INSOLVENCY PROTECTION FOR EMPLOYEE ENTITLEMENTS: INTERNATIONAL ALTERNATIVES TO GEER SCHEME

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ABSTRACT

With the collapse of high profile companies, in 2001 the Howard Conservative Coalition Government in Australia established the General Employee Entitlements and Redundancy Scheme (GEERS). Funded by taxpayers, GEERS was designed to provide limited protection for employee entitlements in the event of corporate insolvency. However, its adequacy as a protective measure has been criticised by commentators on several grounds. The first criticism is that it involves taxpayers bailing out insolvent companies. The second is that government support may discourage employers and their officers from being more accountable for employee entitlements and government subsidising of worker entitlements might lead in extreme cases to misconduct or illegal activities by directors and corporate officers. The third relates to issues of fairness in a system that requires taxpayers to bear the cost of corporate failure without any contribution by employers. In this paper, protective measures put in place in other jurisdictions are considered as potential alternatives to GEERS as a protective measure for employee entitlements in the event of insolvency.

I INTRODUCTION

Internationally, in recent times, a variety of approaches have been developed to protect employee entitlements in the event of corporate insolvency. Jurisdictions such as Singapore and Mexico have protected their employees' entitlements by providing an elevated priority of payment which allows employee entitlements to be paid ahead of secured creditors under what is called 'absolute priority',[1] or to be paid after secured creditors and ahead of other creditors under what it is described as 'relative priority'.[2] On the other hand, Denmark and Canada have adopted more comprehensive protective measures; these operate as a combination of priority and wage guarantee schemes. Other jurisdictions, such as Germany, implement only wage guarantees as a protective measure.

Consequently, in this paper, the state of knowledge in relation to the General Employee Entitlements and Redundancy Scheme (GEERS) and the current debate on employee entitlement protection is developed. Currently, corporate collapse is a significant issue given the state of the world's business environment and the so-called Global Financial Crisis. Whilst Australia has not been affected as adversely as many Organisation for Economic Co-operation and Development (OECD) nations, there have been a number of corporate collapses and business failures since late 2007 and, as a consequence, the Australian government found it necessary to supplement the reserves of GEERS[3] to cope

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1 Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labor Organization, *Protection of Wages: Standards and Safeguards Relating to the Payment of Labour Remuneration* (Report III, Part 1B, International Labour Conference, 91st session, 2003) <http://www.ilo.org/public/english/standards/relm/ilc/ilc91/pdf/rep-iii-1b.pdf> at 6 October 2010.

2 Ibid.

3 Importantly for this part of the discussion it is worthy of note that the higher level of insolvencies between 2007-09 due to the economic downturn in Australia has placed increased financial pressure on GEERS to provide protection for employees who have lost their jobs and entitlements . To address this pressure on

with applications for relief. Despite the continuing operation of GEERS, there has been little public debate as to whether it is a fair, efficient scheme. Significantly, since GEERS was first implemented, there have been a number of alternative models for employee entitlement protection that have emerged internationally.

Thus, the intention in this paper is to answer the following questions:

1. What international treaties or conventions underpin the rights of employees to protection of entitlements upon corporate collapse?
2. What models and approaches exist internationally for the protection of employees affected by employer insolvency?
3. Based on these models and having regard to any international instruments, what can be learned for the Australian context?

To address these questions, a brief discussion enumerates the protective measures that have been implemented in Australia. As well, the protective measures that have been adopted by the International Labour Organization (ILO) are discussed, and how these measures have been implemented by different jurisdictions is outlined. For example, Germany has adopted a guarantee wage fund as a protective measure; Denmark has used a combination of the wage guarantee and the priority options; and Canada has adopted a combination of both a super-priority fund and a guarantee fund. These schemes have been selected because they offer particularly novel approaches and will be considered in turn. In the last section of the paper there is consideration of whether the Australian model could be replaced by one of the alternative discussed models.

II AUSTRALIAN PROTECTIVE MEASURES

Essentially, Australia provides two protection methods for employees affected by employer collapses; viz, legislation, and government policy mechanisms. The first method has been provided by the *Corporations Act 2001* (Cth) (Corporations Act). Section 556 of the Corporations Act entitles employees to receive priority of payment ahead of unsecured creditors in the event of corporate insolvency. Payment of employee entitlements ahead of even secured creditors is available where assets have been secured under a floating charge.[4] However, in most cases, priority provided to employee entitlements under s 556 of the Corporations Act, has not provided effective protection in the event of corporate insolvency, largely because, generally there are few or no assets left after secured creditors have covered their entitlements.[5] This will be discussed further in the section dealing with priority provided by the ILO.

To enhance further the protection of employee entitlements, the Australian federal government introduced the *Corporations Law Amendment (Employee Entitlements) Act 2000* (Cth) which aims to protect employee entitlements from agreements or transactions that are entered into with the intention of defeating the recovery of employee entitlements.[6] To do so this amendment has introduced a duty upon directors to prevent them from incurring debts that would affect the availability of assets for distribution to debtors or would otherwise make the company insolvent. To safeguard employee entitlements civil and criminal liability has now been imposed on directors or any officer who enters into transactions or agreements to prevent the recovery of employee entitlements or significantly reduce the amount available to pay employee entitlements. Employees in

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 A$70 million.

4 *Corporations Act 2001* (Cth) s561.

5 International Labor Organization, above n 1.

6 *Corporations Law Amendment (Employee Entitlements) Act 2000* (Cth) s 596AA(1) of) states: 'The object of this Part is to protect the entitlements of a company's employees from agreements and transactions that are entered into with the intention of defeating the recovery of those entitlements.'

