2013-2014

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

FAIR ENTITLEMENTS GUARANTEE AMENDMENT BILL 2014

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Employment, Senator the Hon. Eric Abetz)
The Fair Entitlements Guarantee Amendment Bill 2014 (the Bill) will amend the Fair Entitlements Guarantee Act 2012 (the Act).

The Act provides financial assistance (called an ‘advance’) to cover certain unpaid employment entitlements for eligible employees who lose their job due to the liquidation or bankruptcy of their employer. This includes assistance for up to 13 weeks of unpaid wages, unpaid annual and long service leave; up to five weeks’ payment in lieu of notice; and redundancy pay, which is currently capped at four weeks per full year of service.

The Bill implements the Government’s 2014–15 Budget announcement to align the maximum redundancy pay entitlement under the Fair Entitlements Guarantee scheme (the Scheme) with the maximum set by the National Employment Standards contained in the Fair Work Act 2009. The new maximum redundancy pay entitlement will be 16 weeks’ pay.

The Bill also makes a number of technical amendments to clarify the operation of the Act.

These technical amendments will:

- clarify that where a claimant is eligible for an advance under the Scheme the claimant’s initial entitlement under the Act will be calculated without reference to any amounts required to be withheld by law, such as pay as you go tax withholding;
- establish a funding source in the legislation for certain legal costs associated with applications to the Administrative Appeals Tribunal for review of decisions made by the Department;
- clarify that the death of a person does not prevent the person being eligible for an advance, to enable the next of kin or estate to pursue a claim;
- clarify that when a debt owed by a claimant to his or her employee is greater than the employment entitlement to which it relates, it can be offset proportionally against any of the claimant’s other employment entitlements under the Scheme; and
- remove the eligibility requirement that a person who was owed debts prior to the insolvency event happening to their employer must have taken reasonable steps to be paid those debts and instead allow the Secretary of the Department to reduce a person’s entitlement by the amount of any debts that he or she did not take reasonable steps to be paid.

The Bill will commence on 1 January 2015 or the day after the Bill has received Royal Assent, whichever is later. The amendment relating to the Department’s funding arrangements will apply from 1 July 2015 to align with the start of the 2015–16 financial year.
FINANCIAL IMPACT STATEMENT

The Bill will place a 16 week cap on the amount of redundancy entitlement payable under the Scheme. This will result in an estimated saving of $79.4 million over the forward estimates:

<table>
<thead>
<tr>
<th></th>
<th>2014–15 $m</th>
<th>2015–16 $m</th>
<th>2016–17 $m</th>
<th>2017–18 $m</th>
<th>Total $m</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014–15 $m</td>
<td>9.2</td>
<td>20.8</td>
<td>23.3</td>
<td>26.1</td>
<td>79.4</td>
</tr>
</tbody>
</table>

The other technical amendments made to the Act by the Bill do not impact on the quantum of entitlements able to be paid to an individual under the Scheme. There are no financial implications flowing from these amendments.
# ABBREVIATIONS AND COMMON TERMS

<table>
<thead>
<tr>
<th>Abbreviation or common term</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>the Act</td>
<td><em>Fair Entitlements Guarantee Act 2012</em></td>
</tr>
<tr>
<td>the Bill</td>
<td><em>Fair Entitlements Guarantee Amendment Bill 2014</em></td>
</tr>
<tr>
<td>the Fair Work Act</td>
<td><em>Fair Work Act 2009</em></td>
</tr>
<tr>
<td>GEERS</td>
<td>General Employee Entitlements and Redundancy Scheme</td>
</tr>
<tr>
<td>the Scheme</td>
<td>The scheme for the provision of financial assistance established by the Act</td>
</tr>
<tr>
<td>the Secretary</td>
<td>The Secretary of the Department</td>
</tr>
</tbody>
</table>
FAIR ENTITLEMENTS GUARANTEE AMENDMENT BILL 2014

Section 1 – Short title
1. This is a formal provision specifying the short title of the Act.

Section 2 – Commencement
2. The table in this section sets out when the provisions of the Bill commence.
3. Sections 1 to 3 of the Bill commence on the day after it receives Royal Assent.
4. Items 1 to 12 and 14 of the Bill commence on the later of 1 January 2015 or the day after it has received Royal Assent.
5. Item 13 of the Bill commences on 1 July 2015. This will allow the changes to the funding arrangements for the Scheme to commence at the start of the 2015–16 financial year.

