ACTU Submission

Fair Entitlements Guarantee Amendment Bill 2014

Senate Education and Employment Legislation Committee

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About the ACTU

The ACTU is the peak body for Australian Unions, made up of 46 affiliated unions. We represent almost 2 million working Australians and their families.

Unions are active every day campaigning in workplaces and communities around Australia for better job security, pay and conditions, rights at work, healthier and safer workplaces, and a fairer and more equal society.

Since it was formed in 1927, the ACTU has spearheaded some of the most significant social, economic and industrial achievements in Australia's history, including decades of wage increases, safer workplaces, greater equality for women, improvements in working hours, entitlements to paid holidays and better employment conditions, the establishment of a universal superannuation system, the social security system, Medicare and universal access to education.

Introductory remarks

The *Fair Entitlement Guarantee Act* 2012 ("the Act") is the product of an extensive consultative process, involving the ACTU, its affiliates, insolvency practitioners and employer associations.

The Committee would also be aware that the *GEERS* scheme which preceded the Act was developed in consultation with all stakeholders under the former Coalition government, and built upon the *SEESA* scheme and the initial employee entitlement scheme (for employees of National Textiles) which we understand provided payment of 100% of entitlements lost through the insolvency of that employer. Each of those schemes were developed in consultation with those impacted by them. The ACTU and our affiliates were consulted in relation to each variation of the operational arrangements which governed the GEERS scheme.

Consistent with past practice, we would have expected broad based consultation on proposed policy changes with all affected parties complemented by a technical consultation through the *Committee on Industrial Legislation* (a sub-committee of the Workplace Relations Consultative Counsel) once the legislation had been drafted but before it had been introduced.

Neither the ACTU nor its affiliates were consulted in relation to the decisions announced in the budget to cap redundancy entitlements under the Act to 16 weeks and to cap indexation of the "Maximum Weekly Wage" cap for four years. In fact, workers were led to believe before the election that there would be no change (Appendix 2). The ACTU participated in one teleconference with departmental officers prior to the Bill being introduced, but we were not provided with any of the documentation being referred to during that discussion. No meeting of the Committee on Industrial Relations has been called in relation to the Bill.

We are accordingly highly critical of the policy development process which has led to the Bill and concerned that the 7 day notice period provided to make submissions to the present inquiry – the only process left to apply any real scrutiny to the Bill – is wholly inadequate.

Contentious amendments

Offsetting: debts owed to employees

Whilst we appreciate, on the basis of the Explanatory Memorandum, that Item 5 of Schedule 1 is intended to be a clarification of the original intention that an employee ought to have taken "reasonable steps" to claim debts owed to them, we are concerned that the drafting of this amendment may lead to circumstances where offsetting occurs other than on a "like for like" basis. Not all categories of employee entitlements are protected by the Act, and as such where a given debt comprises both protected and unprotected entitlements, we are concerned that circumstances may arise where the non-pursuit of an unprotected entitlement may prejudice recovery of a protected entitlement.

Example:

Prior to the insolvency of his employer, David travelled to a remote location for work for a week. It is a condition of his employment that he be reimbursed for fuel and accommodation costs he incurs during this travel. After returning from the travel assignment, David claims his reimbursements in the usual way. He discovers on his next pay date that neither his wages nor his reimbursements have been paid. He e-mails his payroll department regarding the total of the unpaid amounts, which comprise both protected and unprotected entitlements. He receives a reply indicating that his wages will be paid in four days and that he should contact the payroll department the following week regarding his reimbursements. His wages are paid, however his reimbursements are not. Amid growing speculation that the employer is looking to cut costs by sacking some staff, David decides does not pursue his reimbursements. Three weeks later his employment is terminated by an insolvency practitioner and he receives neither his severance pay nor his redundancy. His reimbursements also remain unpaid.

On assessing David's claim under the Fair Entitlements Guarantee, the Secretary decides:

- Prior to the insolvency event, on the first pay period after his return from travel, David was owed a debt that was "partly" attributable to an "employment entitlement" as defined, for the purposes of section 17A(1)(a);
- The debt crystallised on that first pay period after his return from travel, thus was owed to David before the insolvency for the purposes of section 17A(1)(b);
- Because David did not take steps to pursue the reimbursement component of the debt, he did not take reasonable steps to be paid "some" of the debt that became due to him on that day, for the purposes of section 17A(1)(c);
- Accordingly, the amount of the unpursued reimbursement should be offset against David's unpaid redundancy or severance pay entitlement pursuant to section 17A(2).

