TRONDHEIM QUESTIONNAIRE

1. **Is there any specific regulation of insolvency proceedings?**

Two federal law statutes, the *Corporations Act 2001* (Cth) and the *Bankruptcy Act 1966* (Cth), regulate insolvency. Each Act has a number of pieces of subordinate legislation.

The Corporations Act regulates insolvency of Australia's companies. A company may appoint an adminstrator by resolution of the company's Board, if the Board considers that the company is insolvent or is likely to become insolvent (s436A). The administrator has wide-ranging powers over the company, including the power to control and manage the company's business, property and affairs. The adminsitrator may perform any function, and exercise any power, that the company or any of its officers could perform or exercise were the company not under administration (s437A). In exercising these functions and powers, the administrator is acting as agent for the company (s437B).

The Bankruptcy Act regulates the branch of insolvency dealing with natural persons. The property of a bankrupt vests in a trustee when a debtor becomes bankrupt (s58).

2. **Which institutions (government agencies, courts, etc.) are in charge of insolvency proceedings generally and which institutions are in charge of the resolution of conflicts related to employment law.**

Jurisdiction with respect to civil matters arising under the Corporations Act is conferred on most Australian courts, most relevantly the Federal Court of Australia and the Supreme Courts of each of Australia's States and Territories (s1337B).

Certain court proceedings against a company under administration or involving any of that company's property can only be instituted or continued with the administrator's consent or by leave of the Court (s440D). The Court has the power to end the administration of a company (s447A) and to remove and replace an administrator (s449B). The Court also has power to, on application by certain persons, order that an insolvent company be wound up (s459A).

The Federal Court and a court lower in the federal court hierarchy, known as the Federal Magistrates Court of Australia, have jurisdiction over bankruptcy under the Bankruptcy Act (s27). Each court has full power to decide all questions in any case of bankruptcy and to make such orders as it considers necessary to carry out or give effect to the Bankruptcy Act (s30). Those courts may also stay any legal process against a debtor or their property in respect of the non-payment of a provable debt and in consequence of a debtor's refusal to comply with an order of a court for the payment of a provable debt (s60).

Employment law disputes are heard in many Australian courts and tribunals. The Federal Court, the Federal Magistrates Court and a tribunal called the Australian Industrial Relations Commission generally have jurisdiction over matters related to federal statutory

employment law. The main statute regulating federal employment law is called the *Workplace Relations Act 1996* (Cth). Most of Australia's States have their own statutory employment law, although the reach of State statutory employment law has recently been curtailed significantly and most employees are now covered by the federal law. These States have tribunals, generally called the [State name, for example, Tasmanian] Industrial Relations Commission, which have jurisdiction over matters arising under the State statutory employment law. State Supreme Courts and courts lower in the State court hierarchy, which have different names in each State, also have jurisdiction over some matters arising under the State statutory employment law as well as employment-related common law disputes.

3. When a declaration of opening of an insolvency proceeding is issued, are the employment contracts considered automatically terminated or are they still in force?

The employment contracts of a company's employees continue while the company is under administration – they are not terminated automatically. When a court orders the compulsory winding up of a company, the general rule is that the publication of the winding up order operates as notice of dismissal to the company's employees (*Re General Rolling Stock Co* (1866) LR 1 Eq 346; *McEvoy v Incat Tasmania Pty Ltd* 130 FCR 503 at [7]). But it appears that the better view is that this does not apply where the winding up is a voluntary act of the company (see *McEvoy v Incat Tasmania Pty Ltd* 130 FCR 503 at [7]). A liquidator can, however, elect to continue the employment contracts or create new employment contracts with the company's employees (*Re Associated Dominions Assurance Society Pty Ltd* (1962) 109 CLR 516 at 518).

The bankruptcy of an employer does not necessarily operate to terminate the employment contracts between that employer and its employees.

If an employment contract includes a term, whether express or implied, that the solvency of the employer is a condition of the contract's continuation, then the contract may terminate on the employer's insolvency/bankruptcy.

