that:

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76 Riley, above n9 at 499. Rizwaan Mokal maintained that in the United Kingdom, the lower priorities relate to 'non-distribution' as there is rarely enough funds to satisfy the higher categories of priority payment. Rizwaan Mokal, 'On Fairness and Efficiency' (2003) 66 *Modern Law Review* 452 at 459.

77 *Corporations Act* s 1317H.

78 *Parke v Daily News Ltd* [1962] Ch 927; see also *Hutton v West Cork Railway Co* (1883) 23 Ch D 654.

79 *Walker v Wimborne* (1976) 137 CLR 1; *Kinsela v Russell Kinsela Pty Ltd (in liq)* (1986) 4 NSWLR 722.

80 *Spies v The Queen* (2000) 201 CLR 603.

81 Above nn7 and 21.

82 See *Maritime Union of Australia v Patrick Stevedores No 1 Pty Ltd* (1998) 77 FCR 456.

83 The then Federal Minister for Financial Services and Regulation said that the amendment regarding uncommercial transactions would 'ensure that directors don't use asset stripping techniques to avoid paying employees their proper entitlements.' The Honourable Joe Hockey, *More Protection for Workers' Entitlements: Press Release* (28 June 2000).

> A person must not enter into a relevant agreement or a transaction with the intention of, or with intentions that include the intention of:
>
> (a) preventing the recovery of the entitlements of employees of a company; or
>
> (b) significantly reducing the amount of the entitlements of employees of a company that can be recovered.

It should be noted here that the section requires proof of a subjective intention on the part of the directors to prevent or reduce significantly the recovery of employee entitlements. This will be discussed further below in Part 4. While a new offence was created to penalise employers engaging in this behaviour,[84] with a harsh penalty including a maximum term of imprisonment of 10 years, there have been no prosecutions under this section. Compensation may also be payable in action taken by the company's liquidator or by the employees with the consent of the liquidator.[85] In the absence of liquidator consent, employees can also seek the right to sue with leave of the court,[86] pursuant to provisions similar to those found in the insolvent trading legislation.[87]

The second way in which employee entitlements are protected by the amending legislation is by the amendment of the uncommercial transaction provisions.[88] This legislation added a category of 'deemed debts' to the insolvent trading provisions. When a company takes any of the actions listed in s 588G(1A) of the *Corporations Act* it is automatically deemed to have incurred a debt for the purposes of the directors' duty to prevent insolvent trading under s 588G of that Act. One of these debts is entering into an uncommercial transaction. The effect of this amendment is to give the liquidator the ability to recover from directors the value of assets deliberately dispersed by directors, for the purpose, *inter alia*, of defeating employee claims, but without having to prove the requirement under Part 5.8A of the *Corporations Act* of an actual intent to prevent or reduce significantly recovery of employee entitlements.[89]

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84 *Corporations Act* s 596AB.

85 *Corporations Act* ss 596AC, 596AF. Any amount recovered by the liquidator has priority under subs-s 556(1)(e)–(h) and is regarded as a preferential debt owed to employees.

86 *Corporations Act* s 596AH.

87 *Corporations Act* s 588T.

88 Under s 588FB(1) of the *Corporations Act*, '[a] transaction of a company is an uncommercial transaction of the company if, and only if, it may be expected that a reasonable person in the company's circumstances would not have entered into the transaction, having regard to:
(a) the benefits to the company of entering into the transaction;
(b) the detriment to the company of entering into the transaction;
(c) the respective benefits to other parties to the transaction of entering into it; and
(d) any other relevant matter.

89 It should also be noted here that, prompted mainly by the One.Tel collapse in 2001, the *Corporations Amendment (Repayment of Directors' Bonuses) Act* 2003 (Cth) was passed. The legislation inserted s 588FDA into the *Corporations Act* to enable the recovery by a liquidator of excessive bonuses that have been paid to directors in circumstances where a company is in no financial position to make such payments.

(iii) Government Funded Entitlements Scheme

GEERS was introduced for the further protection of employees.[90] It enables employees of insolvent companies to claim recovery of their unpaid entitlements from a government fund.[91] The Government enjoys a statutory right of subrogation to stand in the shoes of employees and claim their statutory priority in the winding up of the company.[92]

However, it operates subject to a number of important limitations including an overall 'cap' of $98,200 on the level at which entitlements paid out under the scheme are to be calculated.[93] The scheme is also discretionary and there is no legislative obligation on present or future federal governments to operate the scheme.[94]

4. Examination of Recovery Rights and Recommendations for Change

The outline in Part 3 of the laws relating to the imposition of personal liability on directors for unpaid corporate debts in relation to taxation and employee entitlements demonstrates a legislative willingness to hold directors personally accountable. These provisions should ensure both a measure of compensation for the affected parties as well as acting as a deterrent against the particular undesirable behaviour.

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90 GEERS replaced the Employee Entitlements Support Scheme (EESS), which was introduced by the Federal Government on 8 February 2000. It adopted the recommendations in Federal Minister for Employment, Workplace Relations and Small Business, the Hon Peter Reith MP, *The Protection of Employee Entitlements in the Event of Employer Insolvency: Compulsory Insurance: Ministerial Discussion Paper* (Canberra: AGPS, 1999). Its purpose was to provide a safety net for employees who lose their jobs due to the insolvency of their employers. The EESS scheme involved a 50 per cent contribution from the states collectively, but support from the states was not forthcoming. The alternative proposal for an insurance scheme for the recovery of employee entitlements contained in that Discussion Paper was rejected. A special scheme to pay the employment entitlements for former Ansett employees was also introduced, funded by a levy on airline tickets: *Air Passenger Ticket Levy (Collection) Act* 2001 (Cth) and the *Air Passenger Ticket Levy (Imposition) Act* 2001 (Cth).

91 Note that employees of a company that went into voluntary administration on or after 1 November 2005 and which became subject to a Deed of Company Arrangement, are not eligible for GEERS until and unless the company goes into liquidation. The ability of employees to make a claim under GEERS is affected if the liquidation has been preceded by a deed within 12 months of the liquidation, and the deed had a different priority for payment of outstanding employee entitlements to that in the event of liquidation.

92 *Corporations Act* ss 560, 556.

93 For further details, see the current version of the GEERS Operational Arrangements. Australian Workplace, *GEERS Operational Arrangements* http://www.workplace.gov.au/workplace/Programmes/EmployeeEntitlements/GEERSV2/GEERSOperationalArrangements.htm> accessed 7 August 2008.

94 The Operational Arrangements state that '[w]hile these OAs set out the general policy basis for the administration of GEERS, any Advance is made without any legal obligation on the part of the Commonwealth to do so.' Id cl 5(c). See further Kinsey, above n5 at 141–142.

These forms of recovery rights outlined in Part 3 will now be analysed. In terms of compensation, it will be seen that the provisions allowing the Commissioner of Taxation to recover unpaid instalments are far more generous than the laws protecting unpaid employee entitlements. This is despite the fact that economic analysis show the Commissioner of Taxation as a creditor who has the ability to protect him- or herself against non-payment of debts, in contrast to employees who have very little ability to protect themselves. It should also be recalled that employees suffer the loss of their jobs, as well as the loss of their entitlements, when their employer company goes into liquidation without making appropriate provision for their payment.