Australia still need to prove that the funds available to pay-out their entitlements have been diminished or disbursed, but also that directors intentionally entered into transactions or agreements to prevent or significantly reduce the prospects of the recovery of employee entitlements.[7] Establishing that the directors' intention was to avoid or reduce employee entitlements could be extremely difficult, if not impossible, and thus these amendments to the *Corporations Act* have been described as being a 'toothless tiger', by the Shop Distributive and Allied Employees Association (SDAEA) which asserted:

> The reality is that the offence would be so hard to prove that nobody will be effectively prosecuted. The solution is to extend the Part to catch any agreement that has the effect of preventing or significantly reducing recovery of entitlements.[8]

A second type of protective measure was introduced, mainly after political pressure was mounted on the Howard Conservative Coalition Government, following high profile company collapses such as the National Textiles Limited, the CE Heath International Holdings Limited (HIH), and Ansett Airlines Pty Ltd.[9] The measure was a wage guarantee scheme, initially in the form of the Employees Entitlements Support Scheme (EESS). Implemented in 2000, the EESS was later replaced by the current General Employee Entitlements and Redundancy Scheme (GEERS). GEERS is fully funded by the federal government and administrated by the Department of Education, Employment and Workplace Relations (DEEWR). The following employee entitlements are covered by the GEERS:

1. unpaid wages in the three month period prior to the appointment of an insolvency practitioner;
2. all unpaid annual leave;
3. unpaid pay in lieu of notice up to a maximum period of five weeks;
4. up to 16 weeks' redundancy pay; [10] and,
5. all long service leave. [11]

However a shareholder, executive director of the insolvent employer, a relative of a director or relative of the insolvent employer have been excluded from GEERS protection. Also there is an effect of the salary cap which limits the employees who can access the scheme; for employees earning more than A$108 300 for 2009-10, entitlements were exempted from protection provided by GEERS.[12] Employee claims are to be processed within 16 weeks of the receipt of claims.[13] Entitlements paid to employees in the event of corporate insolvency under this scheme are recoverable by the Commonwealth government through DEEWR as against the employer by reason of s 560 of the *Corporations Act 2001* (Cth).

Through its current form, the GEERS wage guarantee scheme generally is considered a significant step towards improving protection of employee entitlements in the event of insolvency in Australia,[14] because prior to the establishment of the safety net schemes, there was uncertainty in relation to employee entitlements. Moreover, the legal framework was, and arguably still is, not capable of providing effective protection in relation to

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7 *Corporations Law Amendment (Employee Entitlements) Act 2000* (Cth) s 596AB(1).
8 Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Corporate Insolvency Laws: A Stocktake* (2004) [183].
9 Breen Creighton and Andrew Stewart, *Labour Law* (4th ed, 2005) 374.
10 Initially GEERS covered 8 weeks of redundancy payment, and then on 22 August 2006 it was extended by the former federal government to 16 weeks.
11 Department of Employment, Education and Workplace Relations, *Annual Report* (2007).
12 See the DEEWR annual reports for 2001-02, 2002-03, 2003-04, 2004-05, 2005-06, 2006-07 and 2007-08.
13 General Employee Entitlements and Redundancy Scheme Operational Arrangements, *Other matters affecting Employees' eligibility* (2008).
14 Creighton and Stewart, above n 9, 375.

employee entitlements. In part, the level of protection provided to employees is demonstrated by the total sum that has been paid as employee entitlements following employer insolvency. Since 2002, over A$472 million has been paid to 62 521employees under the various GEERS (see Table 1).

Table 1- Advanced and Recovered Payments under GEERS to Employee Entitlements in events of Insolvency

Year	Amount Paid	Number of Recipients	Number of Insolvencies	Amount Recovered
2002-03	A$63 124 520	8700	923	Nil
2003-04	A$60 307 473	9243	1219	A$5 191 391
2004-05	A$66 659 194	9329	568	A$12 053 589
2005-06	A$49 242 592	7790	912	A$26 015 352
2006-07	A$72 972 489	8624	1097	A$9 487 140
2007-08	A$60 779 791	7808	972	A$16 787 789
2008-09	A$99 756 911	11 027	Not available	A$8 790 000
Total	A$472 842 970	62 521	5691	A$78 325 261

Sources: DEEWR annual reports for 2002-03, 2003-04, 2004-05, 2005-06, 2006-07, 2007-08 and 2008-09.

Notwithstanding some evidence of success as a way to support employees subsequent to corporate collapse, there are three major concerns in relation to GEERS. First, it does not provide protection to all outstanding employee entitlements.[15] Second, GEERS is an administrative scheme established by the Ministry of Employment, Workplace Relations and Small Business and not by legislation; the potential consequences of this were highlighted in 2005 by the *Rocklea* case[16] which demonstrated that, due to GEERS's administrative nature, there is no guarantee that the scheme will provide payments to cover employee entitlements in the event of businesses collapsing, simply because at any time the authorised minister might reduce or abolish the protection of employee entitlements without legislative safeguard.

The third concern is that GEERS is fully funded by taxpayers. Since the establishment of GEERS, over A$472 million has been paid out whereas only about A$78 million has been recovered by the government from the insolvent employer's assets (for further details see Table 1). The way GEERS has been funded might encourage directors to ignore moral hazards, exhibit unwarranted risk behaviour and, in some cases, demonstrate illegal activities such as a 'phoenix company'. The operations of a 'phoenix company' have been described as 'where a company intentionally denies and fails to pay its debts to its

15 Ibid 375.

16 *Commonwealth of Australia v Rocklea Spinning Mills Pty Ltd (Receivers and Managers Appointed (Subject to a Deed of Company Arrangement)* (2005) FCA 902; Creighton and Stewart above n 9, 375; Christopher Symes, *Statutory Priorities in Corporate Insolvency Law: An Analysis of Preferred Creditors Status* (2008) 152.

creditors, and after a while another business commences under the same management using some or part of the previous assets.'[17] It has been established that Australian protective measures are not as effective as they should be in protecting employee entitlements in the event of corporate insolvency; therefore, exploring other alternative measures has to be considered, as discussed in the following section.

III INTERNATIONAL INSTRUMENTS RELEVANT TO EMPLOYEE ENTITLEMENTS

Different approaches have been developed to protect employee entitlements in the event of corporate insolvency. For example, as a developing economy, Mexico has protected employees' entitlements by providing an elevated priority of payment. Elevated priority provides that in the event of corporate insolvency, employee entitlements are to be paid in priority to secured creditors under what it is called 'absolute priority'.[18] Singapore, as a more developed economy, pays employee entitlements only after secured creditors but in priority to unsecured creditors under what it is described as 'relative priority'.[19] Germany, as a developed OECD economy, implements limited wage guarantees as a protective measure, a mechanism described more fully below.[20] Denmark[21] and Canada[22], have adopted more comprehensive protective measures which operate as a combination of priority and wage guarantee schemes.