4. When an employment termination automatically occurs due to the opening of the insolvency proceedings, what benefit or severance could the workers be entitled to as a consequence?

As mentioned above, employment contracts are not terminated automatically when a company is under administration or a person becomes bankrupt.

However, if employees are made redundant as a result of their employer's insolvency, the employees may be entitled to severance benefits. There is no common law or general statutory right to redundancy pay in Australia. Redundancy pay is usually calculated as a set amount of pay (for example, two weeks) for each year of the employee's service with the employer. To be entitled to redundancy pay in the event of an employer becoming insolvent, an employee must have an entitlement to redundancy pay enshrined in their

contract of employment or in an instrument made under the Workplace Relations Act which regulates their employment. Employees will be entitled to a minimum period of notice of the termination of their employment which is set out in the Workplace Relations Act or in their contracts of employment as well as payment of all accrued, unpaid wages and leave entitlements.

In some cases, the Federal Government assists employees who lose their employment by virtue of their employer's liquidation or bankruptcy and who are owed certain employee entitlements. The General Employee Entitlements and Redundancy Scheme ('GEERS') covers the following employee entitlements: unpaid wages, annual and long service leave, payment in lieu of notice and capped redundancy pay. Currently, superannuation, which is the compulsory sacrifice of nine per cent of an employee's ordinary wages into a fund which generally cannot be accessed until the employee reaches retirement age, is not covered by GEERS.

Employees must apply to the Federal Department of Employment and Workplace Relations for a payment under GEERS. The Department then assesses the application and determines whether the employee is eligible for assistance. If funds become available during the liquidation process, the Department may seek to recover from the employer amounts received by an employee under GEERS. In the case of bankruptcy of an employer, employees may be required to enter into a legal arrangement prior to payment being released under GEERS which protects the Department's recovery rights.

5. Is there any chance to terminate the employment contract of one or more employees once the opening of the insolvency proceedings already occurred?

Administrators may terminate contracts of employment by virtue of their power to control and manage the company's business, property and affairs (s 437A of the Corporations Act).

What reason is considered fair in order to allow the administrator of the insolvency proceedings to terminate the employment contracts?

Rather than being a question of fairness, the administrator may terminate the employment contract for any reason, subject to compliance with the terms of the contract and with Australia's laws on anti-discrimination in employment, including the provisions of the Workplace Relations Act which prohibit employers from acting in certain ways for certain prohibited reasons.

Is the employee entitled to any benefit or severance?

Please see the answer to question 4.

6. What privileges or preferences, if any, are granted to employment credits?

The order of priority for payments of sums owed to employees when a company is wound up is regulated by the Corporations Act.

That Act (s 556) provides that the payment of wages and superannuation contributions owed to employees before the date the company is wound up are paid **after** secured creditors, liquidator's expenses, costs of an application for a winding up order (if the winding up is Court ordered), and, where applicable, debts incurred by an administrator or official manager. Next in the order of priority are payments due in respect of injury compensation for which liability arose before the date of the winding up and all amounts due by virtue of an industrial instrument before the winding up date in respect of leave of absence. Retrenchment payments to employees rank after all of the payments mentioned above and are payable whether the retrenchment occurs before, on or after the date of a winding up order. The federal Parliament is currently debating a Bill which would rank compulsory, employer paid superannuation contributions equally in the order of priority with superannuation contributions made by the employee using tax effective salary sacrificing.

The Act aims to protect employee entitlements by prohibiting persons from entering into agreements or transactions with the intention of preventing the recovering of entitlements of a company's employees or significantly reducing the amount of the entitlements of a company's employees that can be recovered (s596AB). If this provision is contravened and the employees suffer loss or damage, compensation may be payable to the liquidator or the employees.