Due to their stringency, the provisions relating to unremitted taxation instalments also give directors a much greater incentive to place the company into voluntary administration than the employee protection provisions do. Ironically, an employee will be in a better position if the directors have failed to remit taxation instalments (because of the incentive to place the company into voluntary administration) than if the tax debt was properly discharged prior to insolvency. This is anomalous, considering that voluntary administration is of greater benefit to employees than other creditor cohorts, affording them a better chance to retain their jobs as well as recover their unpaid entitlements. A range of options to redress these issues will be examined later in this Part.

A. Recovery of Unpaid Taxation Liabilities

As noted above, directors become personally liable for unremitted taxation payments unless they satisfy one of the requirements of the director penalty notice served upon them.[95] While the Commissioner of Taxation favours negotiating with companies to go into voluntary administration as a means of maximising their recovery of taxation,[96] the Commissioner's stringent legal rights against errant directors can and will be enforced where necessary.

For example, it appears from *Gould v Federal Commissioner of Taxation* that penalties can still be applied against the directors under s 8Y of the TAA53 despite the satisfaction of the requirements of the director penalty notice.[97] This is because the traditional mechanism for penalising directors was not removed upon the introduction of the new Division 9 director penalty notice.[98] In *Gould*, it was held that notwithstanding compliance by the director with the requirements of s 222AOE, he was still liable to pay a penalty equal in the amount of the

95 ITAA36 s 222AOE.

96 See Australian Taxation Office, *ATO Receivables Policy* (2006) <http://law.ato.gov.au/atolaw/view.htm?DocID=RMP%2FRP0020> accessed 13 October 2007.

97 (1998) 147 FLR 173.

98 Presumably this is because s 8Y of the TAA53 is broader than Div 9 of ITAA36. The director penalty notice under Div 9 is limited to directors, whereas s 8Y applies to 'any person', including a director, who is concerned in or takes part in the management of the corporation. There are defences available to directors under Div 9, whereas s 8Y deems an officer of a corporation to be concerned in and take part in the management of a corporation, unless the contrary is proved.

outstanding tax in accordance with s 8Y of the TAA53.[99] In addition, a reparation order could be sought under s 21B of the *Crimes Act* 1914 (Cth).[100]

It should be recalled that even if directors comply with the penalty notice regime by putting the company into liquidation, the directors are personally liable for the amount of the notice if the Commissioner of Taxation has been given a voidable preference which has been clawed back by the liquidator. Thus, even if the directors comply with s 222AOB(1)(b) by entering into a s 222ALA agreement with the Commissioner for the repayment of tax and payments are made pursuant to that agreement, and the company subsequently goes into liquidation, the directors can be subject to a cross-claim under s 588FGA if those payments are found to be voidable transactions. A similar outcome could occur if the directors caused the company to comply with s 222AOB(1)(a) by immediately paying the tax. Compliance with that section would not preclude a clawback claim by the liquidator under s 588FGA.

The strictness of these provisions was illustrated in *Browne v Deputy Commissioner of Taxation*.[101] The directors argued, *inter alia*, that they were obliged to pay the tax that constituted the preference, because failure to do so constituted an offence, and that therefore they qualified for one of the defences available.[102] The Full Court of the Federal Court rejected that argument, on the basis that there were options existing under the notice which would have avoided both the giving of the unfair preference and criminal liability for failure to comply with the notice.[103]

Two defences are prescribed under the 1993 legislation for a breach of Division 9. The defences are that the director establishes that he or she did not take part in the management of the company at any time while a director because of ill health or some other good reason, or that the director took all reasonable steps to ensure that one of the four actions referred to above was taken, or alternately there were no such steps that the director could reasonably have taken in all the circumstances.[104]

These defences are interpreted strictly. In *Fitzgerald v Deputy Commissioner of Taxation*,[105] it was held that a director who had occupied the role for 17 days was unable to avail himself of the defences, despite the liability for the tax remittances arising before he took the position and despite the fact that he had resigned before the notice under s 222AOB was issued.[106]

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99 *Gould v Federal Commissioner of Taxation* (1998) 147 FLR 173 at 180; see above n60.

100 *Gould v Federal Commissioner of Taxation* (1998) 147 FLR 173 at 180.

101 (1998) 82 FCR 1.

102 *Corporations Act* s 588FGB(6). It is a defence if it is proved that: (a) the person took all reasonable steps to prevent the company from making the payment; or (b) there were no such steps the person could have taken.

103 These included the appointment of a voluntary administrator or approaching the Commissioner and all other creditors to arrange a compromise whereby all parties were paid the same pro rata percentage of their debts, thus avoiding a preference. *Browne v Commissioner of Taxation* (1998) 82 FCR 1 at 8.

104 ITAA36 subss 222AOJ(2)–(4).

105 (1995) 95 ATC 4587.

The narrowness of the time frame for putting the company into liquidation under s 222AOE(b)(iv) after the Commissioner gives the notice under s 222AOB is illustrated in *Re Scobie; Ex parte Commissioner of Taxation*.[107] The directors argued that the phrase 'begins to be wound up' meant that the filing of an application for an order to wind up, so that their actions in this regard were 'reasonable'. Copper J rejected this argument, stating that a company only begins to be wound up when the Court issues an order and that, therefore, the mere filing of an application does not comply with the liquidation requirements contained in the notice.[108]

The stringency of the law was noted even during Senate debate over the legislation before it was passed. Senator Watson commented:

> [A] director who is unable to convince the board to undertake one of the mandated options under section 222AOB(1) so as to comply with the tax office's demands and resigns from the board could still be liable for the whole of the amount of the unpaid tax should his fellow directors prove to be men of straw. This would be despite his having acted in good faith throughout. Even allowing for contributory or indemnity rights under section 222AOI, a liability proportionate to the number on the board is a misplaced penalty.[109]

The provisions giving recovery rights to the Commissioner of Taxation are possibly too harsh. Three of the four alternatives are difficult for directors to use to their advantage. Unless carefully crafted, any payment arrangement can result in personal liability through the clawbacks under the *Corporations Act*. Placing the company into liquidation within the tight prescribed time limit would be challenging. Voluntary administration provides the safest alternative for directors and, therefore, it can be argued that the very severity of the other options is the mechanism which supplies a powerful incentive for directors to place a financially troubled company into voluntary administration, for the benefit of all creditors.

B. Recovery of Unpaid Employee Entitlements

Both the Commissioner of Taxation and employees are creditors who may remain unpaid if the debtor company becomes insolvent. However, the rights of employees to recover their unpaid entitlements are in stark contrast to the extensive provisions protecting payments due to the Commissioner. This is despite the fact that, as argued in Part 2, employees are unable to protect themselves against the loss of their entitlements *ex ante* through diversification, by

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106 Other decisions confirm the harsh interpretation of the availability of the defences. For example, *Deputy Commissioner of Taxation v Solomon* (2003) 52 ATR 729; *Deputy Commissioner of Taxation v Clark* (2003) 57 NSWLR 113; *Deputy Commissioner of Taxation v Saunig* (2002) 55 NSWLR 722; *Deputy Federal Commissioner of Taxation v Stenner* (2003) 53 ATR 316. See further Patricia Blazey, 'Non Payment of Pay As You Go Withholding Tax and the Implications for Company Directors' (2005) 1(3) *Journal of the Australasian Tax Teachers Association* 70.

107 (1995) 59 FCR 177.

108 *Re Scobie; Ex parte Deputy Commissioner of Taxation* (1995) 59 FCR 177 at 185.