We encourage the Committee to recommend that further consideration be given to the drafting of this provision to address the potential of it misfiring in this fashion.

Technical matters such as this are of the type that could ordinarily be raised and discussed through the Committee on Industrial Legislation.

16 week cap

Item 6 of Schedule 1 replaces the current cap of 4 weeks per year of service on redundancy pay with a cap of 16 weeks pay. A cap of 16 weeks pay had been a feature of GEERS until it was lifted in January 2011. Prior to this, GEERS had lower caps on redundancy entitlements albeit with an administrative discretion to make further payments. The initial *National Textiles* scheme did not have any such cap and the relevant industrial instrument provided redundancy entitlements far in excess of the Award provisions for workers with 5 years of service or more[1].

Based on information disclosed in the Statement of Compatibility with Human Rights, it estimated this amendment will effect a comparatively small number of claimants (6%), but the effect that it will have on those persons will be devastating. This policy position was not disclosed as part of the Coalition's pre election policy commitments and indeed specific commitments were given that entitlements under the scheme would not be reduced (Appendix 2).

The importance of a government scheme to assist workers who do not receive their entitlements on termination cannot be overstated. The reason the scheme exists is to provide timely access to critical funds that are rightly due to the employee. Employees who have lost most likely their only source of income do not have the luxury of waiting for the conclusion of a liquidation process before receiving a dividend. Further, whilst it is true that higher dividends might ultimately be recoverable if the conduct of the directors in the lead up to the liquidation was unlawful, the pursuit of such actions is problematic in a number of ways:

- ASIC has a right to commence such proceedings, however the time taken to investigate and conclude proceedings is likely to be too long to be of any practical benefit to the worker when they are most in need;
- The liquidator has a right to bring such proceedings, but as they rely on the funds of the company to finance their investigation, they are disinclined to so in the ordinary course;
- The employee has a right to bring such proceedings, but this is subject to the agreement of the liquidator or a nine month waiting period. In any event, few unemployed persons would have the means to pursue such an action.

The ACTU and its affiliates have consistently campaigned for stronger and more accessible accountability mechanisms to operate alongside a government backed entitlement scheme and we continue to be of the view that actions on both fronts are required. Further, there are improvements that should be made in areas where both initiatives intersect (refer Appendix 1).

As the economy continues to transition, more and more long term employees (and possibly households) face unemployment and a smaller pool of employers in their chose industry to whom their skills are directly transferrable. Labour mobility is also an issue, particularly where large scale manufacturers and their suppliers are concentrated in particular industrial hubs. Long term unemployment following such redundancy is a very real prospect. These market realities are reflected in the redundancy conditions that have been freely negotiated between the

[1] *Textile Industry (National Textiles) Agreement* 1998, T1618, 16/12/1998, clause 16.

industrial parties concerned. Many of those conditions include higher redundancy entitlements by reference not only to length of service but also age[2].

To seek this amendment at this time, when there is a risk that automotive supply chain manufacturers will be unable to survive post the impending cessation of vehicle manufacturing in Australia, is mean spirited in the extreme.

The financial impact statement attributes a $79.4 million saving to this measure over the forward estimates period. We query whether this figure takes into account the cost shifting that ought to be factored in to such an assessment. Amounts that are expended under the Act are notionally recoverable to some extent, according to the elevated priority of employee creditors. Many other forms of Commonwealth expenditure are not:

- In its review of the *Active Creditor Pilot Program*[3] the Department estimated that on average the Commonwealth was able to recover around 17% of the monies it advanced through *GEERS* and its predecessor as 31 August 2008. Based on DEEWR's 2012-13 Annual Report, the recovery rate presently stands at around 14%. For matters which were funded at the *Active Creditor Pilot Program*, an estimated 562% return on the investment in the project was achieved, suggesting a much higher recovery rate that 14% or 17% is readily achievable at zero net cost to the Commonwealth.

- In contrast, the predominantly older workforce that would be most affected by the cap on redundancy pay are likely to be dependent for a period on welfare benefits following the loss of their employment. Their reduced payment from the scheme is likely to reduce the preclusion period that would otherwise apply as a consequence of their means testing for income support. Such income support payments are not to any extent directly recoverable by the Commonwealth.

