

2011

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Measuring The Impact Of The Financial Crisis On The General Employee Entitlements And Redundancy Scheme

Abstract

With the collapse of high-profile corporations in Australia such as Cobar Mines, National Textiles Ltd and Ansett Airlines, the Howard Coalition Government in Australia (1996-2007) in 2000 established the Employee Entitlements Support Scheme (EESS). EESS was later replaced by the General Employee Entitlements and Redundancy Scheme (GEERS), funded by taxpayers to provide limited protection for employee entitlements in the event of corporate insolvency. However, the increased level of insolvencies between 2007 and 2009 due to the economic downturn in Australia, placed greater financial pressure on GEERS to provide protection for employees who had lost their jobs and entitlements. As a consequence, the Rudd Government was required to supplement the reserves of GEERS to cope with applications for relief. In this paper the impact of the financial crisis on the GEERS budget is examined.

Keywords

Safety Net, Financial Crisis, Impact of Financial Crisis on GEERS

MEASURING THE IMPACT OF THE FINANCIAL CRISIS ON THE GENERAL EMPLOYEE ENTITLEMENTS AND REDUNDANCY SCHEME

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With the collapse of high-profile corporations in Australia such as Cobar Mines, National Textiles Ltd and Ansett Airlines, the Howard Coalition Government in Australia (1996-2007) in 2000 established the Employee Entitlements Support Scheme (EESS). EESS was later replaced by the General Employee Entitlements and Redundancy Scheme (GEERS), funded by taxpayers to provide limited protection for employee entitlements in the event of corporate insolvency. However, the increased level of insolvencies between 2007 and 2009, due to the economic downturn in Australia, placed greater financial pressure on GEERS to provide protection for employees who had lost their jobs and entitlements. As a consequence, the Rudd Government was required to supplement the reserves of GEERS to cope with applications for relief. In this paper the impact of the financial crisis on the GEERS budget is examined.

I Introduction

Corporate insolvency events are part of the business cycle and occur when a business is unable to fulfil its financial obligations. The consequences of insolvency go beyond the parties who are directly involved with the business (the owners/directors, employees and other creditors of the insolvent business) and, often, extend in the case of large businesses to the broader community. Likewise, where an insolvent business is situated in a small population centre, the survival of a town or city can depend on that business sustaining its operations. Thus, corporate insolvencies can have a major effect on the economy at large, especially in the wider context of large-scale corporate collapses where thousands of employees may lose their employment and entitlements.

Employee entitlements in Australia make employees into preferential creditors under the *Corporations Act 2001* (Cth) when corporate insolvency occurs, but employees still rank behind secured creditors when the distribution of corporate assets takes place. However, in most cases of corporate collapse, there are no funds or assets remaining after debts to secured creditors have been discharged. The tenuous position for

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employees is weakened further by their inability, in most circumstances, to avail themselves of the various forms of self-protection that have been developed and implemented by secured and other creditors in protecting their assets. Notably, the industrial laws that for over a century have protected the wages and entitlements of Australian workers have had little impact on the distribution of insolvent corporations' assets.

The effectiveness of measures available under Australian law to provide protection for employee entitlements has been the subject of intense debate, particularly in the aftermath of high-profile corporate collapses in Australia, such as Cobar Mines, National Textiles Ltd and Ansett Airlines. The collapse of these entities eventually resulted in the establishment, by the Howard Coalition Government (1996-2007), of two schemes acting as a form of entitlement safety net for employees to protect them in the event of corporate insolvency. The establishment of these schemes implicitly recognised the inability of corporations and industrial laws to provide adequate protection for employees. The first such scheme, established in 2000, was the Employee Entitlements Support Scheme (EESS); to be replaced later by the General Employee Entitlements and Redundancy Scheme (GEERS).

However, due to the economic downturn in Australia, the increased level of insolvencies between 2007-2009 placed greater financial pressure on GEERS to provide protection for employees who lost their jobs and entitlements. At the time of writing corporate collapse is a significant issue given the state of the world environment and the so-called Global Financial Crisis. Whilst Australia has not been as adversely affected as many other OECD nations there have been a number of corporate collapses and business failures in Australia since late 2007; as a consequence, the Australian Government was required to supplement the reserves of GEERS to cope with applications for relief. In considering these issues this paper takes the state of knowledge in relation to GEERS and employee entitlement protection beyond the current debate.

In order to examine the impact of the financial crisis on the GEERS budget, a brief background on the establishment of safety nets in Australia with a particular focus on GEERS will be used. Also the impact of the financial crisis on Australian economy generally, and some insolvency events particularly will be discussed. A concluding discussion will be conducted on the impact of the financial crisis on the GEERS budget.

II Safety net schemes for unpaid employee entitlements in Australia

Safety net schemes for unpaid employee entitlements have been adopted world-wide in different forms. The purpose of the schemes is to provide protection for employee

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entitlements in the event of insolvency, though they vary somewhat from one jurisdiction to another. Some are publicly funded, as in Australia and Canada,¹ whilst others are employer funded like Germany² and Denmark.³ A government-funded safety net as a protective measure might be seen by some free market commentators as an unwelcome intervention into the economy. Nevertheless, despite these reservations, some commentators argue that such interventions may be needed as an alternative to a full-blown structural change to the market.⁴ Especially as globalisation and market reform may result in unfairness towards specific elements of the market, such as employees. This may occur where market forces cause a shift in industry patterns, lead to factory closures and the like. Similarly, global influences may lead to changes in import and export patterns thereby influencing the makeup of the workforce and, consequently, affecting employment and industry patterns. All of these influences may create unexpected pressures on industry and result in a decline in certain businesses, job losses and even corporate collapses. On this basis, a safety net approach to employee entitlement might be regarded as a necessary measure in order to avoid undesirable free market consequences.⁵ The multi-causal nature of corporate collapse and related unemployment was emphasised in 2000 by the then Minister of Workplace Relations and Small Business, the Honourable Peter