109 Commonwealth, *Parliamentary Debates*, Australian Senate, 26 May 1993 (Senator John Watson) at 1295.

incorporating a premium to cover their risk of non-payment or by obtaining security. However, the losses which confront employees collectively can and have run into the hundreds of millions of dollars for a single enterprise.[110]

The most obvious difficulty for employees enforcing their entitlements is the need to establish a subjective intention on the part of the directors to deprive them of their entitlements. While the requisite intention needs only to be the intention to enter into the transaction, this will be difficult to establish if the transaction is made to look like a corporate restructure to promote administrative efficiency.[111] To defeat the operation of the section, it is likely that directors will ensure that minutes of meetings record only 'proper' intentions. Hill noted that the significant problems for employees in proving that directors are acting with the requisite intention 'inevitably limit [these provisions'] scope and effectiveness as a protective mechanism for employees'.[112] There have been no reported cases to date involving a successful action by liquidators or employees under these provisions.

Ironically, despite one of the aims of the recovery provisions enjoyed by the Commissioner of Taxation being to help protect employees by shortening the time period for recovery, the availability to the Commissioner of actions against directors personally has the potential to diminish the pool of money available to employees if action were taken under Part 5.8A. However, given the unlikelihood of a Part 5.8A action succeeding, this is more of a theoretical than a practical concern.

In addition, employees themselves, while able to take action with liquidator consent under Part 5.8A of the *Corporations Act*, are not able to take action to enforce the uncommercial transactions provision of Part 5.7B, discussed above. This amendment was an important expansion of both ss 588G and 588FB of the *Corporations Act* because it allowed the recovery from a director of a non-debt transaction under the insolvent trading laws. Prior to this amendment, one of the limitations of s 588G was that transactions which could prejudice the rights of creditors but which did not incur a *new* debt, such as the sale of an asset at a substantial discount, did not attract insolvent trading liability.

However, unlike 'true' insolvent trading there is no capacity for the company's creditors to take action against directors, even with the liquidator's consent. This is because under s 588M(3) of the *Corporations Act*, the only creditors with standing to sue are those whose debts the have directors failed to prevent the company from incurring. An uncommercial transaction does not involve incurring a debt to a creditor without prospect of repayment and thus action by creditors is

110 See above Part 1: Introduction.

111 For example, *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 77 FCR 478.

112 Jennifer Hill, 'Corporate Governance and the Role of the Employee' in Glenn Patmore & Paul Gollan (eds), *Partnership at Work: The Challenge of Employee Democracy* (2003) 110 at 119; see further Christopher Symes, 'A New Statutory Directors' Duty for Australia: A "Duty" to be Concerned about Employee Entitlements in the Insolvent Corporation' (2003) 12 *International Insolvency Review* 133 at 144–5; Noakes, 'Corporate Groups', above n23 at 131–2.

precluded. The provisions are only enforceable by the company's liquidator or the Australian Securities and Investments Commission ('ASIC'). ASIC can bring an action for compensation or the recovery of company funds to return to creditors. As Christopher Symes has indicated, these developments do not provide much comfort to employees in insolvency situations.[113]

The linking of s 588FB with s 588G of the *Corporations Act* and the limited defences of s 588H make it appear that directors will not easily be able to escape the reach of the section. There is, however, a practical and theoretical inconsistency between Divisions 2 and 3 of Part 5.7B of the *Corporations Act*. The duty to prevent insolvent trading is a positive one, whereas the uncommercial transaction provision is not impugned unless a reasonable person in the company's circumstances would not have entered into the transaction, having regard to the factors in s 588FB(1) of the Act.

Therefore, there is uncertainty as to the operation of the defences to liability under s 588G of the *Corporations Act* when the deemed debt is an uncommercial transaction. For example, the reasonableness of the expectation of solvency and the reasonableness of reliance on information supplied by another person sit uncomfortably with s 588FB of that Act,[114] which does not impose any obligation on the person to make inquiries into the state of the company's solvency before entering into the transaction in question.[115] The deeming as a debt of an uncommercial transaction which is not the incurring of a debt could be problematic when interpreted by a court.[116] It is uncertain whether the words 'transaction or agreement' cover a unilateral disposal of an asset. The agreement or transaction must 'significantly' reduce the amount of employee entitlements and there are no guidelines as to how significance is to be assessed.

The aim of the amendments to Part 5.7B was to ensure that directors did not use asset stripping techniques to avoid paying employees their proper entitlements.[117] However, the law will not always ensure that directors are held personally liable in these circumstances because the insolvent trading legislation only operates where a transaction results in insolvency or occurs during insolvency. Therefore, a director who strips the company of employee entitlement funds by entering into an uncommercial transaction prior to insolvency will avoid liability under s 588G of the *Corporations Act*.

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113 Symes, 'A New Statutory Directors' Duty for Australia', above n112 at 137.

114 *Corporations Act* ss 588H(2), 588H(3).

115 See further Matthew Broderick & Michael Lenicka, 'Uncommercial Transactions: Corporate Governance for Insolvent Companies' (2004) 22 *Company and Securities Law Journal* 7. They conceded that s 588FB of the *Corporations Act* 'does not specifically cast a duty of inquiry…nor have the courts imposed a duty of inquiry'. But they argued that '[t]he recent extension of liability for insolvent trading to loss caused by an uncommercial transaction supports a duty of inquiry upon directors to gather all relevant information when entering into transactions whilst a company is insolvent, or nearing insolvency, as there is a positive duty to prevent insolvent trading' at 9.

116 Hammond, above n9 at 92.

117 See above n83.

David Noakes was scathing in his criticism of both aspects of the new legislation. Describing the expansion of director liability for insolvent trading to include entering into uncommercial transactions as 'over zealous',[118] he considered the amendments 'unlikely to be either an effective deterrent or a practical avenue to recover employee entitlements. … [T]he amendments over-reach in areas where they are not required, but fail to provide a remedy in situations where they would be appropriate.'[119]

Noakes also remarked upon the lack of support for the extension of the insolvent trading provisions in this way, from both the Parliamentary Joint Statutory Committee on Corporations and Securities,[120] as well as representatives of the business community,[121] noting that the amendments reach well beyond the protection of employee entitlements.[122] He believes that 'the new provisions will sanction directors in situations where it is inappropriate and will inhibit genuine entrepreneurial activity'.[123] The provisions, described as a 'toothless tiger',[124] have nonetheless encouraged various forms of avoidance.[125] In consequence, the Report recommended further review of the Act.[126]

C. Analysis and Options for the Protection of Employee Entitlements

The Explanatory Memorandum for *Insolvency (Tax Priorities) Legislation Amendment Bill* 1993 (Cth) indicated that the proposed legislation was primarily for the purpose of improving the Commissioner's own recovery rights. The criminal nature of the earlier provisions was inhibiting this recovery.[127] The Explanatory Memorandum concluded that '[i]f company directors were made liable for unremitted amounts, which are currently subject to the priority, solvency problems would be confronted earlier and the escalation of debts in respect of those amounts could be prevented.'[128]

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118 Noakes, 'Recovery', above n9 at 129.

119 Ibid.

120 Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Report on the Corporations Law Amendment (Employee Entitlements) Bill 2000* (2000) at [3.25].

121 Noakes, 'Recovery', above n9 at 139.

122 The Explanatory Memorandum acknowledged the provision's broader reach: '[t]he inclusion of uncommercial transactions in s 588G(1A) has implications for the protection of employee entitlements, the prosecution of directors involved in "phoenix" activity and recovery actions by liquidators for the benefit of creditors generally.' Explanatory Memorandum, *Corporations Law Amendment (Employee Entitlements) Bill* 2000 (Cth) at 9.