Section 3 – Schedules
6. Clause 3 of the Bill provides that legislation that is specified in a Schedule is amended or repealed as set out in that Schedule, and any other item in a Schedule operates according to its terms.

SCHEDULE 1 – AMENDMENTS

Item 1 – After section 7
7. This item inserts new section 7A which provides that nothing in the Act affects any requirement for a person to withhold or deduct an amount as required by law. This item also inserts a note which advises readers that the Secretary or another person may be required to withhold or deduct an amount because of the pay as you go withholding rules contained in the Taxation Administration Act 1953, or because of any other Commonwealth, state or territory law.
8. A requirement of any other law to withhold or deduct amounts is not a factor when working out the amount of a claimant’s employment entitlements for the purposes of the Act. Such a requirement becomes relevant when payment is made to the claimant.
9. Payments are made to eligible claimants by the Commonwealth, the liquidator or bankruptcy trustee for the employer or another person on the Commonwealth’s behalf. The payer continues to be responsible for identifying any laws of the Commonwealth, a state or a territory that require an amount to be withheld and remitted to another party.

Illustrative Example
Matt is made redundant by his employer, The Café Pty Ltd. Matt is owed $5,000 for unpaid wages. The Café goes into liquidation two weeks later.

As his debts had yet to be paid, Matt submits a claim under the Act. The Department assesses Matt’s claim and finds that he is eligible to be paid his unpaid wages entitlement of $5,000.

The Department pays $5,000 to The Café’s liquidator, Ross and Associates. As Ross and Associates is making a payment to Matt, it calculates the amount of pay as you go taxation that it is required to be withheld, remits this amount to the Commissioner of Taxation and pays the remainder to Matt.
Item 2 – Paragraph 10(1)(f)

Item 3 – Subsection 10(1) (note)

Item 4 – At the end of subsection 10(1)

Item 5 – After section 17

10. The effect of these items is to remove the eligibility requirement that a claimant who was owed debts prior to the insolvency event happening to their employer must have taken reasonable steps to be paid those debts and instead allow the Secretary to reduce a claimant’s advance for failure to take reasonable steps.

11. Item 2 repeals paragraph 10(1)(f). This means that whether or not a claimant took reasonable steps to be paid any of the debts owed by their employer before the insolvency event will not be considered under the eligibility conditions, but instead considered when determining the amount of their advance (see item 5). Without this amendment, the fact that a claimant did not pursue a minor debt owed by their employer could mean that the claimant would not be eligible for any advance, even if some of their debts were reasonably pursued.

12. Items 3 and 4 insert a new note under section 10 that advises readers that an advance may be reduced under section 17A where a claimant has not taken reasonable steps to be paid a debt.

13. Item 5 inserts new section 17A which provides that where a claimant did not take reasonable steps before their employer’s insolvency event to be paid debts relating to their unpaid employment entitlements, the Secretary may reduce the amount of the claimant’s advance by the amount of those debts. This approach will ensure that individuals are still required to actively protect their own interests by pursuing debts but will also allow payments to be made for debts that a claimant did take reasonable steps to pursue.

Illustrative Example

Jana is a recent emigrant from Krakozhia and English is not her first language. She was an employee of The Cleaning Company Pty Ltd and was made redundant on 1 July. Jana had two outstanding employment entitlements from the final month of her employment that were not paid by The Cleaning Company: unpaid wages amounting to $800 and underpayment of wages amounting to $700.

Jana was aware that her last few weeks of wages had not been paid and took a number of steps to recover these unpaid wages before her employer’s insolvency, including several phone calls and emails to her employer. Jana was not aware that her wages had been underpaid because she had difficulty understanding the terms of her Enterprise Agreement due to her limited English language skills.