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- ¹ *Wage Earner Protection Program Act 2008* (Can); Mohammed Al Bhadily and Rob Guthrie, 'Insolvency Protection for Employee Entitlements: International Alternative to GEER Scheme', (2010) *Journal of Applied Law and policy* <http://www.business.curtin.edu.au/files/JALAP_09_combined.pdf>.
 - ² Andreas R Emmert, 'Introduction to German Insolvency Law' (2002) *International Company and Commercial Law Review* at 427.
 - ³ Al Bhadily and Guthrie, above n 1; The Danish Salary Guarantee' <<http://74.125.153.132/search?q=cache:l5FH3I3BZEgJ:mediacontent.sd.publicus.com/doc/SD35810983.DOC+The+Danish+Salary+Guarantee&cd=1&hl=en&ct=clnk&gl=au>>.
 - ⁴ Christopher Hughes, 'Towards Pinstriped Unionism – Protecting Employee Entitlements Through Securitisation' (2000) 12(1) *Bond Law Review* 1.
 - ⁵ It must be noted that, in a financial crisis, governments around the world are pressured to take intervention measures to support the local economy. An example is the current financial crisis, in which pioneer free market countries such as the United States and the United Kingdom have adopted intervention measures to rescue their economies from recession. In recent months the United States has bailed out companies to the value of US\$25 billion – all to two major mortgage providers, the Federal National Mortgage Association (FNMA) known as Fannie Mae and the Federal Home Loan Mortgage Corporation (FHLMC), known as Freddie Mac. The car industry has also been rescued by financial support from the US government for the amount of US\$15 billion. Moreover, this pattern of interventions has been repeated in European countries, an example being the United Kingdom, which plans to spend £2.3 billion to rescue its car industry, and also France, which intends to spend €5-6 billion to rescue its car industry.

Reith, in his statement to the Australian Parliament when introducing GEERS as a protective measure:

While there can be no doubt about the Federal Government's commitment to labour market reform, the Government is just as committed to helping people who are hurt through no fault of their own as a result of economic reform and the modernization of the Australian economy.⁶

In the same vein and reporting as early as 1988, the Australian Law Reform Commission recommended the creation of 'a wage-earner protection fund' in the *General Insolvency Inquiry* (the Harmer Report), stating that: 'In the Commission's view the interests of employees would be best protected by the creation of a wage-earner protection fund. Such a fund would ensure that employees are paid in every insolvency.'⁷

A series of events has contributed to policy changes in Australia towards enhancing protection measures for employee entitlements in the event of insolvency, resulting in the establishment of GEERS as a safety net scheme. The following section reviews significant insolvency events that particularly influenced the Howard Coalition Government in adopting changes to provide an effective protection policy for employee entitlements.

A Events influencing the development of a safety net in Australia

The establishment of a safety net in Australia was due to the inadequacy of protection for employee entitlements in the event of insolvency;⁸ however, the trigger behind the establishment of the safety net was the collapse of high profile companies such as Cobar Mines, The National Textiles Company and Ansett Airlines.

Cobar Mines, one subsidiary of Ashanti Goldfields, was situated in the New South Wales mining town of Cobar. When it was closed in January 1998, the majority of its assets were under claim by secured creditors. Cobar Mines had insufficient assets to pay \$10.8 million to 250 employees in wages, leave and redundancy entitlements. Indirectly, the collapse of Cobar Mines affected about 1500 jobs in the township of Cobar which was dependent upon the business activity of the Cobar Mines. Pressure

⁶ Peter Reith, 'Federal Government Confirms Employee Entitlements Support Scheme and not Compulsory Insurance' (Media Release, 64/00, 27 April 2000) <http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/7UC16/upload_binary/7uc161.pdf>.

⁷ Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988), vol 1 [727].

⁸ Section 556 of the *Corporations Act 2001*(Cth) provides employee entitlements the priority over other unsecured creditors in the event of corporate insolvency.

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from the Construction, Forestry and Mining Employees Union (CFMEU) led to an investigation by the Australian Securities and Investment Commission (ASIC).⁹ Ultimately, the Ashanti parent company reached a settlement to pay \$6.5 million in employee entitlements.¹⁰ Employees received about 85c for each dollar owed of their unpaid entitlements. A payment of 25c for each dollar owed was paid to other unsecured creditors.¹¹

In another example of a mine closure, which took place on 25 May 1999, Oakdale Collieries Pty Ltd, the owner of the Oakdale Mine located 80 kilometres southwest of Sydney, placed the company under administration after an 18 per cent sales price reduction in coal on the international market. The company owed \$6.3 million or an average of \$50,500 each in entitlements to its 150 former employees.¹² In response to the situation, the Howard Coalition Government enacted the *Coal Mining Legislation Amendment (Oakdale Collieries) Act 1999* (Cth). The amendment allowed for the payment of outstanding entitlements in the form of annual leave, sick leave, payment in lieu of notice and severance pay entitlements. To fund Oakdale Collieries' outstanding employee entitlements, a levy was imposed on the black coal mining industry.¹³ The protection provided by the above *Act* was seen by the Howard Coalition Government as a one-off protective measure. The Honourable Peter Reith, then Minister for Employment, Workplace Relations and Small Business said: 'The payment for the Oakdale workers is seen by the government as a one-off situation made necessary by the current lack of a national scheme and made possible by the availability of the coal industry fund.'¹⁴ The effect from the amendments had a generally positive outcome, not just for the Oakdale employees but because, in time, protection was extended to cover all employee entitlements affected by coal mining insolvency in 1999.¹⁵

⁹ Hughes, above n 4.

¹⁰ Australian Securities and Investments Commission, 'ASIC Brokers \$6.5M Cobar Settlement' (Media Release, 98-375, 7 December 1998) <[http://www.asic.gov.au/asic/pdfflib.nsf/LookupByFileName/98-375.pdf/\\$file/98-375.pdf](http://www.asic.gov.au/asic/pdfflib.nsf/LookupByFileName/98-375.pdf/$file/98-375.pdf)>.