The Bankruptcy Act (s 109(1)) provides that a trustee in bankruptcy is required to pay amounts due to the bankrupt's employees for services rendered to the bankrupt before the date of bankruptcy (excluding amounts for certain leave entitlements). Such amounts are to be paid **after** secured creditors, the costs of the administration of the bankruptcy and, where applicable, the costs of the trustee and solicitor, any remuneration in relation to a deed of assignment or arrangement or composition with creditors and proper funeral and testamentary expenses. Then, payment is made for, relevantly, amounts due in respect of workers' compensation where liability accrued prior to the bankruptcy and amounts due to employees for certain kinds of leave (for example, long service leave, annual leave, sick leave).

7. Is there a guarantee institution that takes charge of the debts unpaid by the insolvent employer and to what extent?

Please see the answer to 4 above in relation to GEERS.

8. Is the guarantee institution subrogated in the rights and/or privileges granted to the worker, and may claim for them during the insolvency proceedings?

If an employer becomes insolvent and an employee loses their employment and receives a payment for unpaid entitlements under GEERS, the Department takes the rank in order of the priority of payments that the employee would have had if the Department had not

made the payment. However, priority is only granted over so much of the amount that the Department has paid that the employee would have been entitled to under the relevant Act (s560 of the Corporations Act). There is a similar provision in the Bankruptcy Act which covers payments made to eligible employees under GEERS in the event of an employer becoming bankrupt (ss109(2), (3) of the Bankruptcy Act).

9. What other effect has the insolvency proceeding on the employment relationship?

The other effects of insolvency proceedings which can be said to relate in some way to an employment like relationship are concerned with the powers of company directors and officers. There are certain limits placed on the powers of company directors and officers during insolvency proceedings. For example, where a liquidator is appointed in a voluntary winding up, all the powers of the directors cease except so far as the liquidator, or the company in a general meeting with the consent of the liquidator, approves the continuance of those powers (s495(2), Corporations Act). While a company is being wound up in insolvency or by the Court, a person cannot perform or exercise a function or power as an officer of the company (s471A(1)), but an officer of a company is not removed from office by virtue of a company being wound up in insolvency or by the Court (s471A(3)).

10. When the whole or part of the enterprise is transferred during an insolvency proceeding, is there any particularity regarding the employees' rights?

The Workplace Relations Act contains provisions regulating employment arrangements when one business is purchased by another business. These provisions are known as the 'transmission of business' provisions. These provisions are not specific to businesses which are sold while under administration, however they apply in such circumstances.

The transmission of business provisions are lengthy and complex. There are also currently very complex transitional provisions in place as a result of the major changes to the Workplace Relations Act in 2006. Accordingly, what follows is a basic summary of the provisions.

If an employee is employed pursuant to an instrument created under the Workplace Relations Act (an award or workplace agreement) and the company which employs that employee is sold, the purchaser of that company is, in certain circumstances, bound by the instruments which covered the employee previously. There are some exceptions to this general rule, most importantly that the new employing company has to have employed the employees within two months of them losing their employment from the former employer. Further, the instruments can only bind the new employer company for a maximum of 12 months after it purchased the company, after which time other employment arrangements can be put in place. Subject to certian limitations, the new employer may also negotiate new instruments with employees within this 12 month period to replace the instruments which have been transferred from the former employer.

Essentially, employees whose employment is transferred to a new employing entity have their existing terms and conditions of employment preserved for a maximum of 12 months.

11. **Are there specific regulations protecting employees if an enterprise is shut down or if there are mass dismissals? Describe them.**

As mentioned above, the Workplace Relations Act contains provisions which prevent employers from acting towards employees in certain ways for certain prohibited reasons. For example, an employer cannot injure an employee in the employee's employment for the reason that the employee is a member of a union (ss792, 793).

Further, the Workplace Relations Act requires that where an employer has decided to terminate the employment of 15 or more employees by reason of redundancy, the employer is required to give notice of the proposed redundancies to the Federal Government employment service (s660) and, if the employee affected is a union member, to the union to which the employee belongs (s668). In the case of notification to the union, the employer must also consult with the union about the termination(s) and ways to avert the termination(s) as well as ways to mitigate the adverse effects of the termination(s).