

NEWSLETTER

Legal Up-Date

November 2007

GERMAN AUSTRALIAN-PACIFIC LAWYERS ASSOCIATION

Michael Kobras has recently been elected a member of the executive committee of the German Australian-Pacific Lawyers Association.

The Association was founded in 1999 and is a non-profit organisation based in Frankfurt. The aim of the Association is to promote knowledge and understanding among German and Australian lawyers about their respective different legal systems, and generally to foster relationships between German and Australian lawyers.

The Association also aims to play an important role in promoting trade relations between Australia and Germany and providing focal point for discussing legal matters affecting the subsidiaries of German companies in Australia.

If you have any queries regarding legal issues concerning Australia and Germany or matters involving German law please contact Michael Kobras at mkobras@schweizer.com.au.

DOCA MAY NOT OFFER DIRECTORS PROTECTION FROM THE ATO

A recent decision of the NSW Court of Appeal has confirmed that directors may remain liable to the Deputy Commissioner of Taxation ("DCT") *even if* the Company has entered into a Deed of Company Arrangement ("DOCA").

In the case in question, a penalty notice was served by the ATO on the company's directors for failing to remit company group taxes and because the directors did not cause the company to either:

- comply with its obligations in respect of the money withheld; or
- make an agreement with the DCT in respect of the amounts withheld; or
- appoint an administrator; or
- commence winding up.

The penalty notice had the effect that each director became liable to the DCT for an amount equal to company's liability (S222AOC(1) *Income Tax Assessment Act 1936* (the "Act").

Subsequently, an administrator was appointed to the company and the DCT lodged a proof of debt for a "running balance account in respect of BAS amounts".

The company's creditors (including the DCT) entered into a DOCA requiring the company to pay the

administrator \$51,000 to cover the agreed part of the company's debts by instalments. In accordance with the usual DOCA provision the company was released from its debts owed to creditors (other than related party and secured creditors), thereby extinguishing the debts so far as the company was concerned forever.

However, the Court held that the discharge provided to the company did not release the directors from their personal liability.

It is therefore clear that directors must act immediately on being served with a penalty notice by the ATO to avoid this sort of liability.

TERMINATION FOR CONVENIENCE

Termination for convenience clauses are a standard inclusion in government contracts but are becoming more widely used in commercial contracts as well.

In a government context, the importance of including such a clause is to allow for changes in government policy and to ensure that a government can act freely in the public interest even if this may interfere with a party's contractual rights. The clause is important in high-risk contracts if, for example, approvals are required or pending.

Where the parties' relationship breaks down and a termination for convenience clause is relied on to terminate the contract, this can sometimes be challenged on the basis of a lack of good faith. However, it has been found by various courts that the obligation to act in good faith is not an obligation to prefer another party's interest over your own.

A recent Victorian Supreme Court decision has resulted in the party seeking to rely on such a termination for convenience being restrained (pending a full hearing) from terminating the contract, based on allegations by the other party of breach of an implied term of good faith and fair dealing.

It will be interesting to see the final decision of the Court in the matter of *Kellogg Brown Root Pty Limited v Australian Aerospace Limited* [2007] VSC 200.

YOUR FEEDBACK

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