¹¹ Ibid.

¹² David Newman, *The History of Employee Priority and Protection in Australian Corporate Insolvency* (2002) 1 <<http://www.maddocks.com.au/download/employee.pdf>>

¹³ Ben Dunstan, 'Protecting employee entitlements in an insolvency' (Paper presented at AAR Client Seminar, February 2000) <<http://www.aar.com.au/pubs/insol/insolfeb00.htm>>.

¹⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 26 August 1999, 9174 (Peter Reith, Minister for Employment, Workplace Relations and Small Business).

¹⁵ Dunstan, above n 13.

The National Textiles Company referred to previously was placed under voluntary administration in January 2000, resulting in \$11 million in losses for 340 employees.¹⁶ The Howard Coalition Government intervened to provide \$7 million for employees' entitlements on the condition that the company accepted a deed of arrangement that was proposed by the administrator.¹⁷

On 12 September 2001, the Ansett Airlines group was placed under administration. Sixteen thousand Ansett employees lost their jobs and around \$500 million in losses were incurred in relation to employee entitlements. The Howard Coalition Government established the Special Employee Entitlements Scheme for Ansett Group Employees (SEESA), funded by a levy on airline tickets, specifically to deal with Ansett employee entitlements.¹⁸ The SEESA scheme will be discussed further below.

The preceding paragraphs have briefly discussed examples of insolvency that show clearly the vulnerability of employees' position where their entitlements have been lost due to businesses folding. This issue has triggered a debate on how best to provide protection for employee entitlements. The debate was conducted within the context of the ineffectiveness of the *Corporations Act* to provide appropriate protection for employee entitlements.¹⁹ Therefore, there was an immediate need for the Federal Government to step in and to provide protection for employee entitlements. This was achieved by establishing the first safety net scheme in Australia, which will be discussed in the next section, to compensate for the lack of appropriate employee entitlements protection provided by the *Corporations Act*.

B Employee Entitlements Support Scheme (EESS)

On 8 February 2000, the then Federal Minister for Employment, Workplace Relations and Small Business, the Honourable Peter Reith, announced the establishment of the Employee Entitlements Support Scheme (the EESS), which was designed to provide protection for employees whose employment was terminated due to insolvency on or after 1 January 2000.²⁰ The EESS was administrated by the Department for Employment, Education and Workplace Relations (DEEWR). The EESS, however, did

¹⁶ Langton, Glenn, Chris Latham, Janet Linklater, Colin Westman and Darren Wickham,, 'Protection of Employee Entitlements in the Event of Employer Insolvency' (2003) 1 <http://www.actuaries.asn.au/IAA/upload/Public/con03paper_langton.pdf>.

¹⁷ Hughes, above n 4.

¹⁸ Stephen O'Neill, 'Corporate Insolvencies and Workers' Entitlements' (E-brief: Online Only, 15 September 2004) 1 <<http://www.aph.gov.au/library/intguide/econ/insolvencies.htm>>.

¹⁹ Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work*, (Oxford, 2nd ed, 2011), 508.

²⁰ Peter Reith, 'The protection of employee entitlements in the event of employer insolvency' (Ministerial Discussion Paper, Parliamentary Library, Parliament of Australia, 1999).

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not cover all outstanding employee entitlements.²¹ In addition, funding of the EESS was planned initially on the basis of a 50/50 contribution by the Federal Government and State and Territory Governments; however, only South Australia joined the scheme in August 2001. The Commonwealth contributed half of the fund even though the other states refused to contribute their proportion.²² The effect of the failure of the sub-national governments to join the scheme resulted in employees covered under the EESS being paid only half of the amount prescribed under the EESS. The scheme applied to employment terminations resulting from insolvency between 1 January 2000 and 11 September 2001.²³ In cases of insolvency, the EESS was intended to cover the following employee entitlements:²⁴

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

The EESS provided protection for employees earning up to \$40 000 annually, to a maximum of \$20 000 for each eligible employee.²⁵

C The Special Employee Entitlements Scheme for Ansett Group Employees (SEESA)

Ansett Airlines was placed under external administration in September 2001, and about 16,000 employees lost around \$500 million in entitlements. In response to this collapse, the Howard Coalition Government established the Special Employee Entitlements Scheme for Ansett Group Employees (SEESA) specifically to deal with Ansett employee entitlements.²⁶ The SEESA, like the EESS, was administered by DEEWR. On 1 October 2000, a special appropriation of \$500 million was created within consolidated revenue to meet the costs associated with SEESA. A \$10 levy was imposed by the *Air Passenger Ticket Levy (Collection) Act 2001* (Cth) on air passenger tickets purchased on or after 1 October 2000 to fund the costs being met by the special

²¹ Ibid.

²² Tony Abbott, 'Employee Entitlement Support Scheme: Year One Activity Report' (2001) <<http://www.dewr.gov.au/ministersAndMediaCentre/abbott/eessreport.asp>>.

²³ Australian National Audit Office, 'Employee Entitlements Support Schemes' (2002) 1 <http://www.anao.gov.au/uploads/documents/2002-03_Audit_Report_20.pdf>.

²⁴ Ibid.

²⁵ Ibid.

²⁶ O'Neill, above n 18.

appropriation. This levy was administered by the Department of Transport and Regional Services (DOTARS). Even though SEESA, unlike EESS, was not funded by the government, it was still a publicly-funded scheme in that it was a levy imposed on travellers.

The coverage of the employee entitlements by this scheme was to pay:²⁷

- all unpaid wages;
- all unpaid annual leave;
- all entitlements for pay in lieu of notice;
- all long service leave; and
- up to eight weeks of unpaid redundancy leave.