As part of the discussion of whether it is possible to replace the existing Australian GEERS model, protective measures that have been recommended by the ILO through its various conventions will be discussed. As part of the discussion consideration will be given as to how the ILO conventions have been implemented by various jurisdictions. Arguably, employees are more vulnerable than other creditors when corporate insolvency arises. In addition to losing jobs (which is no small consideration), employees are unlike other creditors who generally, though not always, are able to take measures to protect their assets. The vulnerability of employees to job loss and loss of entitlements upon insolvency has been recognised by the ILO and the World Bank [23] which led the ILO to formulate conventions for ratifying nations to provide for protective measures for employee entitlements in the event of insolvency. The creation of schemes to provide entitlements to employees affected by corporate collapse, has been influenced significantly by international dialogue and international instruments.

17 Parliamentary Joint Committee on Corporations and Financial Services, above n 8, [8.2].

18 Bob Wessels, *International Insolvency Law* (2006) 195.

19 Victor Yeo and Pauline Gan, 'Insolvency Law in Singapore' in Roman Tomasic (ed), *Insolvency Law in East Asia* (2006).

20 Michael Martinez Ferber, *Employee Entitlements in Insolvency: Comparison between Australian and German Concepts* (2003) CIMEJES <http://www.cimejes.com/word_doc/Employee%20Entitlements%20in%20Insolvency.pdf> at 7 October 2010.

21 *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>at 23 October 2010.

22 Service Canada, *Employment Insurance (EI)* < http://www.servicecanada.gc.ca/eng/ei/menu/eihome.shtml> at 7 October 2010.

23 The World Bank has recognized the vital role of workers in the enterprise which needs to be considered during the collapse of business. See Principle 16 of the World Bank, *Principles and Guidelines for Effective Insolvency and Creditor Rights System* (April 2001) < http://www.worldbank.org/ifa/ipg_eng.pdf> at 7 October 2010. The United Nations Commission on International Trade Law (UNCITRAL) has also recognised employee vulnerability in its Legislative Guide on Insolvency Law, see United Nations Commission on International Trade Law, *Legislative Guide on Insolvency Law* (2005) <http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf> at 7 October 2010.

The first such convention was adopted by Article 11 of ILO Protection of Wages Convention 1949 (No 95) (the 1949 Convention), which was revised by the Protection of Workers' Claims (Employer's Insolvency) Convention 1992 (No 173) (the 1992 Convention), which provided two protective mechanisms. Under the 1949 Convention, the first mechanism proposed for the protection of employee entitlements is priority of payments, a concept which is one of the oldest and commonly adopted measures used to protect employee entitlements in the event of corporate insolvency.[24] Article 11 of the 1949 Convention provides for a 'privileged' priority payment, whereby employee entitlements are to be paid out of insolvent assets in priority to other unsecured creditors. This article has been reinforced by Article 5 of the 1992 Convention. However, this priority payment has been bounded by Article 6 of the 1992 Convention to not less than three months' wages. The worker's claim payment - according to Article 7 of the 1992 Convention - shall not be below a socially acceptable and regular level of wages, and has to be maintained accordingly. The responses to the 1949 Convention are evidenced in a wide range of priority options. For example, as noted briefly above, Singapore has adopted relative priority which places employees' rights ahead of those of other unsecured creditors, whereas Mexico has implemented absolute priority as a protective measure.

IV PRIORITY AS A MEASURE OF PROTECTION IN RELATION TO EMPLOYEE ENTITLEMENTS

Priority provisions are usually enacted via insolvency, bankruptcy or corporations laws, meaning employees are paid in priority to other specified creditors where there is corporate insolvency with the two forms of priority in these circumstances being absolute and relative priority. In Australia, absolute priority through the Maximum Priority Proposal (MPP) was proposed in 2001 by the Howard Government as an alternative to the safety net where employee entitlements are paid in priority to the proven debts of secured creditors. Notably, the proposal was not progressed into the Australian framework. It is not within the scope of this paper to discuss the background and reasons for not adopting the MPP. Relative priority occurs where secured creditors are ranked in priority of employee entitlements, but employee entitlements are given priority over other forms of creditors. Priority in both relative and absolute forms has been adopted in different jurisdictions around the world.[25] In addition, the 1949 Convention recommends that national laws adopt a privileged priority system, but it expresses preference only to 'ordinary creditors'; that is to say, unsecured creditors. In effect the 1949 Convention really addresses relative priority rather than maximum or absolute priority.

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24 José M. Garrido, 'The Distributional Question in Insolvency: Comparative Aspects' (1995) 4(1) *International Insolvency Review* 25, 34.

25 There are other countries that have adopted relative priority, where state or social security claims are ranked ahead of those of employees, for example, Ecuador, Honduras and Spain. In the United Arab Emirates, after settling legal expenses, unpaid wages have priority over movable and unmoveable assets; International Labour Organization, above n 1. By contrast, employee entitlements in South Africa have been provided a statutory priority as a protective measure in the event of insolvency. However, this measure has not benefited employees. This is due to the fact that, in most cases, after secured creditors have recovered their entitlements, there are not enough assets left to be distributed to pay employee entitlements. That said, to save employees' jobs and entitlements the South African insolvency law allows companies suffering from financial stress to be taken over or to merge with another company. However, this is not an effective protective measure because there is no guarantee that redundancy might not follow after the merger has been made, and there is the question as to whether the later employer is liable for entitlements that occurred under the former employer. Nicola Smit, 'Employment and insolvency protection' in Marius Paul Olivier, Nicola Smit and E R Kalula (eds), *Social Security: A Legal Analysis* (2003) 527; Gordon W Johnson, 'Insolvency and Social Protection: Employee Entitlements in the Event of Employer Insolvency' (Report written after the Fifth Forum for Asian Insolvency Reform (FAIR) which was held on 27-28 April 2006

A Relative Priority – Singapore Model

Given the nature of Singapore's open market economy, it is useful to consider the system of priority adopted in that country, notwithstanding that it has a significantly smaller economy than Australia. Singapore has not ratified the 1949 Convention; rather it has adopted the relative priority option in relation to employee entitlements, thereby providing entitlements are paid after secured creditors have recovered their entitlements, but ahead of unsecured creditors. Thus s 328 of the Singapore *Companies Act*, provides that:

> (1) Subject to the provisions of this Act, in a winding up there shall be paid in priority to all other unsecured debts —
>
> (a) firstly, the costs and expenses of the winding up …
>
> (b) secondly, subject to subsection (2), all wages or salary (whether or not earned wholly or in part by way of commission) including any amount payable by way of allowance or reimbursement under any contract of employment or award or agreement regulating conditions of employment of any employee;
>
> (c) thirdly, subject to subsection (2) all amounts due to an employee as a retrenchment benefit or ex gratia payment under any contract of employment or award or agreement that regulates conditions of employment whether such amount becomes payable before, on or after the commencement of the winding up;
>
> (d) fourthly, all amounts due in respect of workmen's compensation under the Workmen's Compensation Act accrued before, on or after the commencement of the winding up;
>
> (e) fifthly, all amounts due in respect of contributions payable during the 12 months next before, on or after the commencement of the winding up by the company as the employer of any person under any written law relating to employees superannuation or provident funds or under any scheme of superannuation which is an approved scheme under the law relating to income tax;
>
> (f) sixthly, all remuneration payable to any employee in respect of vacation leave, or in the case of his death to any other person in his right, accrued in respect of any period before, on or after the commencement of the winding up.[26]

The effect of s 328 is that, employees' entitlements are to be paid ahead of all other unsecured creditors. In most cases, the Australian experience in relation to this form of priority is that employees get little relief from this form of protection because, after secured creditors' debts have been proven, recognised and paid out, the assets of the insolvent company do not cover outstanding employee entitlements. In addition under the Singapore provisions entitlement payouts have been limited by s 328 (2) of the *Companies Act* to five months of salary or S$7500, whichever is less.[27] However s 328 (3) of the *Companies Act*, provides that if there are not enough assets available for distribution, in relation to each entitlement specified in s 328(1) then there is to be proportional distribution among the same class of creditors.[28] This provision seems to suggest that where an employee is owed a range of entitlements and the assets are not sufficient to cover the full amount of these debts then the assets will be distributed pro-rata across all creditors and employees.

B Absolute Priority – Mexico Model

In contrast to the model adopted in Singapore's advanced economy, the developing economy of Mexico presents an alternative priority model and has ratified the 1949

26 *Companies Act 1994* rev ed (Singapore) cap 5, s 328.

27 For further discussion related to priority protection for employee entitlements in the event of insolvency in Singapore see, Christopher Symes, 'Priority Creditors and Their Debts are Always Controversial and Need Justifications even for the Colonial Beneficiaries of Australia, Malaysia and Singapore' (1999) <http://www.flinders.edu.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=AC488DEF-DCFF-ACE7-BE6F-D1D5C6EB7DA1&siteName=sabs > at 23 October 2010.

28 Yeo and Gan, above n 19, 144.

Convention. The development of the current Mexican laws has evolved from the *Bankruptcy and Temporary Receivership Law* of 1943 which, according to the commentator Wessels[29] was considered outdated, as it did not reflect the Mexican current economic reality. In line with the *Principles and Guidelines for Effective Insolvency and Creditors' Rights Systems* developed by the World Bank,[30] the *Mexican Mercantile Insolvency Law* (Ley de Concursos Mercantiles), came into force in May 2000.[31] The law was aimed at maximizing the value of assets of the insolvent company through facilitating rehabilitation of the survivable businesses and liquidating non-viable businesses.[32]

In the case of liquidation, employee entitlements under this law are given a priority, which allows them to be paid ahead of *all other* creditors which notably include secured creditors.[33] Articles 217-224 of the *Mexican Mercantile Insolvency Law,* the *Federal Labor Law*[34] and *Mexican Income Tax Law* provide the following priority:

1. two years of wages and compensation-substantial priority right guarantee by art 123 of the Mexican Constitution;
2. post commencement administrative claims including any post-commencement financing;
3. ordinary administrative expenses;
4. costs raising from judicial or ex-judicial proceedings for the benefits of the estate;
5. fees of trustees, etc;
6. secured creditors;
7. especially privileged creditors(mainly those with liens arising by operation of law and probably creditors with completed execution); and lastly
8. ordinary creditors.

It is important to note that the combination of articles in the Mexican law, in effect, provides absolute priority for two years of wages although other entitlements have been excluded from the priority protection; this is in excess of that recommended by the 1949 Convention and a significant departure from protection models adopted in more advanced developing economies. While both forms of priority are only effective where there are substantial assets available for distribution, the model which provides for absolute priority does give employees the best chance of recovery. The Mexican model does not give absolute priority for all entitlements, and it is unlikely that Mexican employees have access to the range of benefits available to employees in some developing nations; eg, the range of entitlements such as long service leave and superannuation which apply in Australia. Nevertheless, for Mexican employees, absolute priority may be of significant benefit to employees affected by corporate collapse. Finally, the outcome may depend on the efficiency of the insolvency administrative system, and, whilst absolute priority may be provided, it would still be necessary for employees to prove wage debts and this may well depend upon the availability of employer records.

Thus, it can be argued that outcomes are influenced by the effectiveness of the priority option as well as the means of protection for employees. As far as relative priority is

29 Wessels, above n 18, 195.

30 Thomas J Salerno, Josefina Fernandez McEvoy and Salim Jorge Saud Neto, 'The View from Latin America – Mexico and Brazil' (2005) *Global Insolvency and Restructuring Yearbook 2004/05* 86 <http://www.gj.com/reprints/ViewFromLatinAmerica.pdf> at 7 October 2010.

31 Wessels, above n18, 195.

32 Ibid 195.

33 There are other countries that have adopted super priority as a protective measure for employee entitlements in the event of insolvency. An example is Malaysia, where four months of an employee's wages is to be paid ahead of secured creditors; on the other hand, in the Czech Republic, employees' wages, equal to taxes, social security and administration costs, have been granted the same category as super priority. International Labour Organization, above n 1, 172.

34 Adopted in 1931 and amended in 1970.

concerned, empirical studies often have shown that there are insufficient assets remaining for distribution to unsecured creditors after secured creditors have recovered their debts. For example, in 2005-06, the Australian Security and Investments Commission (ASIC) found in the case of the distribution of assets of 95 per cent of insolvent companies in Australia that unsecured creditors received less than ten cents for each dollar of their entitlements;[35] data also supported by GEERS. DEEWR has the right of recovery in relation to all payments made out of GEERS and effectively assumes the same position of priority available to an employee who has made a claim. Since 2002, only A$78 million (or approximately 16 per cent) has been recovered from insolvent assets out of the A$472 million paid as entitlements under GEERS. On this basis it is reasonable to assert that relative priority, as currently existing in Australia, would yield between 10 to 16 per cent of the outstanding debts owing to unsecured creditors.