Given the apparent success of the Active Creditor Pilot program, we recommend (as did those conducting it) that it be continued. At the very least there should be an initial scoping study of ASIC's standard reporting into insolvencies to establish the extent to which matters recommended for further investigation and/or prosecution are in fact being followed up on. We suspect that there are very real opportunities to increase the rate of recoveries back into the scheme for the Commonwealth's benefit. Such an approach would ensure that those responsible for losses being incurred by employees are the ones who bear responsibility for redress, rather than the employees who the government seeks to demonise for having entered into a consensual and legal arrangements with their employer to give them more than the legal minimums that our labour standards require.

Likewise, the Government could take more active steps to stimulate growth and implement coherent industry and skills policies that could help to reduce the likelihood of future insolvencies that are not linked to corporate misbehaviour.

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[2] Such as an extra week of pay for employees aged over 45 with more that 2 years service.

[3] Department of Education, Employment and Workplace Relations, "*Review of the General Employee Entitlements and Redundancy Scheme Active Creditor Pilot*", October 2008

The abolition of the 16 week cap on redundancy pay was the only element of the Act which was opposed by the Coalition while in opposition. The then opposition unsuccessfully moved an amendment in both the House and the Senate to the same effect as Item 6 of Schedule 1.

Some of the debate led by the now Minister Senator Abetz suggested a misunderstanding of the operation of the scheme:

> "Having said that, there are aspects of this bill which we support and that we can understand, but one thing that we are concerned about—and I will be seeking to move an amendment during the committee stage—is the benefits that are to accrue under this legislation.
>
> The benefits that are being legislated here are, in the view of the coalition, somewhat overgenerous inasmuch as they go beyond the Fair Work Australia standards and they go beyond the Australian Industrial Relations Commission standard in relation to matters redundancy. If the parliament legislates this standard then of course it will make it so much easier for those advocating for more generous redundancy schemes to assert that, if the parliament says that this is a good regime in relation to redundancy, because the parliament has so legislated, it should be part of the relevant modern award or the relevant enterprise bargaining agreement."[4]
>
> "So the coalition does not believe that this bill should set a new standard of four weeks per year for an unlimited period of time, as clearly it will set a new standard which will be very difficult to meet for many employers. It will undoubtedly be used to argue for more generous redundancy arrangements in enterprise agreements and modern awards."[5]
>
> "Can I also ask: will this bill provide employees with the potential of receiving greater benefits than they would otherwise have received under their existing arrangements—their enterprise agreement or their modern award?"[6]

Clearly the Act does not provide for the payment of advances that exceed the underlying entitlements of the employees concerned and it would be scandalous if such a misunderstanding had any role in the Government's present policy position.

Further, the increase in redundancy payments available under the Act as compared to GEERS prior to 2011 was not a case of the scheme setting a new standard – rather it was a case of belatedly keeping up with existing standards which had been endorsed through enterprise bargaining. This point seemed lost on the Leader of the House in his second reading speech in support of the Bill:

> "This level of protection is very generous by community standards. It creates 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."
>
> "As well as addressing financial sustainability, this amendment will also address the moral hazard that overly generous redundancy entitlements create."
>
> "It will put beyond doubt that the accepted standard for redundancy pay is what is contained in the National Employment Standards – a maximum of 16 weeks pay. For the sake of consistency, it is

[4] Senate Hansard 26/11/12, Page 9639.

[5] *Ibid.* Page 9650.

[6] *Ibid. Page 9652*

important that the National Employment Standards and Fair Entitlement Guarantee are the same"[7].

There are a number of reasons why these statements are not sound.

Firstly, there are two very significant checks in the Act as it stands that are actively targeted to protect against persons "gaming the system". These appear at section 12 and 25.

Secondly, under the *Fair Work Act*, unions don't sign enterprise agreements. Even if they are involved in the negotiation of such agreements, it is the workers' vote that determines whether the agreement is made and ultimately approved. Unions and workers have an interest in ensuring the long term viability of enterprises. Normal redundancy situations do not involve the redundancy of the entire workforce. It is ridiculous to suggest that workers or unions would endorse an agreement that risked a standard redundancy situation becoming an insolvency situation.

Finally, the National Employment Standards are expressed unambiguously in the *Fair Work Act* as a safety net and minimum standard. To suggest that the "accepted standard" is the thin barrier between compliance and unlawful underpayment - and that anything above that is "unacceptable" - is offensive to Australian workers (not to mention rather ironic coming from a political party with an otherwise pronounced distaste for centralised wage fixing).