123 Noakes, 'Recovery', above n9 at 139.

124 The Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Corporate Insolvency Laws: A Stocktake* (2004) at [10.59] and references cited therein (Stocktake Report).

125 The Stocktake Report noted the structuring of businesses to circumvent potential liability: 'For example, under one form a management company will own the assets and equipment used to run the business while a separate phoenix company will operate the business and employ the workers but have no assets. When the phoenix company accumulates debts and goes into liquidation as an assetless company, the management company continues to trade. Another form involved a management company, a sales company and a labour hire company.' Id at [10.65].

126 Id at [10.67].

However, it was suggested that employees and other unsecured creditors would benefit from the expedition of the Commissioner's actions to recover unremitted taxation from directors.[129] During Senate debate of the Bill, Senator Watson noted that the ATO's guaranteed recoupment under s 221P had been criticised for taking the majority of the company's resources, leaving little for employees or other unsecured creditors. Further, the fact that such recoupment was guaranteed meant that there was no urgency for the ATO to take action against the company and this delay worsened the likelihood of recovery for other claimants.[130] Senator Watson stressed the vulnerability of employees and the need for their protection.[131] However, the introduction this decade of Part 5.8A of the *Corporations Act* and of the GEERS regime indicate that the *Insolvency (Tax Priorities) Legislation Amendment Act* 1993 (Cth) did not achieve adequate protection of employees, who still bear a significant burden when companies go into liquidation.

Given the ability of directors to divest themselves of assets, it is wrong to assume that imposing liability on directors will act as a reliable source of compensation for either the Commissioner of Taxation or employees. Although 'men of straw' are unlikely to be sued by either, facing personal liability is more likely to act as a deterrent for directors against undesirable behaviour than as compensation for the various parties. A discussion of the form of such liability to provide an incentive for directors to place the company into voluntary administration, is below in Section D of this Part. Before examining that, however, it is pertinent to ask whether there are some more viable alternative means of ensuring that vulnerable employees are able to recover their lost entitlements.

(i) Maximum Priority Proposal

In 2001, the Federal Government proposed that employee entitlements be a maximum priority and that they rank ahead of secured creditors.[132] The fact that this proposal was made appears to provide evidence that employee entitlements are not fully paid out under the current level of winding up priority, and that the joint

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127 The Explanatory Memorandum stated: '[u]nder the current law, the combined operation of section 8Y of the Taxation Administration Act 1953 and section 21B of the Crimes Act 1914 can result in company directors being convicted in relation to their company's non payment of amounts deducted. … If convicted, company directors can be ordered by a court to pay reparation equal to the amount of the deductions unpaid. This recovery process results in extensive delays in recovering debts for unremitted tax amounts. The joint Ministers' announcement of 2 December 1992 noted that the Commissioner's priority only operates when a business is put into some form of insolvency administration. As a result, the current operation of the priority puts no pressure on the persons liable to pay unremitted amounts when due. … The proposed amendments will allow the Commissioner to take more effective recovery action for unremitted amounts and will remove the need to have a conviction as a prerequisite to recovery.' Explanatory Memorandum, *Insolvency (Tax Priorities) Legislation Amendment Bill* 1993 (Cth) at 32.

128 Ibid.

129 Commonwealth, *Parliamentary Debates*, Australian Senate, 18 May 1993 (Senator Bob McMullan) at 879; Commonwealth, *Parliamentary Debates*, Australian Senate, 26 May 1993 (Senator Cheryl Kernot) at 1298.

130 Commonwealth, *Parliamentary Debates*, Australian Senate, 26 May 1993 (Senator John Watson) at 1293.

initiatives of 2000 were not sufficient. Despite strong support from the trade union movement and others, criticisms of the proposal were expressed to the Parliamentary Joint Committee.[133] Reasons included the uncertainty the proposal would have on the cost and administration of secured lending, the complexity it would cause during administrations and the incentives for avoidance by secured creditors.[134]

As a result of these criticisms, the Stocktake report concluded:

> The Committee recommends that the maximum priority proposal not be adopted. The emphasis in any reform proposals in relation to employee entitlements should be on preventative measures to minimise the risk of loss of employee entitlements *and modifying current behaviour to ensure directors and managers of companies take greater responsibility in meeting the cost of employee entitlements in the event of business failure*. [Emphasis added.][135]

Despite the rejection of the maximum priority proposal, the Stocktake Report considered that the present situation was unsatisfactory and that some action was warranted. The Report stated that '[t]he committee considers that the protection of employee entitlements in the circumstances of employer insolvency is an important public policy and it is appropriate for governments to explore options for better protecting employee entitlements.'[136] The Federal Government indicated, in late 2005, that it would accept the recommendation not to adopt the maximum priority proposal.[137]

(ii) National Insurance Scheme

A national insurance scheme to protect employee entitlements on the event of liquidation was mooted in 1999.[138] In a survey by insolvency firm Benfield Greig, commissioned by the New South Wales Government,[139] the authors observed that annual losses of entitlements could be up to $464 million.[140] It was suggested that the scheme be funded from a levy on businesses calculated in accordance with

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131 Senator Watson said '[the Bill] seeks to ensure that employees' entitlements and the rights of unsecured creditors, which may otherwise have been lost, are protected, and that is a good measure. This is a change that is sustainable for the pragmatic reason that the Consolidated Revenue is better able to sustain a reduction of the proceeds from an insolvency administration than employees or unsecured creditors might be. The pain caused to employees who have been left with nothing after the collapse of their employer and to unsecured creditors who have had to write off huge losses because of the failure of a major debtor should not be underestimated.' Commonwealth, *Parliamentary Debates*, Australian Senate, 26 May 1993 (Senator John Watson) at 1296.

132 It was announced by Prime Minister John Howard at a press conference on 14 September 2001, and reiterated in the Government's November 2001 election policy statement entitled 'Choice and Reward in a Changing Workplace': Stocktake Report, above n124 at [10.29]. For international adoptions of this sort of proposal, see Bronstein, above n8 at 721.

133 Stocktake Report, above n124 at [10.33]–[10.51].

134 For unanswered questions on the operation of a maximum priority proposal, see Riley, above n9 at 499. See further Davis & Burrows, above n9 at 176.

135 Stocktake Report, above n130 at [10.55].

136 Id at [10.53].

137 The Commonwealth Treasury, *Corporate Insolvency Reform* (2005) at 5–6.

their wages bill, similar to workers' compensation, except where businesses could prove that they had provided protection for employee entitlements. However, the proposal was opposed by industry groups and was abandoned in favour of the Employee Entitlements Support Scheme (EESS), which later became GEERS, as discussed above.

An insurance scheme funded by employers has certain advantages. The cost to the taxpayer is minimised, although the expense is still socialised through an increase in the price of the goods and services provided by the companies paying the premium. It also provides an incentive to business to reduce the risk of loss of employee entitlements. However, the scheme as proposed in Australia was not without its problems. To ease the cost burden to small businesses (defined as those with less than 20 employees), they would be exempt from the proposal, with a separate government-funded safety net provided for their employees. Celia Hammond noted research by the ACTU which placed the average number of employees per company in 1998 as 8.75, meaning that many businesses would be exempt under the scheme.[141] In addition, the differential treatment of small and other businesses would add a further layer of administration and complexity for both businesses and employees affected by the scheme, especially for those businesses close to the employee limit. The scheme assumed that the insurance industry would have the capacity to absorb whatever losses occurred from business failures which may not be realistic.