In relation to absolute priority, there is also doubt about its effectiveness in providing adequate protection for employee entitlements when corporate insolvency arises; eg, Sarra[36] argues that absolute priority has provided ineffective protection for employee entitlements because of insufficient assets available to cover employee entitlements, even where they have priority over secured creditors. This is supported by Symes[37] who notes that absolute priority does not appear to be effective in some labour-intensive businesses. These concerns may not be as applicable to the Australian economy as they are to the economies in developing nations where there is a heavy reliance on human resources. In addition, there are other concerns about the absolute priority model in relation to the accessibility of credit facilities for businesses; eg, McCallum[38] asserts that financial institutions may be reluctant to provide credit to a business in situations where absolute priority is provided to employee entitlements. However, this assertion was not based on any evidence and has been challenged in the 2005 study by Davis and Lee;[39] using credit-modelling techniques, they concluded that there would not be significant disruption to credit markets in the case of adopting the MPP in Australia.[40] It follows, notwithstanding the reservations expressed by some commentators, that the absolute priority model has more teeth than the relative priority model, though its effectiveness may depend on the profile of the economy in which it is operating and the strength of its banking system. In effect, any stand-alone priority system is unlikely to provide full protection for employees when there are insufficient assets available for distribution after a corporate collapse. Moreover, the adoption of absolute priority models frequently meets with resistance from business and, in particular, lenders. It follows, then, that reliance on a privileged priority system such as the MPP will not be effective. Consequently, such schemes do not offer adequate protection for employees and, concomitantly, corporation laws in Australia have not provided adequate resolution to the issues of employee protection.

Importantly, the 1992 Convention does allow for further protection for employee entitlements through the mechanism of guaranteed funds as discussed below.

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35 Australian Government Corporations and Markets Advisory Committee, 'Shareholder Claims Against Insolvent Companies, Implications of the Sons of Gwalia Decision' (Discussion Paper September 2007) 55 <http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFDiscussion+Papers/$file/Sons_of_Gwalia_DP_Sep07.pdf> at 7 October 2010, citing ASIC 2005-2006 statistics.

36 Janis Sarra, 'Widening the Insolvency Lens: The Treatment of Employee Claims' in Paul Omar (ed), *International Insolvency Law: Themes and Perspectives* (2008) 306; International Labour Oganization, above n 1, 183.

37 Symes, above n16, 133.

38 Ron McCallum, 'Law leaves workers a poor second', *Sydney Morning Herald* (Sydney), 17 June 1999, 6.

39 Kevin Davis and Jeannette Lee, 'Employee Entitlements and Secured Creditors: Assessing the Effects of the Maximum Priority Proposal' (Research Associates Working Paper No 2005-02, Melbourne Centre for Financial Studies, Septermber 2005) <http://www.melbournecentre.com.au/working_papers/2005-02-Davis-Lee.pdf> at 28 September 2009.

40 Ibid.

V WAGE GUARANTEE MECHANISMS FOR PROTECTING EMPLOYEE ENTITLEMENTS

As noted, the ILO model advocated via the 1949 Convention has some weaknesses and as a stand-alone does not offer employees a great deal of protection when insolvency occurs. Additionally, the 1949 Convention does not provide protection at all for an employee who continues working after insolvency while the company is still in operation and does not close down. Article 11 of the 1949 Convention was revised by the 1992 Convention to provide two major improvements. The first was the specific standard in relation to scope, limits and rank of the priority; the second, and more important, was to introduce a wage guarantee as a protective measure for employee entitlements.

In a 2003 report on the issue of protection of employee entitlements, the ILO noted;

> In a globalized economy, phenomena such as corporate bankruptcies, company closures and cessation of payments are bound to rise. At the same time, there are those who argue in favour of the elimination of most statutory priorities in bankruptcy or insolvency laws. Under these conditions, the Committee considers it essential to reaffirm the principle of the privileged protection of workers' wage claims in the event of the insolvency of their employer. The process of making insolvency laws more effective should in no event result in such laws becoming socially insensitive. *The designation of employees' wages and entitlements as a preferential debt is a keystone of labour legislation in practically every nation and the Committee would firmly advise against any attempt to question such a principle without proposing in its place an equally protective arrangement, such as a wage guarantee fund or an insurance scheme providing a separate source of assets to ensure the settlement of employees' claims*.[41]

Prior to the 1992 Convention being ratified by 15 countries including Australia[42] the European Community, through its directives, had already adopted guarantee funds as a protective measure;[43] specifically, guarantee of funds was enacted by Denmark, as discussed in more detail in the below.

A wage guarantee or guarantee fund is a measure which ensures payment of specific employee entitlements in the event of corporate insolvency. Such measures have been adopted in developed countries such as Germany, Sweden, Denmark and Canada. Some jurisdictions have combined the priority and wage guarantee, and others have implemented only the wage guarantee measure to protect employee entitlements. Using the models found in three selected jurisdictions; Germany, Denmark and Canada, the issue that needs to be addressed is whether or not there are options open to Australia to adopt some elements of the above jurisdictions models to develop a funding arrangement alternative to GEERS.

A Wage Guarantee – The German Model

Prior to 1999, German law provided an absolute priority for employee entitlements for six months.[44]. However, on 1 January 1999, this preferential treatment was abolished and

41 Emphasis added. International Labour Organization, 'General Survey 2003' (2003) <http://staging2.ilo.org/ilolex/cgi-lex/single.pl?query=252003G11@ref&chspec=25> at 16 February 2010

42 Part II of the Convention relating to preferential treatment of employee entitlements was ratified by Australia in 1994. On other hand, Part III which is related to the guarantee fund of the above Convention, has still not been ratified by the Australian Government. Countries that have ratified Part III are: Armenia, Finland, Latvia Slovenia, Spain and Switzerland. That said some countries, such as Denmark, Belgium, Canada and Australia,, have introduced guaranteed funds, even though they have not ratified Part III of the Convention.

43 See the European Community (Directive 80/987/EEC) which was adopted in 20 October 1980 and then was amended by Directive 87/164, in 2 March 1989); Nicola Smit, above n 25, 515.

44 Ferber, above n 20.

replaced by the German Insolvency Code (Insolvenzordnung (InsO));[45] the new legislation applying to both corporate restructuring and corporate liquidation. The German corporate restructuring option is similar to the Australian Voluntary Administration Arrangement adopted in Australia since 1992. Prior to 1999, the German law sought to secure an 'assets deal' which required a corporation to be liquidated and cease operation before the legislation took effect to protect employee entitlements;[46] which, necessarily, led to the termination of employees' jobs. On the other hand, the aim of corporate restructuring was to allow business to continue operation to maintain employees' jobs.