D General Employee Entitlements and Redundancy Scheme (GEERS)

The General Employee Entitlements and Redundancy Scheme (GEERS) was set up in 2001, in order to replace EESS. The scheme provides protection for employees whose employment was terminated after 12 September 2001, and who their lost entitlements. Employees are entitled to be protected under the scheme if the employee entitlements are established under legislation, an industrial award, a statutory agreement, or contract.²⁸ This scheme, like previous schemes, is administered by the DEEWR. However, unlike the EESS and the funds made available through the *Coal Mining Legislation Amendment (Oakdale Collieries) Act 1999* (Cth), GEERS is fully funded by the Federal Government. GEERS is more comprehensive in its coverage of employee entitlements than the EESS, covering the following:²⁹

- unpaid wages in the three month period prior to the appointment of an insolvency practitioner;
- all unpaid annual leave;
- unpaid pay in lieu of notice up to a maximum period of five weeks;
- up to 16 weeks' redundancy pay;³⁰ and

²⁷ Australian National Audit Office, above n 23 at [1.8].

²⁸ Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Insolvency Laws: A Stocktake*, (2004) at [10.68].

²⁹ Department of Employment and Workplace Relations, *Annual Report 2006-07* (2007), [115].

³⁰ Initially GEERS covered eight weeks of redundancy payment, and then on 22 August 2006 it was extended by the former Federal Government to 16 weeks.

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- all long service leave.

The difference in coverage supplied by the EESS and GEERS is clear. Whereas the EESS covers four weeks of wages, annual leave and redundancy, five weeks in lieu of notice and 12 weeks in long service leave, GEERS covers three months of unpaid wages, all unpaid annual leave, up to five weeks of unpaid pay in lieu of notice, all long service leave, and up to 16 weeks of redundancy.

In order for employees to be eligible for protection through GEERS, they must have been:³¹

- lawfully employed in Australia; and
- not a shareholder, executive director of the insolvent employer, a relative of a director or relative of the insolvent employer; and
- terminated by his/her employer or insolvency administrator; and
- owed certain entitlements; and
- not eligible for assistance provided by the Special Employees Entitlements Scheme for Ansett employees.

However, employees' entitlements are subject to an annual income cap which is as follows:³²

2001-2002	\$75 200.
2002-2003	\$81 500.
2003-2004	\$85 400.
2004-2005	\$90 400.
2005-2006	\$94 900.
2006-2007	\$98 200.
2007-2008	\$101 300.

³¹ Department of Education, Employment and Workplace Relations, *General Employee Entitlements and Redundancy Scheme: Operational Arrangements: Other Matters Affecting Employees' Eligibility* (2008) [8].

³² See the Annual Reports of the Department of Education, Employment and Workplace Relations for the years 2001-2002, 2002-2003, 2003-2004, 2004-2005, 2005-2006, 2006-2007 and 2007-2008.

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The effect of the salary cap is that GEERS will not be available for employees earning \$101 300 or more for the financial year 2007-2008. For the financial year 2009-2010 the limit is \$108 300.³³

Employees who have lost entitlements due to insolvency events are eligible to lodge claims within 12 months of the event with DEEWR. Employee claims are to be processed within 16 weeks of the receipt of claims.³⁴ Entitlements paid to employees under this scheme are recoverable by the Commonwealth Government from the employer by reason of s 560 of the *Corporations Act 2001* (Cth), which allows for any person who advances payments of employee entitlements to enjoy the same priority that is enjoyed by the employee to whom the funds have been paid.

As stated, GEERS is funded by the Federal Government, which established a special account under the *Financial Management and Accountability Act 1997* (Cth) to deal with funds and payments related to GEERS. GEERS itself, as opposed to the fund out of which entitlements are paid, is similar to previous schemes which are not established by legislation but operate by ministerial authority only. This has considerable implications, in particular on the sustainability of GEERS in providing viable protection for employee entitlements. Funded by the Federal Government, the intention of GEERS was to provide better protection for employee entitlements. In that sense, GEERS can be considered by most accounts a positive step towards providing protection for employee entitlements in the event of insolvency.

GEERS and its predecessor have been criticised by some commentators for their inability to provide effective protection for employee entitlements where there is a corporate collapse. Usually, the criticism is directed at the lack of coverage of employee entitlements,³⁵ and the fact that the schemes have been funded by taxpayers, shifting the responsibility of paying employee entitlements from employers to taxpayers.³⁶ The manner in which the scheme is currently funded arguably may place an unfair burden upon taxpayers, giving rise to considerations of moral hazard, particularly where mismanaged businesses are protected by GEERS. Moreover, GEERS was established as an administrative scheme without legislative support. The lack of legislative backing raises issues as to the sustainability of GEERS

³³ Department of Education, Employment and Workplace Relations, 'How your GEERS claim will be assessed' <<http://www.deewr.gov.au/WorkplaceRelations/Programs/EmployeeEntitlements/GEERS/Common/Pages/HowClaimWillBeAssessed.aspx>>.

³⁴ Department of Education, Employment and Workplace Relations, above n 31 at [8].

³⁵ Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 4th ed, 2005) 375.

³⁶ Owens, Riley and Murray, above n 19; Christopher Symes, *Statutory Priorities in Corporate Insolvency Law: An Analysis of Preferred Creditor Status* (Ashgate, 2008) 152.

