

Australian Manufacturing Workers' Union's Submission
Senate Education and Employment Legislation Committee Inquiry
Fair Entitlements Guarantee Amendment Bill 2014

About the Australian Manufacturing Workers' Union



The AMWU's purpose is to improve members' entitlements and conditions at work, including supporting wage increases, reasonable and social hours of work and protecting minimum award standards. In its history the union has campaigned for many employee entitlements that are now a feature of Australian workplaces, including occupational health and safety protections, annual leave, long service leave, paid public holidays, parental leave, penalty and overtime rates and loadings, and superannuation.

The Australian Manufacturing Workers' Union (AMWU) is registered as the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union". The AMWU represents around 100,000 members working across major sectors of the Australian economy, in the manufacturing sectors of vehicle building and parts supply, engineering, printing and paper products and food manufacture. Our members are engaged in maintenance services work across all industry sectors. We cover many employees throughout the resources sector, mining, aviation, aerospace and building and construction industries. We also cover members in the technical and supervisory occupations across diverse industries including food technology and construction. The AMWU has members at all skills and classifications from entry level to Professionals holding tertiary qualifications.

Executive Summary

- The Senate should reject the reduction of employee redundancy entitlements to be paid by the Fair Entitlements Guarantee to 16 weeks.
- The Senate should hold the Government to account for its commitment made before the election that it would not change the Fair Entitlements Guarantee.
- Employees who are going to experience the harshest edge of the Government's proposed change will be mature age and elderly workers at a late stage of their career and who have worked with a company for an extended period of time.
- The Government's own programs recognise the disadvantages and difficulties faced by mature age job seekers.
- The Senate and the Government should look at other areas of reform to find savings or to improve recouping employee entitlements from directors of companies who trade insolvent.
- The Government should be looking at ways it can use the budget to promote economic growth and support businesses to stay afloat rather than entertaining unfair budget cuts.

Introduction

1. The Senate has referred the Fair Entitlements Guarantee Bill 2014 (the Bill) to the Senate Education and Employment Legislation Committee for inquiry.
2. The Australian Manufacturing Workers' Union's (AMWU) members support laws that promote and protect fair pay and conditions of work. The AMWU makes the following submissions to the inquiry with a view to ensuring legislation acts to protect employee entitlements.
3. Australian Manufacturing is experiencing a particularly difficult period at the moment with the Government still without a clear policy for promoting the long term prospects of manufacturing in Australia. During this interregnum of manufacturing policy leadership the Government has allowed automotive manufacturing jobs to be shifted off shore. Further to this, the Government is also now indicating that high tech defence manufacturing jobs may also be off shored directly by decision of the Government. These submissions are made in the context where a significant number of AMWU members may become directly affected by the proposed changes to the Fair Entitlements Guarantee.
4. The Bill has a number of proposed amendments to the Fair Entitlements Guarantee Act 2012.
 - a. Introducing a cap on redundancy entitlements of 16 weeks;
 - b. Debt owed offset against entitlements;
 - c. Amounts required to be deducted;
 - d. Payments can be made to deceased estate;
 - e. Ensuring that an employee "reasonably pursued" their entitlements is not a consideration for eligibility;
 - f. Arrangements for costs associated with appeals;
5. The AMWU is primarily concerned with addressing the unfair impact of the 16 week cap on redundancy entitlements, which proposed cut to the budget announced as part of the raft of measures in the Government's unfair budget for 2014 in May.
6. The AMWU is an affiliate of the Australian Council of Trade Unions (ACTU) and supports the submissions of the ACTU.
7. The Senate should reject the 16 week cap because the proposed change is a breach of the Government's pre-election commitment not to change the Fair Entitlements Guarantee.
8. Further to breaking its promises, the Government's proposed change is an unfair budget cut that targets elderly and mature aged workers. Workers who because of their employer becoming bankrupt have to look for a job in an environment where there is inherent but difficult to prove discrimination against the hiring of mature age workers.

The Coalition's election policy and commitments

9. The *Fair Entitlements Guarantee Amendment Bill* 2014 is described in the Second Reading Speech as being to introduce changes “to not only ensure its smooth operation, but importantly its future sustainability.”¹
10. Prior to the election the then Shadow Minister for Employment and Workplace Relations, Senator Eric Abetz gave a concrete commitment not to change the *Fair Entitlements Guarantee* if the Coalition were elected to form Government.
11. In a letter to a member of the AMWU dated 17 July 2013, Senator Abetz said the following:

“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 Entitlements 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 the 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 exists.