In the event of insolvency, German employees are now entitled to claim their entitlements against the *Bundesanstalt für Arbeit* (§§ 183 ff, 208 of the *German Social Protection Law* (*Sozialgesetzbuch*) III).[47] This law establishes a fund requiring employers to contribute 0.5 per cent of the employees' salary towards a wage guarantee fund in order to protect employee entitlements in the event of corporate insolvency. The contribution has not been deducted from actual wages.[48] The German fund provides protection by guaranteeing 100 per cent of employees' wages[49] for a three-month period[50] if a claim is made;

1. before insolvency proceedings are instituted;
2. before a petition to start insolvency proceedings was dismissed on account of insufficient assets;
3. if employer has not filed for insolvency and manifestly does not have sufficient assets to do so; and/or,
4. before the employer finally ceased trading in Germany.[51]

In addition, employees have access to a lump sum as a specific part of a redundancy payment scheme when there is a business closure.[52] In order for employees to be eligible for the protection that is available through this fund, a claim of payment is made to the

45 The *German Insolvency Code* has replaced the *Bankruptcy Act* (Konkursordnung) and the *Settlement Act* (Vergleichsordnung) in the West German States and the *Total Execution Act* (Gesamtvollstreckungsordnung) in the East German States. For more information on current the German Insolvency, see Andreas Remmert, 'Introduction to German Insolvency Law' (2002) *International Company and Commercial Law Review* 427.

46 For further information see Harald Bußhardt and Nicole Stephan, 'Steady rise of the restructuring plan in Germany' (2008) 33 *eurofenix* 18.

47 Ferber, above n 20; Johnson, above n 25.

48 §§ 358 ff SGB III; Fiona Stewart, 'Benefit Security Pension Fund Guarantee Schemes' (OECD Working Paper on Insurance and Private Pensions No 5, OECD, January 2007). There are other jurisdictions that have adopted similar models to the German fund, such as Poland. Mike Falke, 'Secured Creditor Protection and the Treatment of Different Unsecured Creditor Classes under the Chinese Draft Bankruptcy Code – A Comparative Analysis' (2002) <http://siteresources.worldbank.org/GILD/ConferenceMaterial/20206017/Chinese%20Insolvency%20Law%20Reform%20-%20Falke.pdf> at 7 October 2010.

49 § 208 SGB III; Ferber above n 20..

50 §§ 183 (1), 184 SGB III; Ferber above n 20.

51 Mutual Information System on Employment Policies, 'Basic Information Report: Federal Republic of Germany Institutions, procedures and measures' (2003) <http://www.eu-employment-observatory.net/resources/bir/bir_de2003_en.pdf> at 15 July 2009.

52 Markus Strelow, Marco Wilhelm and Jörg Wulfken, 'German Insolvency Law' (2006) *At a Glance: Insolvency Law* <http://www.mayerbrown.com/publications/article.asp?id=2572&nid=6> at 5 October 2009. It must be noted that the German employees might be entitled toother entitlements provided by other protection mechanisms. There are five social security mechanisms that might provide benefits for employees: health insurance, pension insurance, unemployment insurance, accident insurance, and social indemnity. Contributions to these benefits amounts to about 40 per cent of gross income; however, half of these contributions have been paid by employers and the other half by employees. For further information see, How to Germany, *Social Security and Employee Benefits* <http://www.howtogermany.com/pages/working.html> at 6 October 2009.

local employment office[53] within two months from the institution's bankruptcy proceeding.[54] An extension of two months for a claim can be granted under some circumstances, but has to be determined by the local office.[55]

To accommodate employees' financial needs a special arrangement has been made to enable employees to be paid prior to finalising bankruptcy proceedings by permitting the transfer of entitlements to be claimed on the guarantee fund from an employee to a bank. Banks, then, make an employee entitlements payment and, in turn, the bank will claim the payment from the wage guarantee fund.[56] Therefore, in theory, the German model funded by employer contributions, is sufficient to provide full coverage of up to three months' wages of employees' entitlements.

B Relative Priority and Wage Guarantee – The Danish Model

The model implemented in Denmark, not unlike that in Australia, is a combined form of relative priority with a form of wage guarantee. Under Danish law, employee entitlements are provided priority over unsecured creditors by virtue of ss 93, 94 and 95 of the Danish Bankruptcy Act and claims are ranked as follows:

1. secured creditors' claims;
2. pre-preferential claims which have risen during or in connection with the administration of the bankrupt company and the estate;
3. secondary pre-preferential claims which concern such costs that have arisen if an attempt has been made to restructure the company, including such obligations undertaken with the approval of the supervisor during a suspension of payments;
4. preferential claims, these include employee entitlements on certain suppliers' claims, and;
4. all unsecured creditors claims.

The difference between the Australian GEERS and the Danish model is that where outstanding employee entitlements are in excess of the employer's available assets, Danish employee entitlements are paid out of the Employees' Guarantee Fund (DEGF), which was established on 13 April 1972 by Law No. 116.[57] The law establishes a fund which provides a quick payment mechanism to avoid slow administration procedures. Importantly the DEGF is funded by employers through annual contributions and is administrated by a board consisting of directors comprising Trade Unions and Employers' Associations. Employee entitlements are covered by the DEGF under the following events:

1. if the employer has been declared bankrupt;
2. if the employer dies and the business has been declared insolvent by a court order; and,
3. if the employer ceases the business and it is proven insolvent.[58]

The DEGF covers the following employee entitlements:

1. salary and pay supplements
2. compensation for the non-payment of salary during the notice period
3. pension contributions
4. holiday allowance
5. holiday bonuses

53 The local employment office is the district office where employer's wage account is held. See Mutual Information System on Employment Policies, above n 51.
54 § 323 (1) SGB III; Ferber, above n 20..
55 Mutual Information System on Employment Policies, above n 51.
56 § 188 (1) SGB IIII; Ferber, above n 20.
57 The Danish Salary Guarantee, above n 21.
58 Ibid.

