BILLS DIGEST NO. 30, 2014–15

24 SEPTEMBER 2014

Fair Entitlements Guarantee Amendment Bill 2014

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Date introduced: 4 September 2014
House: House of Representatives
Portfolio: Employment
Commencement: The later of 1 January 2015 and the day after the Act receives the Royal Assent, except for new section 51 which deals with a future appropriation and takes effect on 1 July 2015.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website.
Purpose of the Bill
The purpose of the Fair Entitlements Guarantee Amendment Bill 2014 (the Bill) is to amend the Fair Entitlements Guarantee Act 2012 (the Act) to reduce the maximum redundancy pay entitlement under the Act and to make technical amendments to clarify the operation of the Act.

Background
Through the Fair Entitlements Guarantee (FEG), the Government assists employees whose employers have gone bankrupt or into liquidation by paying certain of their entitlements. The Act replaced the General Employee Entitlements and Redundancy Scheme (GEERS), which had operated since 2001, with this legislated scheme.

The Act sets out details of the maximum entitlements available and how they are to be calculated. There is no overall cap on the potential payment, but some individual entitlements are capped. The scheme pays:

• wages—up to 13 weeks of unpaid wages
• annual leave
• long service leave
• payment in lieu of notice—maximum of five weeks and
• redundancy pay—maximum of four weeks per full year of service.

In addition, the level of wages which will be refunded is capped at a maximum weekly rate. This was $2,364 when the scheme began and has been indexed by movements in average weekly ordinary time earnings. At present it is $2,451. This rate has now been frozen until 30 June 2018.

During the debate on the 2012 Bill the then Opposition opposed the level of redundancy payments that is now included in the Act, on the grounds that it was higher than the community standard, it would become a new community standard and an extra imposition on employers, and it would eventually lead to a loss of jobs.

Committee consideration

Senate Education and Employment Legislation Committee
The Bill has been referred to the Senate Education and Employment Legislation Committee for inquiry and report by 24 September 2014. Details of the inquiry are at the inquiry’s webpage.

Senate Standing Committee for the Scrutiny of Bills
At time of writing, the Bill had not been considered by the Senate Standing Committee for the Scrutiny of Bills.

Parliamentary Joint Committee on Human Rights
At time of writing the Bill had not been considered by the Parliamentary Joint Committee on Human Rights.
Policy position of non-government parties/independents

The Shadow Minister for Workplace Relations, Mr O’Connor, criticised reductions in the redundancy provisions during the debate on the Appropriation Bills. He noted in particular that the cut to entitlements would interact with reductions in assistance to automotive workers who had been, or would be, laid off after many years of service in the industry.

Australian Greens Deputy Leader and Workplace Relations spokesperson, Mr Bandt, released a statement also strongly opposing the change to redundancy entitlements. The independents and other minor parties have not commented.

The other sections of the Bill have not attracted political comment.

Position of major interest groups

While there has not been much debate in the media, the inquiry by the Senate Education and Employment Committee had, at time of writing, received 14 submissions: seven from employer groups, five from unions, one from a legal firm and one from the Department of Employment. Employer groups in general supported the Bill, and in particular argued in favour of the reduction in redundancy entitlements. Unions argued against the reduction in redundancy entitlements. Their views are discussed further in the section on key issues and provisions.

Financial implications

The Explanatory Memorandum (EM) to the Bill estimates that the Bill will result in savings of $79.4 million over the forward estimates. All of the savings result from the reduction in redundancy entitlements.

Special appropriation

Section 51 of the Act provides for an appropriation for the purposes of payments under the Act or regulations made under section 50 to create schemes for assistance of workers who were not employees. Item 13 of Schedule 1 of the Bill repeals the section and replaces it with a new section 51 which includes the original provision and extends the use of the appropriation to paying legal costs incurred by the Department of Employment in relation to reviews of decisions under the Act.

Statement of Compatibility with Human Rights

The Statement of Compatibility with Human Rights can be found following page eight of the EM to the Bill. As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.