This Item ought not proceed.

Offsetting: debts owed by employees

Item 11 of Schedule 1 provides a further way to reduce the monies paid out of the scheme, and is contrary to the statement in the Financial Impact Statement that "The other technical amendments made to the Act by the Bill do not impact on the entitlements able to be paid to an individual under the scheme".

It is highly unsatisfactory that the Scheme becomes the fighting ground for alleged overpayments, occurring at some undefined point in the employment relationship and possibly never brought to the attention of employees, which have the potential to substantially defeat rights to payment from the Scheme. If the Company is owed money, the debts due to it should be pursued by the insolvency practitioner in the usual way.

This Item ought not proceed, or at least the very least two amendments should be considered:

- Firstly, none of the debts dealt with in section 32 (as it stands or as it is proposed to be amended) should impact the amount of an advance to an employee at all, in the following circumstances:
    - Where the employee earns above the "maximum weekly wage" and the debt can be absorbed as against their "employment entitlements" in excess of that cap. The employee has already suffered the loss of everything in excess of the unrecoverable amounts above the "maximum weekly wage";

[7] House Hansard, 4/9/2014, page 1.

  - Where the debt which an employee owes is unrelated to the "employment entitlements" protected by the Act and that debt is less than the total of those unprotected entitlements which have been forgone as a result of the insolvency.

- Secondly, outside of unilateral and mistaken overpayments, it is presently unclear how any "employment entitlements" other than annual leave (which is used in the example in the explanatory memorandum) could bring about a situation where the debt exceeds the entitlement. The amendment should be confined to the circumstance of annual leave paid in advance.

Uncontentious amendments

Advances to be net of tax

The amendment proposed by Items 1 and 7-10 of Schedule 1 reflect what we understand to be the longstanding practice in relation to the recovery and payment of advances by the Department both under the *Fair Entitlements Guarantee* and *GEERS*.

Unclaimed debts

The amendments proposed by Items 2-4 of Schedule are necessary to cement the position that we currently understand pertains when payments are assessed. It would be manifestly unfair if a failure to claim a particular component of the debt due to an employee had the result that the employee was wholly disqualified from any payment from the scheme. However, it would also be unfair if a person's failure to pursue an entitlement not protected by the Act prejudiced them in recovering an advance. For this reason, we have concerns about Item 5 of Schedule 1, which we address in the previous section.

Estates and personal representatives

Item 12 of Schedule 1 is a sensible confirmation of the assumed operation of State based Administration and Probate laws.

Funding

Items 13 ensures that funding is available to the department in connection with the payment of its legal expenses, in respect of payments made on or after 1 July 2015. We trust that this would not be met with a more combative or obstructionist approach in review proceedings under section 40 of the Act.

Appendix 1

***Corporations Amendment (Phoenixing and Other Measures) Act* 2012.**

The ACTU participated in the consultative process that led to the enactment of the above legislation ("the COPA Act") and we publicly supported its passage.

One of the key purposes of the COPA Act from the outset, as explained in the explanatory material which accompanied it at the exposure draft stage, was to enable ASIC to administratively appoint liquidators to wind up abandoned companies in order that those company's employees may qualify for government assistance via the Fair Entitlements Guarantee (formerly the *GEERS* scheme). One of the pre-requisites to employees accessing payments under either scheme is that the company which employed them is being liquidated.

The Senate Economics Committee, in its report recommending the passage of the then Bill, observed as follows:

> "the committee notes that the intention of the Bill is not to assist well-intentioned directors, but to enable affected employees to access a government assistance scheme and to facilitate more investigations of suspected fraudulent phoenixing activity and uncommercial transactions."

Noting that ASIC's new winding up powers were subject to a public interest test, the Committee also said:

> "The intent of the Bill is to target abandoned companies—companies which are clearly not fulfilling their obligations under the Corporations Act—to ensure employees of these companies can access GEERS and so misconduct can be investigated. The committee considers the public interest test is an appropriate and adequate safeguard."