6. payment on public holidays
7. severance payments
8. remuneration for unfair dismissal
9. piece work bonuses
10. any interest due in the period up to the bankruptcy
11. legal costs, within reasonable limits, before the bankruptcy.[59]

Not surprisingly, the owner of the business subject to the insolvency action, or any person related to the business, is excluded from the protection of the DEGF.[60] One qualification to this scheme is that, in order to claim entitlements under the DEGF, the employee must be registered as a job seeker. There is a maximum of 110 000 Danish krones net after taxes (equivalent to about A$24 000) payable as wages, salaries and compensation for each employee,[61] though there is no limitation on the amount which can be claimed as outstanding holiday entitlements. The maximum wages, salaries and compensation payment is based on the average net earnings of a skilled employee for a six-month period of time, and the Ministry of Labour has the authority to adjust the maximum payment.[62] However, the DEGF does not cover entitlements for the period after the worker has been notified of the employer's insolvency and the employee continues working.[63] The employee has to lodge a claim no later than four months from the date of the employer's bankruptcy or six months from the date of the company ceasing to exist. However, an exemption can be made from the lodgement deadline and a claim processed on a special-case basis. Payment and processing of the claims usually takes four weeks from receipt of the claim.[64] The Danish model is an employer-funded scheme, but with some limits on the amounts that can be claimed by employees, based upon statutory caps determined by average net earnings. However, there do not appear to be caps on eligibility as in the GEERS system which prevents higher paid employees from gaining access to any protection at all.

C Absolute Priority and Wage Guarantee –The Canadian Model

The Canadian model presents a different approach in providing protective measures for employee entitlements in the event of employer insolvency; it consists of a combination of the absolute priority model and a guarantee fund. The guarantee fund is provided by the *Wage Earner Protection Program Act,* C 2008 (WEPPA) which came into force on 7 July 2008. Funded by the Canadian government, the aim of WEPPA is to protect specified unpaid wages and other entitlements in the event of insolvency. As stated in the preamble to the Act, its aim is 'to establish a program for making payments to individuals in respect of wages owed to them by employers who are bankrupt or subject to a receivership'.

Under the scheme, limited absolute priority is provided for wages through an amendment of the *Bankruptcy and Insolvency Act* 1985 (BIA). Canadian employees do not need to wait for liquidation to be finalised in order to be eligible to receive payments. WEPPA provides up to CAD$3000 for unpaid wages for each employee. The Canadian federal government recoups this payment by assuming the absolute priority position granted to employees to recover the CAD$3000.[65]

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59 ATP, *What does the LG cover* < http://www.atp.dk/X5/wps/wcm/connect/ATP/atp.com/private/sik/lg/lgdaekning/lg+cover> at 7 October 2010.

60 See *Danish Bankruptcy Act,* s 94.

61 The Danish Salary Guarantee, above n 21.

62 See *Danish Bankruptcy Act,* s 95; ATP, above n 59.

63 See *Danish Bankruptcy Act,* s 93; The Danish Salary Guarantee, above n 21.

64 ATP, above n 59.

65 *Bankruptcy & Insolvency Act,* s 7; *Wage Earner Protection Program Act 2008*, s 36. An amount of CAD$3000, equivalent to about A$3200, may not sound much, but employees in Canada are entitled to

Section 5 of WEPPA provides that the individual's contract of employment must have been terminated due to employer insolvency or receivership and outstanding eligible wages must be owed. Eligible wage has been defined by s 2 (a) and (b) of WEPPA as:

(a) wages other than severance pay and termination pay that were earned during the six-month period ending on the date of the bankruptcy or the first day on which there was a receiver in relation to the former employer; and
(b) severance pay and termination pay that relate to employment that ended during the period referred to in paragraph (a).

Wages are defined in s 2 as: 'wages includes salaries, commissions, compensation for services rendered, vacation pay, severance pay, termination pay and any other amounts prescribed by regulation'. Some employees have been excluded from the coverage of the Act because s 6 of WEPPA provides as follows:

> An individual is not eligible to receive a payment in respect of any wages earned during, or that otherwise relate to, a period in which the individual:
>
> (*a*) was an officer or director of the former employer;
>
> (*b*) had a controlling interest within the meaning of the regulations in the business of the former employer;
>
> (*c*) occupied a managerial position within the meaning of the regulations with the former employer; or
>
> (*d*) was not dealing at arm's length with
>
> (i) an officer or director of the former employer,
>
> (ii) a person who had a controlling interest within the meaning of the regulations in the business of the former employer, or
>
> (iii) an individual who occupied a managerial position within the meaning of the regulations with the former employer.

Employees are entitled to receive payment under WEPPA for entitlements earned during the six months prior to the date of insolvency.[66] WEPPA entitlements[67] include:

1. salaries;
2. commissions;
3. compensation for services rendered,
4. vacation pay;
5. severance pay;
6. termination pay; and,
7. any other amounts prescribed by regulation.

The trustee or a receiver has to identify and determine the amounts owed to individuals as entitlements, and to inform each of them of their rights and entitlements under WEPPA and the conditions under which payments may be made.[68] Further, the Minister has to be provided the same information as has been provided to employees. If individuals are later found to be eligible for coverage under WEPPA then the Minister has to provide payment.[69] Processing of the employee payments is designed to take between four to six

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Employment Insurance and Regular Benefits, which are funded by both employees and employers. Under this scheme employees who lost jobs through no fault of their own are entitled to payment of CAD $457 weekly for an average earner earning annually CAD$43,200. The duration of the payment ranges from 19 to 52 weeks. For further details, see: Service Canada, above n 22.

66 *Wage Earner Protection Program Act 2008*, s 2(a).
67 *Wage Earner Protection Program Act 2008*, s 2(b).
68 *Wage Earner Protection Program Act 2008*, s 21.
69 *Wage Earner Protection Program Act 2008*, s 9.

weeks,[70] and a right of review for decisions made by the Minister in relation to entitlements is available under the Act.[71] Table 2, below, compares insolvency protection schemes discussed above.

Table 2: Australian, Danish, German & Canadian insolvency protection measures.