*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.”*²

12. The Coalition’s election policy document titled the *Coalition’s Policy to Improve the Fair Work Laws* (May 2013) contains no references to any change to the *Fair Entitlements Guarantee*, as Senator Abetz letter (17 July 2013) correctly identifies. In fact the document is equally unequivocal in its completeness:

*“The details of the Coalition’s Policy to Improve the Fair Work Laws are spelled out clearly in this document. Based on the laws as they stand now, the Coalition has no plans to make any other changes to the Fair Work laws.”*³

13. The Government is now going back on its word by attempting to change that “slightly modified entitlements guarantee.” Those slight modifications are not slight but are important modifications to the GEERS which allow the proper protection of employee entitlements and take into account the impact of unemployment on mature age workers.

¹ The Hon. Christopher Pyne MP, *Second Reading Speech, Fair Entitlements Guarantee Amendment Bill* 2014, 4 September 2014 House of Representatives.

² Letter from Senator Abetz 17 July 2013 is attached to this submission at Attachment A.

³ Coalition Policy to Improve the Fair Work Laws, May 2013, Election Policy Document at p11 (available from the Parliamentary Library).

14. The Senate cannot allow this Government and the current Leader of the Government in the Senate to turn its back on this pre-election commitment to Australians. Senator Abetz must be held to his word which is evidenced clearly by the letter which he signed before the election.

Why the 16 week cap is Unfair

15. The justification for the 16 week cap in the Minister's second reading speech is because that is the standard found in the National Employment Standards (the NES). What the Minister does not explain is that the NES is the minimum statutory entitlement. It is not the "community standard" as the Minister purports in the second reading speech.
16. Employment conditions are not set by legislation alone and are not set by the *Fair Entitlements Guarantee Act* 2012. The system of workplace laws as regulated by the Fair Work Act 2009 is such that the minimum statutory entitlements as provided for the NES are built on top of or supplemented by Modern Awards and by Enterprise Agreements (also commonly called collective agreements or workplace agreements).⁴
17. Employees who might accrue significant redundancy entitlements are those who have negotiated enterprise agreements with redundancy entitlements above the NES. Once the entitlement is negotiated, employees would need to have worked a significant amount of time to have their service attract higher levels of redundancy.
18. Younger workers will not have the level of service necessary to accrue significant redundancy entitlements and would feel less of an impact from the proposed 16 week cap. Workers of newly formed companies are also unlikely to have negotiated significant redundancy entitlements in their Enterprise Agreements.
19. Against this background the types of employees who are mostly likely to be affected and who would feel the negative impact most harshly from the Government's unfair budget cut are employees who are:
 - a. mature aged or older workers;
 - b. who have negotiated increases in redundancy entitlements in their enterprise agreements over a long period of time;
 - c. who are unlikely to engage in further training; and
 - d. are either unlikely to find further employment because of the difficulty for mature age workers to find work or will find it incredibly difficult to find employment because of the mature age status.

⁴ Modern Awards apply across industries and occupations with their terms set by the Fair Work Commission. Modern Awards and the NES provide the safety net of minimum wages and conditions which apply to employees across the economy. Once an Enterprise Agreement is negotiated the Modern Award does not apply and conditions and entitlements for the work site become regulated by the Enterprise Agreement in conjunction with the NES. The relationship between Enterprise Agreements and the NES is such that terms of the Enterprise Agreement are usually superior to the NES and therefore supplement the NES. Modern Awards are often incorporated as terms of Enterprise Agreements in many agreements negotiated by unions to ensure that award entitlements are not excluded by the Enterprise Agreement. Agreements also must satisfy a Better Off Overall Test at the time they are approved by the Fair Work Commission, which involves a global comparison of the Enterprise Agreement against the Award/s which might otherwise apply.