An alternative to the above type of scheme would be compulsory risk rated insurance,[142] operating in a similar way to the present market in policies for trade creditors in case of customer insolvency. Risk rating takes into account all factors affecting the possible insolvency payout, including business size, amount of other secured and unsecured debt, and earnings, and would therefore avoid the cross-subsidisation of weaker businesses by their more stable competitors. However the process of risk rating is administratively complex and costly, and this cost would be borne by the businesses themselves, again with the need to pass on this expense to their customers.

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138 Federal Minister for Employment, Workplace Relations and Small Business, the Hon Peter Reith MP, *The Protection of Employee Entitlements in the Event of Employer Insolvency: Compulsory Insurance: Ministerial Discussion Paper* (Canberra: AGPS, 1999). The Harmer Report also suggested a wage earner protection fund. Harmer Report, above n19 at [727]. See further Hammond, above n9 at 88.

139 O'Neill, above n9 at 6.

140 More recent estimates of potential losses put the figure much higher. Institute of Actuaries of Australia, *Protection of Employee Entitlements in the Event of Employer Insolvency* (2003) at 18. Noakes commented that '[i]n researching the literature, it became apparent that estimates of the size of the problem of insolvency leading to loss of employee entitlements varied markedly', noting one estimate of 40,000 workers losing on average $7,000 each and another of 26,000 workers losing $17,846 each. David Noakes, 'Measuring the Impact of Strategic Insolvency on Employees' (2003) 11 *Insolvency Law Journal* 91 at 93.

141 Hammond, above n9 at 90.

142 This is discussed fully by Bickerdyke, Lattimore & Madge, above n9 at 161. The authors also examine, and dismiss, the option of voluntary employee insurance.

(iii) Industry Trust Funds

Trust funds established by specific industries, employers or employee bodies such as trade unions, funded by levies on employers, are another alternative frequently contemplated when compulsory insurance is analysed.[143]

Such schemes include the now abandoned ManuSafe fund, established by the Australian Manufacturing Workers' Union. The main criticism of such funds, which operate by requiring employers to contribute funds to a trust until called upon in the company's insolvency, is that it withdraws working capital from businesses. In addition, if all possible future entitlements are covered by such trusts, it can lead to some funds being tied up in the trust unnecessarily, because not all present employees will eventually be entitled to long service leave, leave *in lieu* of notice and redundancy payments. These funds are also administratively complex.[144]

(iv) Deferred Benefit Accounts

A related idea is Davis and Burrows' Deferred Benefit Account.[145] In essence, the account, held at a registered financial institution, would hold an amount equal to the balance of the company's provision for entitlements in its monthly management accounts. The interest earned on the account would help to offset the cost of additional borrowings, needed to provide that portion of the company's working capital. Maintaining the balance of the account would be a company responsibility, verified by an auditor. A failure to maintain the correct balance could be punishable under the *Corporations Act*.

Such a scheme would be designed to work in conjunction with the GEERS arrangements, as the monthly provision would not allow for unpaid current wages, payment *in lieu* of notice or redundancy pay.

(v) Negotiated Security Arrangements

Riley has taken a very different approach. She suggested that large groups of employees be treated in the same way as other providers of large amounts of finance to the company and be granted security interests, enforceable by fixed charges. While acknowledging that such arrangements would require 'considerable industrial muscle',[146] negotiating for trustees to hold company assets as securities on behalf of employees is a possible alternative for employees of large corporations. Such corporations are a tiny proportion of the total number of companies, yet, as the Ansett case shows, can employ huge numbers of staff and

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143 Many countries have such funds. See Bronstein, above n8 at 725. The Stocktake Report concluded that 'the proposals for the establishment of insurance schemes or trust funds are a major departure from the current system and would require a thorough examination and extensive consultation with industry before even preliminary models could be produced. The Committee believes that the proposals are worthy of further attention but suggests that much ground work would need to be done before any serious consideration could be given to the proposals.' Stocktake Report, above n130 at [10.86].

144 See further Bickerdyke, Lattimore & Madge, above n9 at 162–4.

145 Davis & Burrows, above n9 at 178.

146 Riley, above n9 at 504.

owe massive amounts of money in entitlements to employees.[147] The proposal has the advantage of not withdrawing any capital from the company as it operates. However, it could have the effect of increasing the cost of capital demanded by other lenders, who would have recourse to a smaller proportion of the company's assets in the event of its liquidation.

(vi) Pooling or Contribution Orders

There are many strategies that a parent company can adopt to exploit its corporate structure. It may undercapitalise subsidiaries, allow members of the group to operate at a loss, or move assets or liabilities between them.[148] To overcome this situation, the Harmer Report recommended that the New Zealand model of liability be adopted.[149] This allows for the making of contribution orders and pooling orders.[150] Instead, Australia followed the British wrongful trading model,[151] with the addition of a provision for holding company liability for insolvent trading, s 588V of the *Corporations Act*.[152]

The issue is again before the legislature as the *Corporations Amendment (Insolvency) Bill* 2007 (Cth).[153] Part IV of this Bill is entitled 'Facilitating Pooling in External Administration' and provides for a statutory pooling mechanism, allowing a court to determine that a group of companies in liquidation is a pooled group if it is satisfied that it is just and equitable to do so. However, there are a number of limitations on the pooling order mechanism as a device for the protection of employees. First, for obvious reasons, it is of no use to employees of companies which are not part of corporate groups. Secondly, the Explanatory Memorandum points out that '[t]he Court may not make the order if the order would materially disadvantage an eligible unsecured creditor of a company in the group and the eligible unsecured creditor has not consented to the making of the order.'[154] Thirdly, pooling orders do not assist employees of companies in either

147 See Kinsey, above n5.

148 Anthea Nolan, 'The Position of Unsecured Creditors of Corporate Groups: Towards a Group Responsibility Solution Which Gives Fairness and Equity a Role' (1993) 11 *Company and Securities Law Journal* 461 at 485.

149 The Harmer Report, above n19 at [336] and [857]. See further John Farrar, *Corporate Governance in Australia and New Zealand* (2001) at 240.

150 A contribution order requires a solvent company in a group to contribute to the debts of an insolvent company within the group. See further Murray, above n9 at 12–19, who makes the case for the adoption of the New Zealand model. A pooling order requires the assets of the group to be pooled for the benefit of the creditors of companies within the group.

151 *Insolvency Act* 1986 (UK) s 214.

152 Nolan commented '[t]he pooling order recommendation appears to have been forgotten entirely even though the Harmer Committee "received no submissions opposing this proposal". The contribution order recommendation has been recast as an insolvent trading provision … In the Explanatory Memorandum to the Corporate Law Reform Bill … it is claimed that this provision implements "the Harmer Report's recommendations in relation to available assets" even though…the Harmer Report's recommendations are quite different to those enacted under the Reform Act. At most, the Government has simply accepted the *philosophy* underlying the Harmer Report's contribution order proposal'. Nolan, above n148 at 464–5. [Emphasis in original.]

153 It was introduced into the House of Representatives on 31 May 2007.

the James Hardie or Patrick Stevedores situations, where the holding company remains solvent and where the employees are faced with the separate legal entity, and limited liability of the parent company.