Our submission to that Committee included the following:

> "We support these amendments on the basis that they have the potential to decrease the time it takes for employees of insolvent companies to access funds through GEERS/Fair Entitlements Guarantee. Whether or not these powers prove to be effective in realising that goal will depend on training, resourcing and investigation commitment within ASIC"

Further to our comments to the Committee, we were disappointed to discover that ASIC has formulated a "Regulatory Guide"[8] which would appear to frustrate the object of the legislation. Regulatory Guide RG242 published by ASIC includes the following at page 7:

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8 Accessible at http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg242-published-25-January-2013.pdf/$file/rg242-published-25-January-2013.pdf

> "We may wait up to six months from when we receive a request to wind up a company to appoint a liquidator. We believe six months allows sufficient time for a creditor to have commenced its own winding-up action.
>
> We may consider it not to be the best use of government funding to exercise the power to wind up a company if the cost of taking winding-up action would exceed the amount of employee entitlements claimed. The cost of taking winding-up action is generally estimated to be about $15,000. This figure comprises ASIC's costs and the liquidator's remuneration.
>
> We may also consider it not to be the best use of government funding to wind up a company where the amount of outstanding employee entitlements claimed is substantial enough to enable an employee, or the employees jointly, to petition the court to wind up the company."

We are extremely disappointed that ASIC has taken this approach. The central difficulty with the 6 month waiting period, aside from the obvious and significant personal financial consequences where unemployed workers have no access to *Fair Entitlements Guarantee Act (*"FEG Act"*)* payments for that period, is that the workers claims under the FEG Act will be treated differently than if a shorter waiting period applied.

Section 10(1)(c) of the FEG Act deals with the eligibility requirement that there be a connection between an insolvency and the termination an employee's employment. The section relevantly *presumes* a relationship between an insolvency and a termination of employment where the employment ended *less than 6 months* before the appointment of the liquidator. However, where *6 months or more has passed* between the end of the employment and the appointment of a liquidator, the employee *bears the onus* of satisfying the Secretary of the Department that the termination of their employment was "due to the insolvency of the employer". Clearly this will be difficult where an entity simply closes its doors and, from the employees' perspective, vanishes without explanation.

Furthermore, ASIC's approach seems to take a very limited view of the "public interest test" enshrined in the legislation, and essentially substitutes that test for ASIC's own assessment as to the "best use of government funding". That approach is clearly flawed on a number of fronts, not the least because ASIC's view as to the "best use of government funding":

- does not appear to take account of the fact that the government clearly intended that the legislation would support payments being made out of the *Fair Entitlements Guarantee* scheme; and
- makes unrealistic assumptions about the capacity of unemployed workers who have lost their entitlements to fund litigation - an assumption which is again contrary to the fundamental policy underpinnings of both the FEG Act and the COPA Act.