Key issues and provisions

Redundancy entitlements

The most important provision of the Bill is item 6 of Schedule 1. It repeals paragraph 23(b), of the Act which caps redundancy pay at four weeks per year of service, and substitutes new paragraph 23(b), which caps redundancy pay at 16 weeks.

Figures presented in the Department of Employment’s submission to the Senate Education and Employment Committee inquiry suggest that the cost of redundancy payments is increasing at a much faster rate than the cost of the FEG as a whole. In the year to June 2013, the redundancy item increased by 49 per cent, while unpaid wages increased by six per cent and the cost of the scheme as a whole increased by 35 per cent. Redundancy payments account for nearly 40 per cent of the cost of the scheme, up from 31 per cent in 2009–10. Thus there is on the face of it a budgetary argument for reining them in.

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Submissions by employer groups including the Australian Industry Group (AiG) and the Australian Chamber of Commerce and Industry (ACCI) to the Senate Education and Employment Committee inquiry also express concern about rising costs. The AiG appears to fear that if the scheme becomes too expensive, employers will be asked to pay a levy to support it.

The rise in the cost of redundancy provisions in the FEG may be driven by the length of service rather than by the entitlement per year. According to the Department of Employment submission, the manufacturing sector accounted for 21 per cent of claimants and 42 per cent of expenditure on redundancy entitlements. It is not possible to be certain from the Department’s data, but this could be accounted for by the fact that manufacturing employment has been relatively stable for some years, so that those who remain in the industry have more years of service and more redundancy entitlements than employees in growing industries, even if the entitlements accrue at a modest rate. If this is the case, the growth in expenditure on redundancy entitlements may level out as structural adjustment in the economy is accomplished.

The Australian Council of Trade Unions (ACTU) submission to the Senate Education and Employment Committee inquiry queries the savings from this measure on two grounds: it asks whether the figure takes full account of cost shifting and savings (for example, through social security payments which might have been avoided and tax that might have been paid if the original entitlement stood); and it suggests that further effort could be put into recovery of entitlements by the Commonwealth from the liquidators. The submission by law firm Slater and Gordon also suggests that the rising cost of the scheme could be mitigated by more vigorous pursuit by the Commonwealth of payments in the winding-up process.

The Government’s Statement of Compatibility with Human Rights on the Bill says that only six per cent, or about 815 people a year, will be affected by the new cap. This means that a substantial budgetary saving is being borne by a few people.

It has been argued that the existing redundancy entitlement is very generous by community standards. The Department of Employment submission confirms this: about five per cent of registered enterprise agreements provide for redundancy pay of four weeks per year of service or better. In the same way, the maximum wage that is covered by the FEG, $2,451, is ‘generous’, being 69 per cent above full-time adult average weekly ordinary time earnings of $1,454. Indeed, probably fewer than five per cent of employees earn that amount. These are maximum entitlements, so by definition they might be expected to be above the average.

The Government has stated that capping the entitlement at 16 weeks aligns the payment with the maximum entitlement under the National Employment Standards. This is not accurate, as the entitlement to 16 weeks redundancy pay after nine years of service provided for in section 119 of the *Fair Work Act 2009* is a minimum entitlement for that length of service, rather than a maximum, as section 61 of that Act makes clear. While there is a case for tying employment related, taxpayer funded benefits to minimum standards—for example, the current paid parental leave scheme pays the entitlement at the minimum wage—other elements of the FEG are not tied to minimums, and the case for doing so with redundancy payments has not been made.

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23. Australian Bureau of Statistics (ABS), *Employee earnings, benefits and trade union membership, Australia, August 2013*, cat. no. 6310.0, ABS, Canberra, 4 June 2014, accessed 19 September 2014. In August 2013 the 90th percentile was at $2081 a week.


By adopting a simple maximum entitlement expressed in weeks of pay, without the structure set out in the National Employment Standards, the amendment introduces a new anomaly. For example, an employee subject to an agreement which provides four weeks’ pay for each year of service will reach his or her 16 weeks entitlement after four years; an employee whose agreement follows the national minimum will reach his or her 16 weeks after nine years. This could result in a 25 year old employee and a 45 year old having the same entitlement.