D. *Suggested Solution for the Protection of Employee Entitlements*

GEERS, despite its limitations, has a number of advantages over the alternatives outlined above. It avoids the increase in the cost of secured lending that might stem from the adoption of the maximum priority proposal or negotiated security arrangements. It overcomes the administrative difficulties which might arise from a national insurance scheme, mandatory industry trust funds or deferred benefit accounts. It eliminates the possibility of over- or under-provision of liabilities. Ian Bickerdyke, Ralph Lattimore and Alan Madge commented in relation to GEERS's predecessor, the EESS, that it would be 'among the least costly of such schemes around the world (although the cost will increase during downturns in the business cycle)'.[155]

Its main disadvantage is that it might discourage directors from providing for the payment of accrued employee entitlements, on the basis that these will be provided for by the government. This supposition is based on economic theory. Economic efficiency requires that the cost of avoiding risk should be borne by the party which can most cheaply estimate and avoid it.[156] Here the employer is the party who understands and controls the risk of loss of employee entitlements and can most cheaply make provision for them, rather than the Federal Government, who socialises the cost to the taxpayer.[157] Regulation should provide incentives for the employer, through the decisions of its directors to take appropriate care.[158] The incentives for the directors to adopt strategies for the protection of employee entitlements can include avoidance of the imposition of personal liability. This is particularly important as the company approaches insolvency, when directors may choose to take risks with what remains of the company's money.[159]

What is required, therefore, is effective deterrence. It is now time to turn to ways in which directors can, first, be deterred from 'gambling' with employees' entitlements when their companies are facing insolvency, and secondly, be encouraged to seek to place a company in financial difficulties into voluntary

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154 Explanatory Memorandum accompanying the *Corporations Amendment (Insolvency) Bill* 2007 (Cth) at [4.245].

155 Bickerdyke, Lattimore & Madge above n9 at 158.

156 Guido Calabresi & A Douglas Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85 *Harvard Law Review* 1089 at 1096.

157 See further Kinsey, above n5 at 146.

158 Ian Ramsay, 'Holding Company Liability for the Debts of an Insolvent Subsidiary: A Law and Economics Perspective' (1994) 17 *University of New South Wales Law Journal* 520 at 539.

159 Scott noted that '[a]s long as the debtor's business prospects remain good, a strong reputational incentive deters misbehaviour. But once the business environment deteriorates, the [director] is increasingly influenced by a 'high-roller' strategy. The poorer the prospects for a profitable conclusion to the venture, the less the entrepreneur has to risk and the more he stands to gain from imprudent or wrongful conduct.' Robert Scott, 'A Relational Theory of Secured Financing' (1986) 86 *Columbia Law Review* 901 at 924.

administration. It is recommended that this be achieved by an amendment of the present directors' liability provisions under Part 5.8A of the *Corporations Act* to be adapted from those enjoyed by the Commissioner of Taxation.

Voluntary administration is available under pt 5.3A of the *Corporations Act* and has been an alternative to liquidation since 23 June 1993. Placing a company into voluntary administration is a mechanism which can be beneficial to both the company and its creditors.[160] It gives the company a chance to trade out of its difficulties.[161] It is the solution which is most likely to lead to the rescue of the company or its business and therefore to the preservation of jobs.[162] It also is designed to maximise the return to creditors as it ensures an orderly disposal of assets, rather than the 'fire sale' mentality common to liquidation.[163] Voluntary administrations will have a beneficial outcome for creditors if the funds distributed under the deed are greater than those available from the company's liquidation.[164] Indeed it should be noted that the introduction of voluntary administration under pt 5.3A of the *Corporations Act* was one of the motivations behind the introduction of div 9 of the ITAA36.[165]

The threat of personal liability on directors in the event of insolvency would encourage directors to place the company promptly into voluntary administration to protect the company's remaining assets. Failure to do so would result in their own assets being available for distribution to employees. The apparent harshness of this provision could be ameliorated by allowing the directors to recover *pari passu* as unsecured creditors in the company's winding up.[166]

In order to adopt a similar legislative regime, it would be necessary to identify the person with standing to take the enforcement action, in the event that directors do not take the suggested remedial action. The company's eventual liquidator

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160 Section 435A provides that: '[t]he object of this Part is to provide for the business, property and affairs of an insolvent company to be administered in a way that:
(a) maximises the chances of the company, or as much as possible of its business, continuing in existence; or
(b) if it is not possible for the company or its business to continue in existence–results in a better return for the company's creditors and members than would result from an immediate winding up of the company.'

161 Explanatory Memorandum accompanying the *Corporations Amendment (Insolvency) Bill* 2007 (Cth) at [3.15].

162 The Explanatory Memorandum accompanying the *Corporations Amendment (Insolvency) Bill* 2007 (Cth) noted that '[i]n 2005, 7,277 companies entered external administration. Of these, 2,636 companies — approximately 36 per cent — entered voluntary administration' at [3.15]. 'The primary purpose of the voluntary administration procedure…is to provide a flexible and relatively inexpensive procedure that enables a company to suspend the payment of its debts, so that it can attempt a compromise or arrangement with its creditors aimed at saving the company or the business or, if that is not possible, maximising the return to creditors. If successful, the compromise or arrangement will be set out in a deed of company arrangement (DOCA), which binds the company and the creditors. If these attempts fail, the legislation facilitates the transition to winding up', at [3.17].

163 It has been argued that the process of voluntary administration is open to abuse where it is used to reorganise the debtor without the intention of maximising the value of the organisation's assets. See Intan Eow, 'The Door to Reorganisation: Strategic Behaviour or Abuse of Voluntary Administration' (2006) 30 *Melbourne University Law Review* 300.

would be the appropriate person to avoid a multiplicity of actions if employees were individually entitled to sue. As with the present Part 5.8A, employees should be able to seek consent to initiate action if the action is not taken by the liquidator.

In practical terms, there is no reason why the ITAA36 provisions could not be adapted to the recovery of employee entitlements. The key factor is to maintain the element of strict liability which makes the taxation provisions both so stringent and so effective. The main difference is that the Commissioner of Taxation is a single creditor, owed an ascertainable amount, in contrast to the potentially large numbers of employees who hold a range of entitlements, including accrued wages, annual leave, long service leave, pay *in lieu* of notice and redundancy entitlements.

The legislation could be a variation of the taxation provisions themselves, although located in the *Corporations Act*, and appear somewhat as follows:[167]

> Section (x)(1) The persons who are directors of the company from time to time must cause the company to do at least one of the following:
>
> (a) comply with its obligations in relation to the entitlements of employees, as and when they fall due;
> (b) appoint an administrator of the company under section 436A of the *Corporations Act* 2001 (Cth);
> (c) begin to be wound up within the meaning of that Act.[168]
>
> (2) If sub-section (1) is not complied with before the end of the 28 days, each person who was a director of the company at any time during the 28 days is liable to pay to the company's liquidator, by way of penalty, an amount equal to the unpaid amount of the entitlements.[169]

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164 This may occur where the directors and owners of the company seek to buy back the business under administration. See further Phillip Lipton & Abe Herzberg, *Understanding Company Law* (12th ed, 2004) at 576. In addition, the DOCA, which succeeds the period of voluntary administration, allows for a period over which the administrator can sell company assets at a proper value, rather than a hasty sale by a liquidator which will not reflect the true value of the assets. This period is prescribed by the DOCA or until it is terminated pursuant to s 445C of the *Corporations Act*.

