

CLIENT UPDATE

■■ CORPORATE INSOLVENCY

■■ RESTRUCTURING

■■ FORENSIC ACCOUNTING

Unpaid Employee Entitlements and GEERS

The General Employee Entitlements and Redundancy Scheme (GEERS) is a basic payment scheme established to assist employees who have lost their employment due to the liquidation or bankruptcy of their employer, and who are owed certain employee entitlements.

GEERS is a fabulous safety net for employees, however it is not a tool to assist the restructuring of companies, therefore the operational arrangements that guide the GEERS implementation are very particular in their assessment criteria. GEERS covers capped unpaid wages, annual and long service leave, capped payment in lieu of notice and capped redundancy pay for companies in liquidation or a sole trader in bankruptcy, in circumstances where the insolvent estate does not have sufficient funds to meet these entitlements in a timely fashion.

It is our experience that many directors of insolvent companies do not attempt to properly address their circumstances by appointing liquidators, and leave their companies to the whims of their creditors. In all cases this action has effects upon the employees, but one of the most significant is that it prevents employees from being paid through GEERS what they are owed.

However, in the past 12 months we have seen two situations in which companies were forced into liquidation to ensure employees could claim on GEERS.

Unions take action

In one matter, the Construction, Forestry, Mining and Energy Union was successful in winding up a timber resources company in southern New South Wales in order to facilitate workers' entitlements to be paid through GEERS.

FWA takes action

In another matter, Fair Work Australia intervened to support a company being forced into liquidation, in order to ensure employees who lost their jobs when a factory closed were eligible for GEERS.

In this matter, the agency made legal submissions supporting a creditor's application in the Victorian Supreme Court to wind up a clothing manufacturer, so that 45 workers who lost their jobs were able to claim their GEERS entitlements.

Further Developments?

From the standpoint of an insolvency firm, we have observed GEERS being reviewed and fine-tuned by legislation such as the Fair Work Act, but we are aware that an election promise was made by Prime Minister Julia Gillard to introduce an uncapped guarantee on employees' redundancy entitlements.

If introduced, the Fair Entitlements Guarantee Scheme would replace GEERS, and would focus on ensuring that workers would be able to claim up to four weeks severance pay for each year of service, rather than a capped 16 week maximum under the GEERS system.

It remains to be seen if the new minority government will keep to Labor's commitments, but what it continues to alert us to is that the payment of employee entitlements in insolvencies remains a priority for the Federal Government, and further improvements to this beneficial scheme can be expected into the future.

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Setting aside a Statutory Demand

Debt collection can be very expensive, but in certain circumstances, suppliers with debts owing to them can cost-effectively commence action to pursue the legal remedy of liquidation with a creditors' statutory demand notice.

These notices can be issued at low cost and do not require a judgment debt to first be obtained, and therefore present options for cheaper debt collection, but also potential abuse by creditors pursuing incorrect debt recovery.

A statutory demand is a written demand made against a debtor company to pay its debt to the issuing creditor. A creditor may serve a company with a statutory demand for a debt (or debts) due and payable, the total of which must exceed \$2,000.

The failure by a company to comply with the obligations of a statutory demand within the specified 21 days will result in the company being presumed to be insolvent, and a creditor may then make an application to the court for the company to be wound up.

Given the severity of the outcome of a failure to comply with a statutory demand notice, it is important for advisers to be aware of how such a demand should be treated if served.

If served with a statutory demand, an application can be made to court to have the statutory demand set aside on grounds that:

- there is a genuine dispute between the company and the person serving the statutory demand about the existence or amount of the debt claimed;
- the company has an offsetting claim, which must exist at the date of hearing;

- a defect in the demand may cause substantial injustice unless the demand is set aside; or
- there is some other reason why the demand should be set aside, for example failing to provide an affidavit with the demand, failure to verify that the debt is due and payable, or conduct that may be an abuse of process, unconscionable or gives rise to injustice.

It is vital that a response to a disputed statutory demand is made within the 21 day timeframe to avoid a presumption of insolvency, and we recommend that specialised legal advice should be urgently sought by a recipient of a creditors' statutory demand notice.

About us

Heard Phillips aims to be the first choice for critical SME insolvency, restructuring and forensic accounting matters in South Australia.

Our firm seeks to deliver superior quality outcomes for clients through our credible and reliable practitioners, who take pride in displaying the highest level of respect to all stakeholders.