In his second reading speech, Mr Pyne argued that the generosity of the redundancy provision created a moral hazard:

‘... it provides an incentive for employers and unions to sign up to unsustainable redundancy entitlements, safe in the knowledge that if the company fails, the Fair Entitlements Guarantee and the Australian taxpayer will pay for it.’

It does not seem plausible either that employees would value highly a provision contingent on insolvency in the future; or that an employer would yield especially easily to an unrealistic demand, given that they would then be liable for that payment in cases of individual redundancies. As both the ACTU and the ACCI in their submissions to the Senate Education and Employment Committee inquiry note, employees have a far greater interest in a business remaining solvent. However, the proposed new provision does raise such a possibility. It does not include the old cap on the rate of accrual, so that redundancy entitlements accruing at, say, eight weeks a year would be paid to someone who had worked for two years for a business that becomes insolvent. At the very least, the new provision, because of the removal of the maximum rate of accrual, could increase any moral hazard that exists.

**Other provisions**

**Item 5 of Schedule 1** clarifies that an employee should have taken reasonable steps to recover any debts related to employment entitlements. The intent of the provision is uncontroversial, but the ACTU, noting that the Act does not protect all employment related payments, has raised a concern that, as it is drafted, it could lead to recovery of a protected entitlement such as unpaid wages being prejudiced by an employee’s not having taken steps to recover an unprotected entitlement such as travel expenses.

Section 17 of the Act provides that an employee’s entitlement can be reduced by the amount of debts the employee owes the employer. Subsection 32(2) specifies that if a debt relates to a particular condition of employment, it will be deducted from the related entitlement. For example, a debt relating to an advance of annual leave is deducted from the annual leave entitlement. **Item 11 of Schedule 1** provides that, if there is insufficient related entitlement, the debt can be recovered from other entitlements. The ACTU argues that any debts to the company should be pursued by the insolvency practitioner in the usual way, which seems to be a criticism of the Act rather than of this amending Bill. It proposes that any debts should first be offset against unprotected entitlements or unpaid wages above the cap.

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26. The redundancy pay provision of the National Employment Standards is set out in the Appendix.
28. This is not a fanciful level of provision. For example, the ANZ Enterprise Agreement 2013–14 (Australia) provides for seven weeks redundancy pay for the first year of service (and four weeks for subsequent years): Fair Work Commission, 2013 FWCA 211, Australian and New Zealand Banking Group Limited.
29. ACTU, *submission*, op. cit., p. 5.
30. Ibid., pp. 9–10.
## Appendix: Redundancy pay provision in National Employment Standards

<table>
<thead>
<tr>
<th>Employee’s period of continuous service with the employer on termination</th>
<th>Redundancy pay period</th>
</tr>
</thead>
<tbody>
<tr>
<td>At least 1 year but less than 2 years</td>
<td>4 weeks</td>
</tr>
<tr>
<td>At least 2 years but less than 3 years</td>
<td>6 weeks</td>
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<tr>
<td>At least 3 years but less than 4 years</td>
<td>7 weeks</td>
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<tr>
<td>At least 4 years but less than 5 years</td>
<td>8 weeks</td>
</tr>
<tr>
<td>At least 5 years but less than 6 years</td>
<td>10 weeks</td>
</tr>
<tr>
<td>At least 6 years but less than 7 years</td>
<td>11 weeks</td>
</tr>
<tr>
<td>At least 7 years but less than 8 years</td>
<td>13 weeks</td>
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<tr>
<td>At least 8 years but less than 9 years</td>
<td>14 weeks</td>
</tr>
<tr>
<td>At least 9 years but less than 10 years</td>
<td>16 weeks</td>
</tr>
<tr>
<td>At least 10 years</td>
<td>12 weeks</td>
</tr>
</tbody>
</table>

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