A liquidator for The Cleaning Company is appointed on 1 August. As her debts had yet to be paid, Jana submits a claim under the Act and is assessed as being eligible with an initial entitlement of $1,500. As Jana has taken reasonable steps to be paid her unpaid wages, this amount is included in her payment under the Scheme. When considering whether Jana’s entitlement should be reduced by the amount of the debt she did not take steps to pursue, the assessor considers the steps that Jana has taken as well as her language skills and personal circumstances. The assessor determines that there were no other reasonable steps that Jana should or could have taken to pursue her debt and she is advanced her full entitlement of $1,500.
14. The requirement to take ‘reasonable steps’ will depend on the individual’s unique circumstances. As noted in the Explanatory Memorandum for the Act:

Where a person was unaware they were owed a debt, for example, it would generally not be reasonable to expect them to have taken steps to be paid that amount. Also, it will permit the Secretary to acknowledge that commencing legal action to recover outstanding entitlements may not have been reasonable due to either the size of the amount, or the level of education or language skills that the person holds.

Generally, a person will be eligible if they have taken ‘reasonable steps’ such as bringing the outstanding entitlement to the employer’s attention or seeking assistance from the Fair Work Ombudsman.

**Item 6 – Paragraph 23(b)**

15. This item repeals the four weeks per year of service cap on redundancy pay entitlements and replaces it with the limitation that a claimant’s redundancy pay entitlement cannot exceed 16 weeks’ pay.

16. This amendment aligns the maximum redundancy pay entitlement under the Scheme with the maximum payment set by the National Employment Standards contained in the Fair Work Act. This restores the level of redundancy pay entitlement that was available under the GEERS Operational Arrangements that were in effect between 22 August 2006 and 31 December 2010. There will be no cap on the amount of entitlement accrued each year up to the maximum of 16 weeks.

17. This amendment will apply to claims where the insolvency event occurs after the commencement of this item. Section 2 provides that this item commences on the later of 1 January 2015 or the day after the Bill receives Royal Assent.

18. Claims relating to an insolvency event that occurs before the commencement of this item will not be affected even if an application is submitted after the commencement of this item.

**Illustrative Example**

<table>
<thead>
<tr>
<th>Item 6 of the Bill commences on 1 January 2015.</th>
</tr>
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<tbody>
<tr>
<td>Sue is made redundant on 2 January 2015 when her employer, The Accountants Pty Ltd, enters liquidation. Sue has worked for The Accountants for five years and under the terms of her governing instrument is entitled to a redundancy payment equivalent to 20 weeks’ pay.</td>
</tr>
<tr>
<td>Sue submits a claim for her unpaid redundancy pay entitlement on 1 February 2015. Because The Accountants’ insolvency event occurred after 1 January 2015, Sue’s redundancy pay entitlement is capped at the equivalent of 16 weeks’ pay.</td>
</tr>
</tbody>
</table>

**Item 7 – Section 24**

19. This item removes references to pay as you go taxation from the calculation of the basic amount for a claimant’s wages entitlement. This is a consequential amendment to the insertion of the new section 7A.
Item 8 – Paragraph 28(1)(b)

Item 9 – Paragraph 28(1)(c)

Item 10 – At the end of subsection 28(1)

20. These amendments are consequential to the amendments made by items 1 and 7 and further clarify how amounts that are required to be withheld by law are treated by the Scheme.

21. Items 8 and 9 remove references to the withholding or deduction of amounts as required by law from section 28. New section 7A consolidates these references and specifically provides that nothing in the Act affects any requirement for a person to withhold or deduct an amount as required by law.

22. Item 10 inserts a note at the end of subsection 28(1) which directs readers to the new section 7A. This further reinforces that all payments made under the Act are subject to any laws of the Commonwealth, a state or a territory that require amounts to be withheld.

Item 11 – After subsection 32(2)

23. This item inserts a new subsection 32(2A).

24. New subsection 32(2A) clarifies that where a debt owed by a claimant to his or her employer is greater than the employment entitlement to which it relates (for example, annual leave taken before it is accrued), it can be offset proportionally against any of the claimant’s other employment entitlements that are payable under the Scheme.

Illustrative Example

Paul is made redundant when his employer, The Online Power Company Pty Ltd, enters liquidation. Paul is owed $10,000 by his employer for unpaid wages. In the months leading up to his redundancy, Paul had taken annual leave in excess of the entitlement that he had accrued under his governing instrument. At the date of his redundancy, Paul’s annual leave debt was valued at $2,500.