Older mature aged workers will be the most negatively affected

20. The Government's proposed changes reflect a lack of concern for the particular needs of mature age workers who are unemployed. The Government appears not to have taken into account that employees with significant redundancy entitlements have only accrued significant redundancy entitlements through long term employment at a particular workplace. The entitlement only arises once their employment has been terminated.
21. The specific needs of mature aged workers and their difficulty in gaining employment are well known. At the Australian Human Rights Commission approximately two thirds of the complaints that we receive in the area of age discrimination are related to employment.⁵ According to the ABS, in 2011, 18 per cent of unemployed people over the age of 45 said they couldn't get work because they were 'considered too old by employers'.⁶
22. The need for supporting mature age job seekers is further evidenced by the Government's own "restart" wage subsidy program which provides a \$10,000 payment to employers who hire mature aged workers.⁷ This payment would not exist without the obvious need to provide an incentive for employers to give older job seekers a chance in recruitment processes and employment interviews.
23. The Minister for Employment, Senator Abetz's Explanatory Memorandum's Statement of Compatibility with Human Rights addresses the broad heading of "social security" without once mentioning the difficulties faced by older workers in obtaining employment once they lose their employment with a long term employer.
24. The same statement on compatibility with human rights goes on to address the financial sustainability of the Fair Entitlements Guarantee and highlights two figures which are meant to lend weight to the 16 week cap on redundancy entitlements: a figure of \$297, 693.22 paid under the 2011 reformed *GEERS* and another figure of \$175,921.26 paid under the *Fair Entitlements Guarantee Act* 2012. Without knowing the specifics of these particular cases we can approximate the age of the employees based on the formula for calculating the maximum redundancy entitlement.⁸ If the employee's redundancy pay was lower than the maximum under the legislation then the age approximation would increase.
25. For the first example provided by the Minister in his Explanatory Memorandum, we can approximate that the employee worked for at least if not more 31 years and was about 56 years of age. For the second example we can approximate that the employee worked for at least if not more than 18 years and was about 43 years of age.
26. The Government's unfair cut should also be seen in the context of the Government proposing to change the age pension to 70. Not only is the Government proposing that those losing their job late in their career, in their 40's or 50's should receive less of their redundancy entitlement, but they should also be in the job market for longer.

⁵ Australian Human Rights Commission, Annual Report 2010-2011, 2011, p. 115. At http://humanrights.gov.au/pdf/about/publications/annual_reports/2010_2011/AHRC_AnnualReport10-11_Final.pdf

⁶ Australian Bureau of Statistics, 6222.0 - Job Search Experience, Australia, July 2011. At <http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/6222.0Main%20Features3Jul%202011?opendocument&tabname=Summary&prodno=6222.0&issue=Jul%202011&num=&view=> (viewed 25 January 2012)

⁷ Details for this \$10,000 grant for employers is available at <http://employment.gov.au/restart-wage-subsidy>

⁸ In order to calculate the approximate age of the employee claiming: We assume the following inputs, the maximum weekly wage rate in the legislation of \$2,364 and assuming the redundancy is the maximum of 4 weeks per year, we can estimate the length of service for these employees. If we assume the employee commences work at the company which becomes insolvent at age 25. $y = \text{years employed}$, $z = \text{total entitlements paid by Fair Entitlement Guarantee}$. $\$2,364 \times 4y = z$; Solving this equation provides an estimate of years of service which added to 25 provides an estimate of the workers age. If the redundancy entitlement per year of service was lower, this would also increase the age.

27. The context of this measure is that it is a saving of about of \$20.8m a year from a \$261.65m a year program. This 10% saving will fall hardest on mature aged workers who would otherwise be entitled to a sum which reflects their length of service and loyalty to an organisation. It is also of note that had the organisation not become insolvent and employees worked until their retirement, they would not have received any redundancy entitlement. A company experiencing an insolvency event is a particularly unfortunate and hopefully unlucky event outside the control of the directors.

Moral Hazard

28. The Minister's second reading speech claims that:

"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."