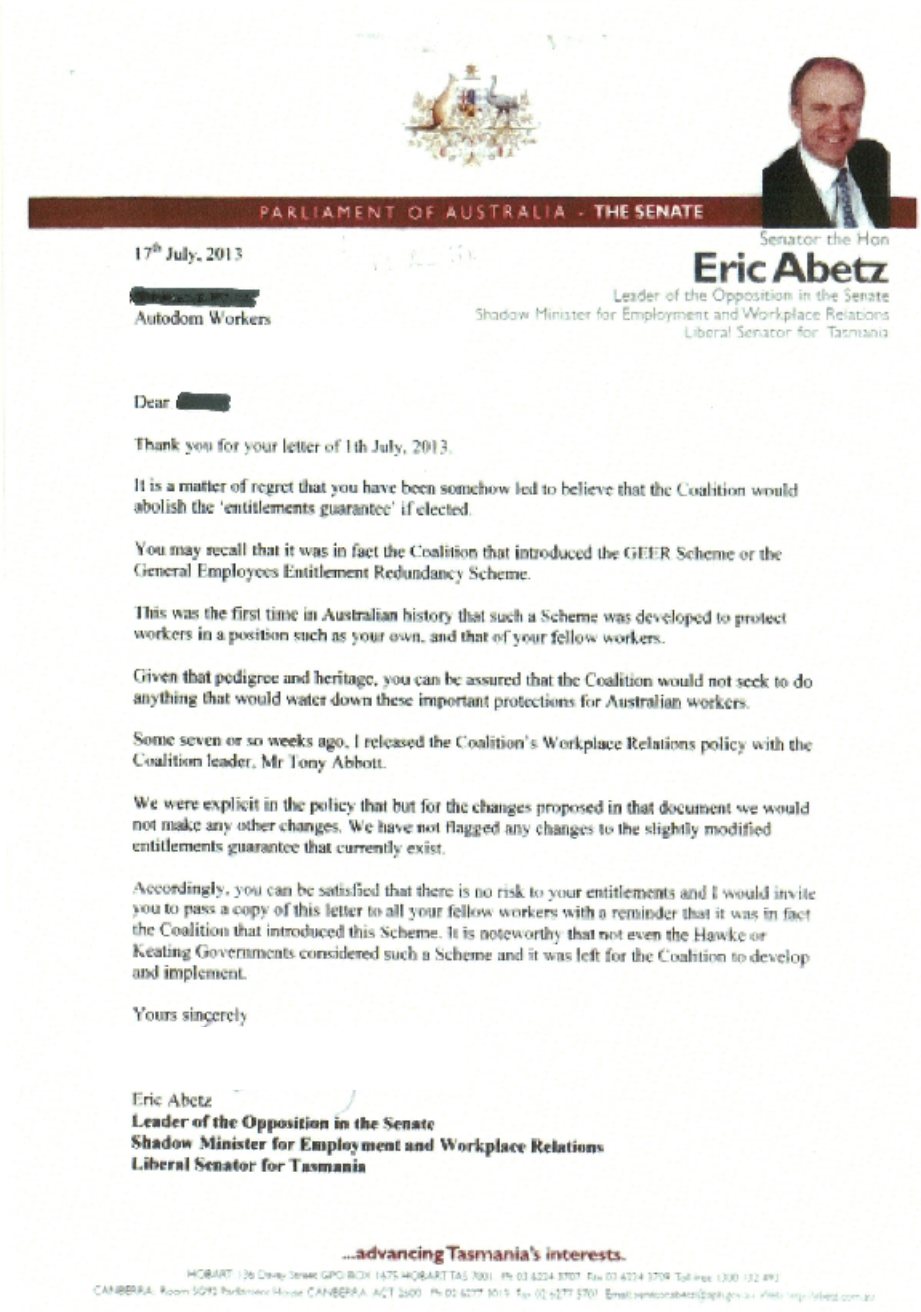
In its submission to Committee, ASIC foreshadowed that it would produce guidance material in relation to the new powers it was granted by the COPA Act. Specifically, ASIC submitted:

> "The Bill introduces a significant new discretion for ASIC to wind up an abandoned company to assist employees access GEERS. We consider it desirable that ASIC provide policy guidance on the circumstances when it will

> use that discretion. In particular, this guidance will need to consider ASIC's role in light of the responsibilities of other key agencies with an interest in this area including DEEWR and the ATO.
>
> We will commence preparing this guidance once the final form of the legislation is known. In accordance with our normal consultation processes, we will consult publicly in respect of any guidance."

The ACTU was not consulted in the formulation of any such guidance material, notwithstanding our very clear interest. Regulatory Guide RG242 must be revised to achieve consistency with the legislation and its policy underpinnings.

Appendix 2



PARLIAMENT OF AUSTRALIA - THE SENATE

Senator the Hon
Eric Abetz
Leader of the Opposition in the Senate
Shadow Minister for Employment and Workplace Relations
Liberal Senator for Tasmania

17th July, 2013

[redacted]
Autodom Workers

Dear [redacted]

Thank you for your letter of 11th July, 2013.

It is a matter of regret that you have been somehow led to believe that the Coalition would abolish the 'entitlements guarantee' if elected.

You may recall that it was in fact the Coalition that introduced the GEER Scheme or the General Employees Entitlement Redundancy Scheme.

This was the first time in Australian history that such a Scheme was developed to protect workers in a position such as your own, and that of your fellow workers.

Given that pedigree and heritage, you can be assured that the Coalition would not seek to do anything that would water down these important protections for Australian workers.

Some seven or so weeks ago, I released the Coalition's Workplace Relations policy with the Coalition leader, Mr Tony Abbott.

We were explicit in the policy that but for the changes proposed in that document we would not make any other changes. We have not flagged any changes to the slightly modified entitlements guarantee that currently exist.

Accordingly, you can be satisfied that there is no risk to your entitlements and I would invite you to pass a copy of this letter to all your fellow workers with a reminder that it was in fact the Coalition that introduced this Scheme. It is noteworthy that not even the Hawke or Keating Governments considered such a Scheme and it was left for the Coalition to develop and implement.

Yours sincerely

Eric Abetz
Leader of the Opposition in the Senate
Shadow Minister for Employment and Workplace Relations
Liberal Senator for Tasmania

...advancing Tasmania's interests.

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