Paul submits a claim for his unpaid wages entitlement under the Act. The Department assesses Paul’s claim and finds that he is eligible to be paid his unpaid wages entitlement of $10,000. Because Paul owes a debt to his employer, the Secretary of the Department exercises her discretion to reduce the amount of the advance by the amount of that debt.

Because Paul is not owed an amount in relation to annual leave, subsection 32(2A) provides that the debt may be offset against his other entitlements. Paul’s wages entitlement is reduced by the amount of his debt and his advance becomes $7,500.

Item 12 – After section 49

25. This item inserts new section 49A to clarify that the death of a person at or after the end of a person’s employment does not:

- prevent the person from being eligible for an advance under the Act, or
- prevent that advance from being paid to the person’s estate.
Item 13 – Section 51

26. This item repeals section 51 and replaces it with a new section.

27. This new section provides that the Consolidated Revenue Fund is also appropriated for the purposes of paying amounts to another person in respect of legal costs incurred by the Department in relation to applications to the Administrative Appeals Tribunal made under section 40 or an appeal to a court in respect of such an application.

Item 14 – Application

28. This item sets out when the amendments to the Act that are made by the Bill will commence.
ATTACHMENT

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Fair Entitlements Guarantee Amendment Bill 2014

The Fair Entitlements Guarantee Amendment Bill 2014 (the Bill) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview of the Fair Entitlements Guarantee Amendment Bill 2014

The Fair Entitlements Guarantee Amendment Bill 2014 (the Bill) will amend the Fair Entitlements Guarantee Act 2012 (the Act).

The Act provides financial assistance to cover certain unpaid employment entitlements for eligible employees who lose their job due to the liquidation or bankruptcy of their employer. This includes assistance for up to 13 weeks of unpaid wages, unpaid annual and long service leave; up to five weeks’ payment in lieu of notice; and redundancy pay, which is currently capped at four weeks per full year of service.

The Bill implements the Government’s 2014–15 Budget announcement to align the maximum redundancy pay entitlement under the Fair Entitlements Guarantee scheme (the Scheme) with the National Employment Standards contained in the Fair Work Act 2009 (the Fair Work Act). The new maximum redundancy pay entitlement will be 16 weeks’ pay.

The Bill also makes a number of technical amendments to clarify the operation of the Act. These amendments address provisions which, since the commencement of the legislation, have resulted in some confusion or ambiguity about their intended operation.

Human Rights Implications

The Bill engages the right to social security, including social insurance, under Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Committee on Economic, Social and Cultural Rights (the Committee) has stated that the right to social security encompasses the right to access benefits, whether in cash or in kind, without discrimination in order to secure protection from lack of work related income caused by unemployment.¹

The Act establishes a basic payment scheme for persons whose employment has ended due to the insolvency or bankruptcy of their employer. The scheme can be characterised as ‘social insurance’ because it provides a safety net for individuals by ensuring that certain unpaid entitlements are met when a person’s employer becomes insolvent. It seeks to protect individuals from lack of work-related income due to unemployment and, in this way, promotes the right to social security.

Limitations on human rights are permissible where they are aimed at achieving a legitimate objective and are reasonable, necessary and proportionate.

Statement of Compatibility with Human Rights

**Technical amendments**

The Bill makes the following technical amendments that do not limit the right to social security:

- clarifying that where a claimant is eligible for an advance under the Scheme the claimant’s initial entitlement under the Act will be calculated without reference to any amounts required to be withheld by law, such as pay as you go tax withholding;
- establishing a funding source in the legislation for certain legal costs associated with applications to the Administrative Appeals Tribunal for review of decisions made by the Department;
- clarifying that when a debt owed by a claimant to his or her employee is greater than the employment entitlement to which it relates, it can be offset proportionally against any of the claimant’s other employment entitlements under the Scheme; and
- clarifying that the death of a person does not prevent the person being eligible for an advance, to enable the next of kin or estate to pursue a claim.

**Capping redundancy entitlement at 16 weeks**

Section 23 of the Act currently provides that a claimant’s redundancy pay entitlement cannot exceed the total of four weeks’ pay for each full year of the claimant’s service with the employer but does not place a cap on the total number of weeks’ pay that may be advanced to a claimant.