Scheme Features	GEERS	Danish Fund	German Fund	Canadian (WEPPA)
Cost	Low	High	High	Low
Administration costs	Low	High	High	Low
Funding	Taxpayers	Employer	Employer	Taxpayers
Established by	Executive policy	Legislation	Legislation	Legislation
Capacity to seek review	Limited	Legislative	Legislative	Legislative
Estimated duration of processing payment	Up to 16 months	Up to 4 weeks	Up to 8 weeks	Up to 8 weeks
Coverage of employee entitlements	Partial +	Partial ++	Partial	Partial+
Cap on eligibility	Yes	None	None	None
Incentive to improve managerial style	Low	Low	Low	Low
Deterrent effect on risk activities by employer	Low	High	High	Low
Impact on employer's Cash flow	Low – indirect	Moderate	Moderate	Low- indirect
Potential to promote Moral hazard	Moderate	Low	Low	Moderate

+ GEERS more comprehensive in its coverage than German Fund
++ Covers more entitlements than GEERS and German Fund and WEPPA

VI EVALUATION OF THE ABOVE MODELS AS REPLACEMENT FOR GEERS

Discussion has established that there is range of models available for the protection of employee entitlements when workers are affected by insolvency. Needless to say, the size, strength and industry profiles of an economy also have a significant influence upon the protections and entitlements available to workers. In most developing economies there is insufficient fiscal capacity, government infrastructure and tax collecting capacity to support a taxpayer-funded entitlements scheme. In developing economies such as Mexico, reliance is placed on the corporations, insolvency and bankruptcy laws so as to provide some priority preferences. In short, developing economies are least likely to be able to afford any form of taxpayer guarantee fund such as GEERS or WEPPA.

Consequently, developing economies generally are not put to the test of deciding to underwrite employee entitlements through taxpayer funded mechanisms of employee

70 Service Canada, *Wage Earner Protection Program* <http://www.servicecanada.gc.ca/eng/sc/wepp/index.shtml> at 6 October 2009

71 *Wage Earner Protection Program Act 2008*, ss 11-15.

contributions. In developing economies, the debate on funding has been resolved with different outcomes depending on the history of government intervention and the political persuasion of the governing party which would be charged with implementing the scheme. In Australia, the Howard Conservative Coalition which established GEERS opted for the taxpayer-funded model, arguably not because it was the advocate of government intervention of social security but because it was unwilling to impose any impost on business to underwrite corporate failure.

It has been established that neither relative nor absolute priority has provided adequate protection for employee entitlements in the event of corporate insolvency. This is due to the simple fact that, in most cases, there are insufficient assets left after secured creditors have recovered their entitlements. Therefore, a focus on German, Danish and Canadian guarantee fund models can be used to explore their merits as alternatives to GEERS as a protective measure in Australia.

Both GEERS and WEPPA are funded by taxpayers. This is in distinction to the German and Danish funds which are both funded by employers' contributions; on a monthly basis for the Germans and annually for the Danish. As mentioned above, the funding mechanism of the guarantee fund may influence the way the process is managed, especially in relation to risk-taking activities that might increase in cases of public-funded guarantee schemes such as GEERS. The German, Danish and Canadian funds are established by legislation. On the other hand, GEERS is an administrative measure that was established by the Ministry of Employment, Workplace Relations and Small Business which makes the German, Danish and Canadian models more sustainable in continuing to provide protection for employee entitlements than is the case in Australia.

Both priority and guarantee funds have been adopted by the Danish and Canadian models as well as GEERS. In the case of the Danish model, payment is made after following procedures that prove that there are insufficient available assets to pay employee entitlements. On the other hand, in the case of the Canadian model, employees get paid through WEPPA after employer insolvency is established. The Canadian federal government stands in the employees' position with an absolute priority to recover any amount that has been paid as employee entitlements. Australia has adopted a similar approach to the Canadian model through a combination of GEERS and relative priority (as opposed to absolute priority in the Canadian model), which allows for payments for employee entitlements to be made as soon as the application for payment has been finalised. This is also the case in Germany which provides a positive outcome to employees because they do not wait until the liquidation proceedings have started. Delay occurs in the Danish model with the priority payment.

When considering the length of time to provide redress for employees, under GEERS the application procedure takes up to sixteen weeks. This compares unfavourably to the German model which takes up to eight weeks; the Canadian model which takes a maximum of six weeks; and the Danish model which takes up to four weeks to process payment applications (see Table 2).

The Danish model's coverage of employee entitlements is more comprehensive than GEERS, the German and the Canadian funds. That said, GEERS' coverage is much more inclusive of employee entitlements than the German fund, which covers only three months of wages as protection (see Table 2). Each of the Danish, Canadian and Australian models limits who is able to recover entitlements from the guarantee fund. Under the Danish model, the employer and his/her relatives have been excluded from the coverage. This contrasts to the Canadian model where directors and officers of the insolvent employer are not covered by WEPPA. In Australia, besides the GEERS cap which excludes protection to employees who earned more than A$108 300 for 2009-10, there is also exclusion to insolvent business shareholders, directors, executives and their relatives. On the other hand, the German measure has not exempted any group of employees from its protection. Both the Danish and German approaches are funded by the employers, which might be fairer to taxpayers than GEERS and WEPPA with their taxpayers' funded protective

measures. Also both GEERS and WEPPA encourage moral hazard through risk-taking behaviour. Employers operating in the Australian and Canadian jurisdictions might feel comforted by the certainty provided by GEERS and WEPPA to pay employee entitlements in the event of insolvency and as a result take more risks than those without the availability of such funds should a business collapse.

VII CONCLUSION

In this paper, international conventions on insolvency protection for employee entitlements adopted by the International Labour Organization have been reviewed as well as a variety of protection measures adopted in different jurisdictions around the world. It has been established that international treaties have provided two major forms of protective measures; viz, priority and wage guarantee. The use of these measures has been encouraged by the improvement that has been achieved by some jurisdictions in providing effective protective measures in the event of corporate insolvency, with most countries having implemented one or both of the protective measures that have been adopted in the ILO Conventions.

It has been argued that neither relative nor absolute priority has been effective in providing adequate protection for employee entitlements in the event of insolvency, largely because in most cases there are insufficient assets available for distribution. It has been established that wages guarantee has been adopted by different jurisdictions around the world to protect employee entitlements in the event of insolvency. The Danish and Canadian protective measures represent models which use both, a wages guarantee and priority system; in the case of the Danish model, it is a relative priority whereas the Canadian model uses absolute priority with the latter being potentially more effective than the Danish in recovering part of the amount that has to be paid as entitlements to former employees. Unlike the Danish and Canadian models, Germany has adopted only guarantee protective measures for employee entitlements, funded by employers; this allows employees to be paid, although the amount is limited to three months of employee wages.

What can be learned from the international jurisdictions' experiences in protecting employee entitlements in the event of insolvency is that, even though both the German and the Danish models require employers to contribute into a fund to protect employee entitlements, neither is a feasible replacement for GEERS as a protective measure. Particularly is this the case where, under both the German and the Danish models, not all employee entitlements have been protected and high contributions have been imposed thereby affecting the cash flow needed to ensure the survival of businesses.