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as a protective measure, given that political influences may at any point result in its discontinuation.³⁷

Even though GEERS has been considered as a step in the right direction to protect employee entitlements, it has been argued that it is not a viable protective measure in that GEERS is a mechanism that imposes no liability on employers to provide protection for employees' entitlements in the event of insolvency.³⁸

III The financial crisis and the corporate collapse in Australia

Dominique Straus-Kahn, who was then the Managing Director of the International Monetary Fund (IMF) stated in April 2009 that, losses associated with the global financial crisis were estimated to be \$4.1 trillion. This was a revised figure on the previous year's estimation of \$2.2 trillion, and consisted of more than \$630 for every human being on the planet. The American banks have had to write off more than one trillion in so-called toxic loans and more than \$300 billion has had to be written off by British banks.³⁹ The IMF warned that there was likely to be further financial hardship. The comments were echoed by the World Bank, which described the impact of the financial crisis as 'the most severe since the Great Depression ... [and] rapidly turning into a human and development crisis.'⁴⁰ The human impact of the financial crisis has been considered a social disaster in terms of the number of jobs that have been lost. According to the Organisation for Economic Cooperation and Development (OECD), as at 2009 there were about 34 million people unemployed in the OECD's 30 member countries, including European countries, North America, Japan, South Korea, Australia and New Zealand. The OECD has stated that the number of unemployed could rise to 42 million by 2010.⁴¹

In this regard, the global financial crisis has taken a toll on the Australian economy. Aart de Geus, the Deputy Secretary-General of the OECD, during his visit to Sydney in February 2009, voiced his concern in relation to the impact of the financial crisis on the Australian economy, since the Australian economy depends on commodity exports that have a big influence on the current account deficit. These comments were echoed by the Honourable Wayne Swan, the Australian Treasurer, in February 2009; he indicated that the global economic crisis had affected Australia by extracting

³⁷ Creighton and Stewart, above n 35 at 375; Symes, above n 36 at 152.

³⁸ Owens, Riley and Murray, above n 19.

³⁹ Edmund Conway, 'IMF puts losses from financial crisis at 4.1 trillion', *Telegraph* (London), 21 April 2009.

⁴⁰ The World Bank, 'Global Monitoring Report' (2009) at 9. All currency amounts are in AUD unless otherwise specified.

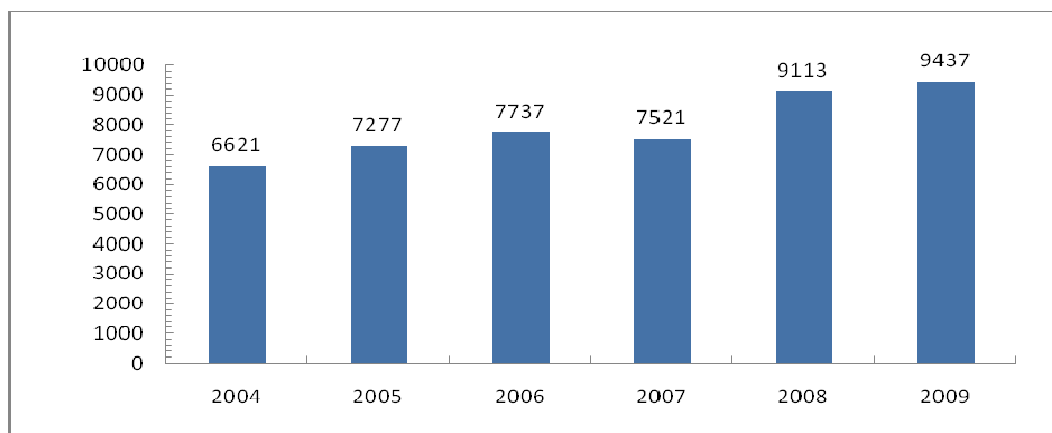
⁴¹ Organisation for Economic Cooperation and Development, 'OECD Interim Economic Outlook' (2009).

\$60 billion from the value of its exports.⁴² As a consequence of this loss of exports there were heavy job losses (see Figures 1 and 2).

The Australian Bureau of Statistics (ABS) estimated that 53,800 full-time jobs were lost in Australia in February 2009, or about 2,000 job losses per day, the worst job losses in 18 years.⁴³ In September 2010 the unemployment rate in Australia has stabilised at around 5.1 per cent and the predictions of heavy job losses have not materialised.⁴⁴

Whilst the rate of unemployment in Australia did not reach the levels experienced overseas, or indeed the level predicted during 2009, the number of companies that entered into external administration in 2008 increased by 21 per cent compared with the 2007 data (see Figure 1).

Figure 1: Number of insolvencies for the last six years⁴⁵



⁴² David Uren and Jane Schulze, 'Two More Years of Economic Pain Predicted', *The Australian* (Sydney), 26 February 2009 at 5.

⁴³ Australian Bureau of Statistics, *Labour Force Figures for February 2009* (12 March 2009) <<http://www.abs.gov.au/ausstats/abs@.nsf/ProductsbyReleaseDate/>>.

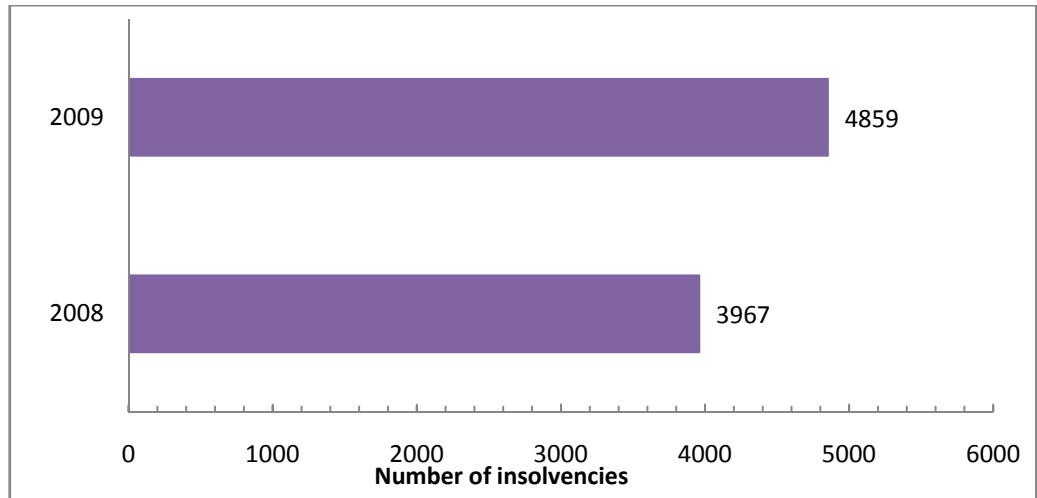
⁴⁴ Australian Bureau of Statistics, *Labour Force Figures for September 2010* (7 October 2010) <<http://www.abs.gov.au/ausstats/abs@.nsf/ProductsbyReleaseDate/>>.

