Inquiry into Australia's Insolvency Laws

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1. My perspective

This submission comes from the perspective of an employee creditor of a company which is currently in voluntary administration.

On 12 July 2002, my former employer went into voluntary administration, and my position was terminated on 26 July 2002.

Since that time I, with all other employee creditors, have not received any of the monies owed us by our former employer, and, due to legal ambiguities of the Deed of Company Arrangement (DoCA), we have been unable to receive money from the Department of Employment and Workplace Relations (DEWR) General Employee Entitlements and Redundancy Scheme (GEERS).

2. The appointment, removal and functions of administrators and liquidators

Administrators should not be permitted to:

2.1 conduct a creditors' meeting to vote for a DoCA if the pertinent information cannot be made available to creditors within a reasonable period of time prior to the meeting

2.2 conduct a vote for a DoCA which has not yet been written

2.3 create a DoCA which reduces the priority of employee entitlements.

2.1 The information upon which the vote for the DoCA was to be based (as the Deed itself had not yet been written) was delivered less than one working day before the meeting was to take place. This effectively prevented employee creditors based in Melbourne (and therefore unable to attend the meeting in Sydney) from participating.

This situation was reported to ASIC on 27 October, the day before the meeting. ASIC eventually reported that the administrator had said they were acting under a Supreme Court Order. Employee creditors have since determined that the Court Order gave the administrator permission to postpone the meeting, not to delay delivery of vital information.

The timeline of events was:

Monday, 21 October, 2002	Received notice of creditors' meeting (dated 18 October) for Monday 28 October 2002. Proxy forms accompanied the notice, but the creditors' report did not. The notice stated that the creditors' report would be posted on or before 22 October.
Thursday, 24 October, 2002	Received email from an ex-employees' mailing list stating that the creditors' report had been posted that day (two days after the meeting notice had said it would be sent out).
Friday, 25 October, 2002	Received creditors' report, dated 23 October.
Saturday 26 October, 2002	Deadline for proxies to be received in Sydney.
Sunday 27 October, 2002	Complaint made to ASIC.
Monday 28 October, 2002	Creditors' meeting to vote on DoCA.

2.2 The DoCA had not been written at the time of the vote. This was unfair to all creditors. The creditors' report ostensibly contained information upon which the Deed would be based, but given that the DoCA is a legally binding document which directly impacts creditor priorities and claims, it should have been available for scrutiny *before* the vote.

2.3 The DoCA disrupts the normal distribution priorities set out in Section 556 of the Corporations Act. Unsecured creditors have been given access to a proportion of funds which would normally be available to employee creditors. Consequently, DEWR has been unable to effect payout of employee entitlements through GEERS, as the recovery of GEERS advances

to the company cannot be guaranteed. The administrator has had to seek legal advice as to the implications of the Deed which they, themselves, prepared.

This could be construed as incompetence on the part of the administrator. However, taken in conjunction with both the untimely delivery of vital creditor information, and the necessity to vote for the DoCA unseen, it could also be construed as a cynical manipulation of the position of employees as minority creditors.

The administrator has been able, either by accident or with malice aforethought, to systematically reduce the rights of employee creditors, because the current system permits such actions to take place without restriction. There should be regulatory checks in place to prevent this from happening.

3. The rights of creditors

The relationship between a company in administration and employee creditors is different to that of other creditors because:

3.1 employee creditors have no mechanism to write off the bad debt

3.2 the monies owed to employee creditors represents their primary (or only) source of income.

3.1 Unlike other creditors, employee creditors have no mechanism by which to write off their employer's bad debt. Banks take on loans as a calculated risk, and trade creditors are able to write off bad debts as part of their business process. Employees do not have the ability to offset this loss.

3.2 Unlike other creditors, the money owed employee creditors represents their entire income. When their employer goes into administration, the employees are left owed a significant amount of money which, in most cases, has already been allocated to general living expenses. Employee creditors frequently then find themselves unemployed, with no immediate source of income.

Employee creditors' rights should be unassailable. It should not be possible for their rights to be limited in any way.

4. The treatment of employee entitlements

Employee entitlements should be:

4.1 unassailable

4.2 available with minimal delay.

In the event that the company comes out of administration, creative work done by terminated employees will be built upon by the company for future profit.

4.1 Employee entitlements should be unassailable. There should exist no mechanism by which they can be reduced or denied, particularly on a case-by-case basis. Employee creditors of a particular company should be no less entitled to the full value of their entitlements than employee creditors of any other company. The extent to which the monies owed employee creditors are repaid should not be dependent on such factors as whether employee creditors constitute a minority or majority vote (or are prevented from participating in a vote for a DoCA, as discussed in section 2 above).

4.2 Given that, as discussed in section 3 above, the money owed employee creditors constitutes their primary income, and that, in many cases, these same employee creditors face immediate and unforeseen unemployment, there should be minimal delay in the payment of their entitlements.

In the event that the company comes out of administration, creative work done by terminated employees will be built upon by the company for future profit. This is particularly true in the case of software development, where work can seamlessly be continued on existing development.

Employee creditors should be paid the full sum of their entitlements and with minimal delay, without the temporal or *pari passu* considerations which limit payment to other creditors.

5. Compliance with, and effectiveness of, deeds of company arrangement

A Deed of Company Arrangement should not be:

5.1 able to undermine employee entitlements

5.2 so ambiguous as to require the administrator itself to seek legal advice as to its interpretation.

5.1 As discussed in section 1 above, the DoCA disrupts the normal distribution priorities set out in section 556 of the Corporations Act. Effectively, the rights of employees to their entitlements have been undermined by the DoCA.

5.2 This has resulted in an unresolvable ambiguity, from the perspective of DEWR, regarding payment of employee entitlements under the GEERS scheme, as the DoCA does not guarantee repayment of employee entitlements to DEWR.

Consequently, both DEWR and the administrator have had to take legal advice on its implications.

This is an unacceptable situation, particularly given that the priority of employee entitlements are clearly set out in law. It should not be possible for a DoCA to reduce legally-instituted rights.

6. Conclusion

Stronger regulations need to be put into place to prevent administrators from limiting the rights of creditors by effectively preventing them from voting for Deeds of Company Arrangement. It should not be possible to require creditors to vote upon Deeds of Company Arrangement which do not exist at the time of the vote.

Deeds of Company Arrangement should not be able to limit payment of employee entitlements.

The rights of employee creditors should be placed on a different plane of priority to those of other creditors, and should be the first consideration at the distribution of company assets.