165 Senator McMullan stated: '[t]he removal of the Commissioner's priority [over other statutory priority creditors in s 556(1) of the *Corporations Act* as a result of s 211P of the ITAA36] is essential to the smooth operation of the proposed scheme of voluntary administration under the new insolvency provisions of the Corporations Law due to commence in June this year.' Commonwealth, Parliamentary Debates, Australian Senate, 18 May 1993 (Senator Bob McMullan) at 880. Senator Watson also spoke of 'the recently announced new insolvency procedure through voluntary administration. This procedure is designed to allow a company to trade out of financial difficulties under an administrator. Creditors, who must assent to the arrangement—which involves a moratorium on debts for all creditors—are unlikely to do so if the only probable beneficiary of this particular arrangement is the Australian Taxation Office. In the current environment there is a need to remove the priority of the tax office.' Commonwealth, Parliamentary Debates, Australian Senate, 26 May 1993 (Senator John Watson) at 1294.

166 This presently occurs where the directors have been ordered to reimburse the Commissioner for amounts clawed back by the liquidator under s 588FGA(2). The directors then stand in the shoes of the Commissioner by way of subrogation or otherwise under s 588FGA(5) and can prove in the liquidation under s 553.

Here, 'employee entitlements' would pick up the definition presently available under s 596AA(2) of the *Corporations Act*. There would be no need place a requirement of insolvency into the section because employers at all times *do* have to comply with their obligations in relation to the entitlements of employees as and when they fall due. If they cannot, they are insolvent and should take the appropriate remedial action. This has the advantage of avoiding the difficulties associated with defining insolvency which plague the insolvent trading provisions.[170]

Twenty-eight days has been chosen as the time period for compliance, mainly because the 14 day time period in the tax provisions may be unduly harsh. Directors should be given a proper opportunity to remedy their fault in failing to make adequate provision for the employee entitlements by allowing them a reasonable period of time to place the company into voluntary administration. However, a longer time would not be desirable, as it would jeopardise the chance of the company being saved during the administration period. It should be noted that there is an option to place the company into liquidation, as well as voluntary administration, despite the fact that this article has argued that the latter is more beneficial for employees. This is because it would be unfair to force directors to choose between personal liability and voluntary administration, where the latter was not appropriate on the facts of the case.

The company's liquidator, once appointed,[171] would take action to enforce the payment from the directors, in the event that subs-s (b) or (c) were not complied with in the time period specified. While placing the funds from directors in the hands of the liquidator makes it available in accordance with the priorities of s 556(1) of the *Corporations Act* and does not reserve it exclusively for the employees' benefit, this is the same result as if the directors caused the company to make adequate provision for the entitlements prior to its insolvency. It is this failure which ought to render the directors liable for these entitlements, not the loss of the entitlements *per se*. Employees will then enjoy their existing s 556(1)(e) priority.

It could be suggested that the present insolvent trading legislation already deals with the recovery of employee entitlements via an objective test of intention and that further legislation is therefore not required.[172] Part 5.7B of the *Corporations Act* imposes liability on directors for debts incurred when there are reasonable grounds for suspecting insolvency. Commentators note that one of the benefits of

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167 This is the basic section which imposes liability and encourages the directors to seek voluntary administration. The other range of provisions which apply to unremitted taxation instalments, such as clawbacks of voidable transactions, could also be considered here, and could be adapted in a similar manner.

168 This is based on s 222APB of the ITAA36.

169 This is based on s 222APC of the ITAA36.

170 See below n176.

171 The company would eventually be placed into liquidation. For example under s 459A of the *Corporations Act*, the Court 'may order that an insolvent company be wound up in insolvency'. The court may then appoint an official liquidator under s 472 of that Act.

the provisions is that they have acted as a form of encouragement towards the use of voluntary administration followed by deeds of company arrangement.[173] This is because of the requirement that the company go into liquidation before insolvent trading action can be initiated against directors.[174] As in the case of directors' liability for unremitted taxation instalments,[175] directors choosing voluntary administration safeguard themselves from this potential personal liability.

However, the form of the insolvent trading provisions make them unsuitable for the recovery of employee entitlements. If directors do not cause the company to incur a debt when there are reasonable grounds for suspecting that the company is insolvent, creditors, including employees, have no right to proceed against them personally for recovery of their debts when the company does fail.[176] For the insolvent trading provisions to work beneficially for employees, the entire amount of their debt would need to be incurred when the directors had reasonable grounds for suspecting that the company was insolvent. This is not the case with employee entitlements. The concern is generally about the non-payment of accumulated annual, long service leave and pay *in lieu* of notice, as well as redundancy entitlements under industrial awards, all of which were earned or accrued when the company was presumably solvent, rather than the final few weeks of actual salary that might be lost as the company flounders. Therefore, it is unlikely that the current form of liability for insolvent trading would be an adequate mechanism for the recovery of accumulated employee entitlements or would act as an effective form of encouragement to place the company into voluntary administration.

The aim of an employee entitlement recovery regime based on that for unremitted taxation instalments would be to provide a critical incentive to directors to deal with the company's insolvency, rather than allow the situation to worsen. The actual recovery of assets from directors for distribution to employees is a secondary consideration. The suggested amendment to the law would therefore be in addition to the retention of GEERS. Nonetheless, it is pertinent to ask whether any mode or degree of personal civil liability would provide a sufficient deterrent against improper behaviour by directors, since they have the ability to divest

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172 Section 588G(1) of the Corporations Act applies where:

(a) person is a director of a company at the time when the company incurs a debt; and
(b) the company is insolvent at that time, or becomes insolvent by incurring that debt, or by incurring at that time debts including that debt; and
(c) at that time, there are reasonable grounds for suspecting that the company is insolvent, or would so become insolvent, as the case may be …

Section 588G(2) provides that:

By failing to prevent the company from incurring the debt, the person contravenes the section if

(a) the person is aware at the time that there are such grounds for so suspecting; or
(b) a reasonable person in a like position in a company in the company's circumstances would be so aware.

Recovery of compensation is pursuant to s 588M(2) and (3). In addition to this, breach of s 588G is a civil penalty provision, pursuant to s 1317E(1)(e) of the Act. Consequences for breach of these provisions are set out in Pt 9.4B of the *Corporations Act*. Section 588G(3) creates the criminal offence of insolvent trading where the person's failure to prevent the company incurring the debt was dishonest.

themselves of their personal assets to be 'judgment proof' in practical if not legal terms.

Commentators have referred to the advantages of imposing criminal liability for corporate fault on directors and other managers. Brent Fisse and John Braithwaite argued that 'individual accountability has long been regarded as indispensable to social control.'[177] If directors believe that they may be subject to criminal liability, this provides a strong incentive for them to monitor the corporation's activities and implement preventative programs to avoid future breaches.[178] Davis and Burrows suggested that the present criminal liability imposed on directors by s 596AB for breach of pt 5.8A provisions would already address this behaviour.[179] However, the requirement to prove a subjective intention on the part of the directors to prevent or reduce significantly the recovery of employee entitlements, beyond reasonable doubt, makes the prospect of successful prosecutions unlikely.