⁴⁵ Australian Securities & Investment Commission, *Insolvency and company registration statistics* (12 March 2009) <<https://storm.asic.gov.au/asic/asic.nsf/byheadline/Insolvencies%2C+terminations+%26+new+reg+stats+portal+page?openDocument>>.

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From January to June 2008, 3967 companies entered into external administration whilst for the same months in 2009 there were 4859 companies which entered into external administration, an increase of over 22 per cent (see Figure 2).

Figure 2: Number of insolvencies for January-June for 2008 & 2009



The collapse of businesses has significant consequences for employees with respect to the loss of employment and entitlements. The situation of employees is that they are generally more vulnerable than other creditors when insolvency occurs. In addition, the position of employees is unlike that of other creditors in that they are less able to protect their interests and entitlements effectively by taking precautionary measures that secure or minimise losses in the event of insolvency. Against this brief background reflecting on the current financial situation due to the impact of so-called the global financial crisis in Australia, and evident in the increased corporate collapses and rising numbers of employees affected by these failures, GEERS has to step in to provide protection to employees who have been affected by the insolvency. To establish the extent of the impact of the financial crisis on the GEERS budget, examples of insolvency events which might be triggered by the financial crisis and have led the Rudd Labor Federal Government to increase the GEERS budget, will be discussed in the next section.

ABC Learning Centres and car parts companies collapses were used by the Federal Government as the basis to increase the GEERS budget's capacity to cope with increased number of employees who were seeking GEERS protection, so the following section will focus on these particular collapses.

A The collapse of ABC Learning Centres

ABC Learning Centres Pty Ltd (ABC) was founded by Eddie Groves in 1988, in Brisbane, Queensland. ABC rapidly expanded, growing to 43 childcare centres by June 2001. By November 2005, it had 697 childcare centres throughout Australia and New Zealand.⁴⁶ It purchased the third largest childcare operator in the United States, Learning Care Group Inc., which itself operated 467 centres in the US, and other educational facilities in south-east Asia. This purchase provided ABC Learning with 70,000 licensed childcare places in addition to the 50,000 it already had.⁴⁷ In March 2006, it announced a bid for Kids Campus, one of its few remaining large competitors in Australia, which gave it another 106 centres. On 13 December 2006 it was announced that ABC would acquire the second largest child care provider in the United States Chicago based La Petite Academy, for US\$330 million, as well as the 5th largest provider in the UK, Busy Bees Group Ltd. It had expanded aggressively into the outsourcing of child care services, negotiating deals with some of Australia's largest employers.⁴⁸ This included the Australian Department of Defence, taking over the Department's 19 childcare facilities.⁴⁹ Aside from offshore expansion, the company was also expanding into training and education. It ran the ABC Early Childhood Training College, providing training for childcare workers, and published a magazine, *Small Wonders*, aimed at educating and informing parents with young children.⁵⁰ It was a highly profitable company. During the financial year 2004/5, ABC recorded a net profit after tax of \$52.3 million on total revenues of \$292.7 million. The six months ending 31 December 2005 showed no slowing in the financial momentum for the company, with profit after tax reaching \$38 million and revenues of \$219.8 million.⁵¹

An unexpected drop of 42 per cent in profit in the second half of 2007 to \$37.1 million, and adverse market rumours about its \$1.8 billion debt, triggered a decline in the company's share price.⁵² Several directors of the company, then, were forced to dump millions of shares after receiving margin calls. The share price went down

⁴⁶ Ben Hills, 'Cradle Snatcher', *The Sydney Morning Herald* (online), 11 March 2006
<<http://www.smh.com.au/news/national/cradle-snatcher/2006/03/10/1141701698670.html>>.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Hardie Grant, 'Parenting' (2010)
<http://www.hardiegrant.com.au/Magazines/Our_Work/Sectors/Parenting.aspx>.

⁵¹ Hills, above n 46.

⁵² Tim Smith and Robert Fenner, 'ABC Learning Names Ferrier Hodgson Outside Manager' *Bloomberg* (online), 6 November 2008
<<http://www.bloomberg.com/apps/news?pid=20601087&sid=aDq3o1DcJTDM>>.

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from \$7 to 54 cents. In March 2008, ABC announced it would sell 60 per cent of its American child care business to Morgan Stanley, using the proceeds to pay off accumulated debt. This sale realised US\$700 million.⁵³ Trading in ABC Learning shares was suspended in August 2008 after the company failed to release its earnings for the 2007-08 financial year. The company entered into receivership in November 2008. According to the ABC administrator, Ferrier Hodgson partner Greg Moloney, 2243 creditors were seeking \$1.66 billion. Banks were owed \$995 million in secured entitlements. 16,000 ABC employees were owed \$31 million in holiday and long service leave, excluding redundancy entitlements. In addition, unsecured debtors were owed \$600 million.⁵⁴

ABC Learning employees who resigned or were made redundant were entitled to access GEERS during the period of voluntary administration by reason of the exercise of special discretion by the Honourable Julia Gillard, the Minister for Employment and Workplace Relations. In addition to this support a specific broadcast was posted on the GEERS website to provide information about GEERS assistance to former ABC employees.⁵⁵

B The Global Financial Crisis and the motor vehicle industry in Australia

One of the victims of the global financial crisis in Australia has been the motor vehicle industry. In 2008, the annual drop in car sales was 10.6 per cent: for the four-wheel-drive segment, sales were down by 20 per cent, and for passenger cars, 1.5 per cent.⁵⁶ In early April 2009, Holden announced that from 4 May it would reduce production at its Adelaide plant from about 600 vehicles a day to 310. This was due to reduced demand in domestic and export markets.⁵⁷ The editor of the car buyer's

⁵³ 'ABC Learning Centres Confirms Sale of 60pc in US Business', *The Australian* (Sydney), 5 March 2008, 8.