The Bill will amend the Act to cap the maximum amount of redundancy pay entitlement at 16 weeks’ pay. This amendment will align the maximum redundancy payment under the Scheme with the maximum available under the National Employment Standards contained in the Fair Work Act. This also restores the level of redundancy pay entitlement that was available under the administrative scheme from 22 August 2006 to 31 December 2010.

This amendment engages the right to social security by impacting claimants who have accrued more than 16 weeks’ redundancy pay entitlement as they will not be advanced their full entitlement.

The legitimate objective of this amendment is to ensure the ongoing financial viability of the Scheme. The Committee has recognised this as being a legitimate objective, stating that social security schemes ‘should also be sustainable… in order to ensure that the right can be realized for present and future generations’. The 2014–15 Budget indicated the cap on redundancy combined with the pausing of the ‘maximum weekly wage’ will result in savings of $87.7 million over four years.

The amendment is a reasonable, necessary and proportionate approach to achieving this objective for a number of reasons.

First, the National Employment Standards were implemented to ensure that the national workplace relations system was built on a strong safety net. Adopting the National Employment Standards’ amount on the redundancy pay entitlement may limit the amount of a claimant’s redundancy pay entitlement, but this is considered appropriate given the Scheme’s status as a safety net for workers who are owed debts by their insolvent employer. This means that the Scheme continues to provide an effective safety net to persons who have been made redundant.

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because of the insolvency of their employer while at the same time assisting the financial sustainability of the Scheme.

Second, the absence of a maximum cap on the total redundancy pay entitlement payable under the Scheme has the potential to significantly undermine the Scheme’s financial viability and result in payments that are well above what is necessary to provide a social insurance scheme for people made redundant as a result of their employer’s insolvency event. Since the introduction to the Scheme of the four week redundancy pay per year of service cap, 75 claimants have received redundancy payments of more than $100,000. The highest amount paid to a claimant in respect of redundancy pay entitlement was $297,693.22 under the 2011 version of the General Employee Entitlements and Redundancy Scheme (which operated from 1 January 2011 until 4 December 2012) and $175,921.26 under the Act. These amounts go well beyond what can be considered a reasonable community expectation of what a social insurance scheme should pay. By contrast, prior to the four weeks’ redundancy pay per year of service capping being introduced on 1 January 2011, the highest payment for redundancy that was capped at 16 weeks’ pay was $43,200. This amount reflects a much more reasonable standard for what will be paid under this Scheme.

Third, the Department estimates that the 16 week cap on the redundancy pay entitlement will affect only around six per cent of future claimants who are paid an advance under the Scheme, which will be approximately 815 people per year. Over the past three financial years 41,393 claimants have been paid an advance under the Scheme or its predecessor (the General Employee Entitlements and Redundancy Scheme). Of these, 2446 received entitlements equivalent to more than 16 weeks’ pay out of 21,752 claimants who were entitled to a redundancy pay entitlement.

Finally, where a claimant is owed more than 16 weeks’ redundancy pay by their insolvent employer, they will be able to pursue the portion of that debt that is not paid by the Scheme in accordance with the Corporations Act 2001.

Partial payment

Paragraph 10(1)(f) of the Act states where a person was owed an unpaid employment entitlement before an insolvency event happens to their employer, they must have taken reasonable steps to be paid those debts before that event to be eligible under the Scheme. This may result in a claimant being wholly ineligible if he or she has not taken reasonable steps to recover every one of the debts they are owed before the insolvency event happens to their employer. This has the potential to result in unfair outcomes for claimants.

The Bill removes paragraph 10(1)(f) from the eligibility criteria. The Secretary of the Department will then be able to reduce the claimant’s advance by the amount of any unpaid employment entitlements that he or she did not take reasonable steps to be paid prior to his or her employer’s insolvency.

This amendment positively engages the right to social security. It will allow greater flexibility in finding a claimant to be eligible for an advance by allowing the Department to advance portions of a claimant’s advance, rather than finding them wholly ineligible for any advance. This will ensure a fairer operation of the Scheme.
Conclusion

The Bill is compatible with human rights because it seeks to maintain the sustainability of the Scheme of financial assistance without compromising minimum entitlements and to the extent that the amendments may limit rights, those limitations are reasonable, necessary and proportionate to that legitimate objective.

Eric Abetz, Minister for Employment