While the benefits of imposing any form of liability on company directors and managers are obvious, the disadvantages are more subtle. The CAMAC report entitled 'Personal Liability for Corporate Fault' noted that 'imposing personal liability without personal fault for a corporate breach is a significant disincentive to officers taking on directorships or other senior management roles'.[180] Oesterle remarked that 'executives on boards will be more likely to resign at the first sign of trouble. Firms may find themselves looking for directors to fill vacancies and to make critical decisions just when good business people will slam the door on inquiries.'[181]

For many reasons convictions for corporate criminal offences are difficult to obtain.[182] According to Tomasic there is a 'widespread view that the criminal justice system [is] a poor mechanism for dealing with corporate law offences. One reason for this [is] the proposed reluctance of the courts to convict white collar or corporate offenders.'[183] This presupposes that ASIC has taken steps to initiate a prosecution, which is dependent on their resource constraints, internal priorities and estimate of the chances of success.[184] Henry Bosch observed that 'the evidentiary requirements of the criminal law and the need to prove complex cases

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173 Abe Herzberg, 'Why are There So Few Insolvent Trading Cases?' in Ian Ramsay (ed), *Company Directors' Liability for Insolvent Trading* (2000) 148 at 158. See also Colin Anderson & David Morrison, 'Was Elliott Rescued and Will He Recover? Rescue Versus Recovery in the Australian Insolvency Context' (Paper presented at the Corporate Law Teachers' Association Conference, Sydney, 7 February 2005). A recent empirical study by James, Ramsay and Siva has looked at the prevalence of insolvent trading actions, and noted that there have been only 103 cases since 1961. In the eleven years preceding the study, there were only 19 cases of insolvent trading, compared to 61 in the previous 11 years, which tends to confirm that the availability to directors of voluntary administration has decreased the choice of this recovery option for creditors. Paul James, Ian Ramsay & Polat Siva, 'Insolvent Trading: An Empirical Study', (Research Paper, Clayton Utz and Centre for Corporate Law and Securities Regulation, University of Melbourne, 2004) at 17 <http://cclsr.law.unimelb.edu.au/research-papers/Monograph%20Series/Insolvent%20Trading%20final.pdf> accessed 10 August 2008.

174 *Corporations Act* 588M(1)(d).

175 ITAA36 s 222ANA(1).

beyond reasonable doubt have greatly reduced the effectiveness of regulation and policing of the companies and securities area.' These requirements make it less likely that corporate wrongdoers will be punished.[185]

Therefore, while the imposition of criminal liability might provide superior deterrence over civil liability because it cannot be avoided by the shedding of personal assets, it is ineffective if prosecutions are not pursued and courts will not convict. A combination of deterrence through civil liability provisions similar to those enjoyed by the Commissioner of Taxation, plus compensation from GEERS, is therefore arguably the most effective way of ensuring the protection of employee entitlements in the event of corporate insolvency.

5. *Conclusion*

There is a significant public policy argument that the Commissioner of Taxation should be able to collect taxes in an efficient manner and that government revenues should be protected. This justifies the comprehensive raft of provisions available to the Commissioner to recover unremitted taxes. However, employees are less able to protect themselves against the non-payment of their entitlements than taxation authorities. They are unable to diversify away their risk of non-payment and lack the ability to charge a premium to compensate for that risk. In addition, if their employer becomes insolvent, they suffer a double blow by losing their jobs as well as their accrued benefits.

The threat of being personally liable for unremitted taxation instalments is designed to act as a deterrent against directors using these sums as part of their

176 A number of other difficulties arise in the implementation of the insolvent trading legislation. These include uncertainty as to the meaning of incurring a debt. Mandie J in *Australian Securities and Investments Comission v Plymin* (2003) 175 FLR 124 at 248 examined the previous authorities before concluding that 'the exercise of choice' by the directors can be relevant in ascertaining the incurring of a debt. In the case of liabilities such as taxation, the choice will be in continuing to trade, which attracts the taxation debt. There is also uncertainty as to the definition of insolvency. In *Emanuel Management Pty Ltd (in liq) v Foster's Brewing Group Ltd* (1999) 178 FLR 1 at 27 Chesterman J refused to take judicial notice of an industry wide practice to allow payment beyond contract terms. He stated: 'I do not understand how "commercial reality" can determine when a debt is due for payment. Indeed, I do not understand what "commercial reality" is, let alone how it may be discovered.' The term 'commercial reality' was used in *Powell v Fryer* (2000) 18 ACLC 480 at 482. In *Southern Cross Interiors Pty Ltd (in liq) v Deputy Commissioner of Taxation* (2001) 53 NSWLR 213, Palmer J held, at 224, '[i]n considering the company's financial position as a whole, the Court must have regard to commercial realities. Commercial realities will be relevant in considering what resources are available to the company to meet its liabilities as they fall due, whether resources other than cash are realisable by sale or borrowing upon security, and when such realisations are achievable.' This view was upheld in *Lewis v Doran* (2004) 184 FLR 454 at 480.

177 Brent Fisse & John Braithwaite, 'The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability' (1988) 11 *Sydney Law Review* 468 at 473.

178 Vikramaditya Khanna, 'Corporate Criminal Liability: What Purpose Does it Serve?' (1996) 109 *Harvard Law Review* 1477 at 1495.

179 Davis & Burrows, above n9 at 179.

180 Corporations and Markets Advisory Committee, Parliament of Australia, *Personal Liability for Corporate Fault* (2005) at 32.

emergency working capital as the company descends into insolvency. However, it is not simply this action which warrants the imposition of personal liability. It is justified by the failure of the directors to take the specified remedial action. In essence, the only viable alternative for directors is to place the company promptly into voluntary administration.

This article has argued for a similar legislative regime to apply with respect to unpaid employee entitlements. In the absence of effective means of holding directors personally accountable for unpaid employee entitlements, the existence of a government-funded scheme such as GEERS may discourage directors from taking greater responsibility for ensuring that their company has sufficient assets to meet their employees' entitlements. There is nothing in the present Part 5.8A of the *Corporations Act* to encourage directors to put the company into voluntary administration, unlike the insolvent trading provisions and the tax liability provisions.

Voluntary administration is the form of insolvency administration most likely to maximise payouts to all creditors and to keep the company or its business running. This can result in the saving of jobs, which is of great benefit to employees. To achieve effective deterrence of undesirable behaviour and to encourage voluntary administration, it is therefore recommended that those provisions be amended to resemble those from which the Commissioner of Taxation benefits. In addition, it is recommended that the GEERS system be retained to ensure that some measure of compensation is available to employees, in the event that directors attempt to make themselves 'judgment proof' by the deliberate divesture of their personal assets prior to insolvency.

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181 Dale Oesterle, 'Corporate Directors' Personal Liability for "Insolvent Trading" in Australia, "Reckless Trading" in New Zealand and "Wrongful Trading" in England: A Recipe for Timid Directors, Hamstrung Controlling Shareholders and Skittish Lenders' in Ian Ramsay (ed), *Company Directors' Liability for Insolvent Trading* (2000) 19 at 30.

182 See Seumas Miller, 'Corporate Crime, the Excesses of the 80s and Collective Responsibility: an Ethical Perspective' (1995) 5 *Australian Journal of Corporate Law* 139 at 162; Roman Tomasic 'Corporations Law Enforcement Strategies in Australia: The Influence of Professional, Corporate and Bureaucratic Cultures' (1993) 3 *Australian Journal of Corporate Law* 192; Roman Tomasic, 'Corporate Crime' in Duncan Chappell & Paul Wilson (eds), *The Australian Criminal Justice System The Mid l990s* (1994) 259; and Roman Tomasic, 'Corporate Crime in a Civil Law Culture' (1994) 5 *Current Issues In Criminal Justice* 244 at 251.

183 Tomasic, 'Corporations Law Enforcement Strategies in Australia' above n182 at 217.

184 Noakes commented that '[t]here will not be a deterrent factor where directors believe that they are unlikely to be prosecuted, based on the historical use of criminal sanctions by ASIC'. Noakes, 'Corporate Groups', above n23 at 139.

185 Henry Bosch, *Bosch on Business: Essential Reading for Directors, Executives and Investors* (1992) at 1.