⁵⁴ Natasha Bitá, 'ABC Learning's Debt Revealed as Rival CFK Childcare Centres Collapses', *The Australian* (Sydney), 19 November 2008 at 11.

⁵⁵ Department of Education, Employment and Workplace Relations, 'GEERS Assistance for ABC Learning Employees' (2010) <http://www.deewr.gov.au/WorkplaceRelations/Programs/EmployeeEntitlements/GEERS/Documents/ABC_FactSheet_2009.pdf>.

⁵⁶ Murphy Katharine and Geoff Strong, 'Local Car Industry on Brink', *The Sydney Morning Herald* (Sydney) 20 November 2008 at 12.

⁵⁷ Australian Associated Press, 'The Australian Car Industry Will Not Survive the Downturn, Expert Says', *The Daily Telegraph* (online) 14 April 2009 <<http://www.dailytelegraph.com.au/news/breaking-news/holden-will-sink-expert/story-e6freuyi-1225697264184>>.

guide, *Dog & Lemon Guide*, Clive Matthew-Wilson, said 'Australia's car factories are losing money on every vehicle they make.'⁵⁸ Toyota Australia also had its share of losses in 2008; its profit after tax was down \$123.4 million compared to \$242.2 million for 2007. This downturn in the motor vehicle industry in Australia was also reflected in the car parts industry. At the time, the Industry Minister, the Honourable Kim Carr, warned that the top 200 car parts manufacturers were under financial stress.⁵⁹ Ultimately, this resulted in the insolvency of some manufacturers of car parts, which will be discussed below.

National Parts Pty Ltd (National Parts) closed its doors on 12 February 2008, resulting in the termination of about 300 employees, mainly in warehouse, distribution and sales. It was the biggest independent distributor of automotive parts in Australia. The former employees of National Parts were owed around \$5 million in entitlements.⁶⁰

Drivetrain Systems International (DSI), an automotive transmission manufacturing business in New South Wales, was the only transmission factory in Australia. On 25 February 2009, DSI was placed under administration and 223 workers were made redundant. The remaining 163 workers were offered eight week contracts to work with Ford. Most of the redundant workers had worked for DSI for a period of 15-30 years. There was up to \$70 million in business debt, and \$25 million owed in employee entitlements. Some workers who had been employed with DSI for over 30 years were individually entitled to \$90,000-\$100,000 in entitlements, and some were entitled to more than 100 weeks in redundancy payments. These workers were entitled to claim some, but by no means all, of these losses from GEERS.

On 26 August 2009, the engine bearing and gasket maker Automotive Components Ltd (ACL) was placed into voluntary administration. Ford, Holden and Toyota car manufacturers relied on ACL engine bearings and gaskets. On 27 August 2009, ACL Chairman Ivan James stated to the Australian Associated Press that 'Our volumes fell, from the onset of the global financial crisis to now, to roughly 45 per cent below previous levels, with a high level of fixed costs and a fixed workforce.'⁶¹ Three

⁵⁸ Ibid.

⁵⁹ Ben Schneiders, 'Car Industry Declining Rapidly, Minister Warns', *The Age* (online) 25 March 2009 <<http://www.theage.com.au/business/car-industry-declining-rapidly-minister-warns-20090324-98yj.html>>.

⁶⁰ Julia Gillard, 'Assistance for Employees of National Parts' (Media Release, 22 February 2008) <<http://www.deewr.gov.au/Ministers/Gillard/Media/Releases/Pages/default.aspx>>.

⁶¹ Australian Associated Press, above n 57; Paul Carter, 'With Ford a Customer How Can You Fail? Easy, Says ACL Boss', Trading Room (online) 27 August 2009 <http://www.tradingroom.com.au/apps/view_breaking_news_article.ac?page=/data/news_research/published/2009/8/239/catf_090827_165500_3199.html>.

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hundred and twenty ACL employees lost their jobs and entitlements, and were owed \$30 million in entitlements.

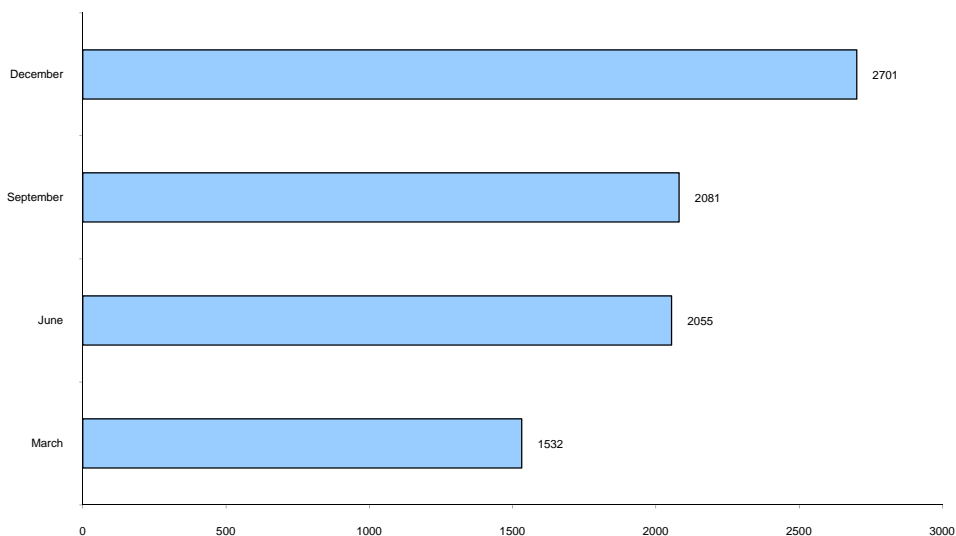
IV The impact of the financial crisis on the GEERS budget

The above insolvency events, and other similar examples, have led to thousands of employees losing jobs and entitlements due to the so-called Global Financial Crisis. As indicated above, the statutory protection through the preferential treatment provided by the *Corporation Act 2001* (Cth) to employee entitlements in the event of insolvency has not effectively protected employee entitlements. Consequently, GEERS has to protect those whose jobs and entitlements have been lost.

The then Minister for Employment and Workplace Relations, the Honourable Julia Gillard, assured employees that their entitlements lost as a result of the abovementioned car parts industry insolvencies would be covered by GEERS.⁶² Employees who had lost wages and other entitlements as a consequence of corporate collapse may be entitled to make a claim for at least part of those losses through GEERS. Importantly for this part of the discussion it is worthy of note that the increased level of insolvencies between 2007-2009, due to the economic downturn in Australia, has placed greater financial pressure on GEERS to provide protection for employees who have lost their jobs and entitlements (see Figure 3).

⁶² Julia Gillard, 'Assistance for Employees from Drivetrain Systems International' (Media Release, 10 March 2009)
<<http://www.deewr.gov.au/Ministers/Gillard/Media/Releases/Pages/default.aspx>>.

Figure 3: Number of claimants who received GEERS assistance in 2008⁶³



To address this pressure on GEERS, in March 2009 the Federal Government introduced an Appropriation Bill (No. 5) 2008-2009 to increase the allocation for the GEERS budget by an extra \$70 million. In this regard, Mr Craig Thomson, a Labor Member, stated:

Looking at the main items included under Appropriation Bill (No. 5) for the Department of Education, Employment and Workplace Relations, there is \$70 million for the General Employee Entitlements and Redundancy Scheme, GEERS, which covers capped unpaid wages, annual leave and long-service leave, capped payment in lieu of notice and capped redundancy pay. This is an estimates variation as GEERS is a demand-driven program, and the current economic climate will obviously see an increase in the demand for this particular program.⁶⁴

Ms Gillard also indicated that about \$50 million would be allocated out of the extra \$70 million to cover ABC Learning employee entitlements.⁶⁵

⁶³ Gillard, above n 60.

⁶⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 12 March 2009, 2585 (Craig Thomson).

⁶⁵ Julia Gillard, 'Government Seeks Additional \$70 million for Redundant Workers' (Media Release, 15 March 2009) <<http://www.deewr.gov.au/Ministers/Gillard/Media/Releases/Pages/default.aspx>>.

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The figures in Table 1 below, show the number of insolvencies recorded in Australia evidencing some variation across the years and being more prominent following the onset of the global financial crisis, though as can be seen from the above discussion, a range of factors contribute to corporate collapses.

**Table 1 - Advanced and Recovered Payments under GEERS
Employee Entitlements in Events of Insolvency**

Year	Amount Paid	Number of Recipients	Number of Insolvencies	Amount Recovered
2002-03	\$63 124 520	8700	923	Nil
2003-04	\$60 307 473	9243	1219	\$5 191 391
2004-05	\$66 659 194	9329	568	\$12 053 589
2005-06	\$49 242 592	7790	912	\$26 015 352
2006-07	\$72 972 489	8624	1097	\$9 487 140
2007-08	\$60 779 791	7808	972	\$16 787 789
2008-09	\$99 756 911	11 027	NA	\$8 790 000
Total	\$472 842 970	62 521	5691	\$78 325 261

Sources: DEEWR Annual Reports for the years 2002-2003, 2003-2004, 2004-2005, 2005-2006, 2006-2007, 2007-2008 and 2008-2009.

To have a sense of the affect of the so-called Global Financial Crisis on the GEERS budget, comparing the last two financial years, the above table shows that during 2007-2008 amounts of over \$60 million have been paid to 7808 employees who lost their jobs due to insolvency; however, in the financial year 2008-2009 almost \$100 million was paid to 11027 employees entitlements. The above figures indicate that during 2008-2009 there has been about a 64% increase in paid entitlements compared with 2007-2008. Also, the number of claimants who sought GEERS protection rose 40% during 2008-2009 compared with the year 2007-2008. This indicates clearly that the financial crisis and its impact on job losses due to insolvencies have significantly affected the capacity of GEERS's budget to provide adequate protection for employee entitlements. As pointed out, this has led the Federal Government to increase GEERS's budget allocation for the financial year 2009-2010 to cope with the increased number of employees seeking the protection of GEERS.

V Conclusion

In recent years in Australia, a number of high profile corporate collapses, such as Cobar Mines, National Textiles Ltd and Ansett Airlines, have caused thousands of

employees to lose their employment and entitlements. More recently, the global financial crisis was implicated in the collapse of ABC Learning Centres, affecting thousands of families and employees, as in the car parts industry also.

As can be seen, the first casualties of insolvency are often employee jobs and entitlements. There are others, of course, who might suffer financially as much as employees do. However, employees occupy a far more tenuous position in that, unlike other creditors, they are unable to take measures to protect their interests and entitlements in the event of insolvency. Also, the statutory protection that has been provided by the preferential treatment of employee entitlements has proven to be ineffective, due to the fact that in most cases there is little or nothing of assets left to protect employees entitlements after corporate collapses. To address employees' vulnerability and the lack of effective protection in the event of insolvency, GEERS was established by the Howard Government under political and public pressure to deal with thousands of job and entitlements losses caused by high profile corporate collapses. Even though the Australian economy has been less impacted on by the global financial crisis than OECD countries, financial constraints have triggered insolvency cases which have led to thousands of employees losing jobs and entitlements. In 2008-2009 there was a 40% increase in the number of claimants who sought GEERS protection compared to 2007-2008. However, the increase in numbers of claimants has caused a greater financial pressure on GEERS to provide protection for employees who have lost jobs and entitlements due to the global financial crisis, thereby prompting the Federal Government in 2009 to double the budgetary allocation for GEERS to cope with claimants.