29. This reason from the Government misunderstands the general use of redundancy entitlement, which is not primarily in instances of insolvency. Redundancy is predominantly used in organisations in restructures often as a result of introducing technology or reshaping an organisation to ensure its ongoing sustainability by refocusing areas of business. Good employers and managers negotiate hard on redundancy entitlements because they know to keep their business going long into the future, they need to make sure they can afford to reshape and restructure the business when required.
30. The Minister's explanation of moral hazard is a simplistic rationale which shows a misunderstanding of long term successful businesses who are in the business of constant change, innovation and growth.
31. The Minister's explanation of moral hazard also seems to be condoning a practice which may lead to the possibility of insolvent trading where employers enter into Enterprise Agreements with terms and conditions of employment which they know they cannot meet or satisfy.
32. Lastly, the Minister's concern about moral hazard is addressed by the current s.25 in the Act which provides for the Secretary of the Department administering the Fair Entitlements Guarantee to disregard recently agreed changes in terms and conditions. Under this section which is in the current Act, if an employer agrees to changes such as increasing redundancy entitlements in an enterprise agreement when it knows that it cannot satisfy the payment of those entitlements, then the Secretary may disregard that change and calculate entitlements based on the entitlement in the enterprise agreement before the change.

Other areas of reform to prioritise

33. The real moral hazard the Government should be focused on, is the hazard that directors will be trading insolvent and disregarding employee entitlement liabilities when determining if the corporation can meet its debts when they fall due. The incidences where directors have been trading insolvent and have not been prosecuted and the company has received advance payments through the Fair Entitlements Guarantee should be an area of concern for the Government that should be looked into by the Committee.
34. If the government wanted to increase the pool of assets available to recover creditor debts including the payments made under the Fair Entitlements Guarantee it would look more closely at the enforcement of directors duties under the Corporations law. The government should be looking to ensure that directors who do not discharge their obligations when it comes to ensuring that they are not trading insolvent become personally liable for the debts of the company.

35. Reform should focus on promoting companies in trouble appointing administrators as close as possible to the point when they can satisfy their debts rather than at the point when a large number of employees and creditors are left with their entitlements and debts unsatisfied.

Going for growth is the best way to avoid businesses going under

36. If the Government is serious about reducing the number of businesses becoming bankrupt or insolvent, it should prioritise growth and using fiscal policy (the budget) to promote economic growth. It shouldn't be seeking to make further cuts to the budget which will put downward pressure on economic growth.
37. Positive economic conditions also increase the likelihood that employment with service recognised will be provided by businesses who take over parts of businesses that are being liquidated. A strong jobs market where employees are in a strong bargaining position will result in more employees being transferred when businesses are sold with their full entitlements and conditions.
38. Recent modelling for Labour20 organisation showed that a *“coordinated mix of policies in the G20 targeted to increase the share of wages in GDP by 1%-5% in the next 5 years and to raise public investment in social and physical infrastructure by 1% of GDP in each country can create up to 5.84% more growth in G20 countries.”*⁹

What is the value of entitlements at risk?

39. Research conducted by the AMWU in the lead up to the enactment of the Fair Entitlements Guarantee around 2010 showed that more than 1.6 million private sector workers were owed more than 16 weeks redundancy pay. More than 250,000 of these workers, or around 1 in 6, are employed in the manufacturing sector. These 1.6 million workers are entitled to more than \$62 billion in redundancy payments. But at a maximum of 16 weeks GEERS only protects approximately \$25 billion. That leaves around \$37 billion of unprotected redundancy pay, almost \$6 billion of which is owed to more than 250,000 manufacturing workers. In other words potentially 1.6 million workers have almost \$37 billion of redundancy pay at risk because of the shortcomings of GEERS.
40. This amounts to approximately \$37 billion dollars which could assist workers as they transition through the difficult period of unemployment. Money which is used for keeping a family home from being foreclosed, keeping kids in school and putting food on the table. The redundancy entitlements negotiated by union in enterprise agreements also recognises that it is expensive for mature age workers to undertake further training or education whilst they have home loans and other liabilities people in their 40s and 50s generally have. Retaining support for these more adequate redundancy entitlements would allow employees to undertake further training or education to negate the difficulties faced by mature age workers in finding employment.

Conclusion

41. For the reasons outlined above, the AMWU submits that the Senate should reject the Government's proposed unfair budget cut to the Fair Entitlements Guarantee.

End

⁹ http://www.tuac.org/en/public/e-docs/00/00/0F/17/document_news.phtml (accessed 12 September 2014) the report was also published in the Age newspaper at <http://www.theage.com.au/national/more-pay-the-way-to-growth-says-report-20140911-10fo3u.html?skin=text-only> (accessed 12 September 2014).



PARLIAMENT OF AUSTRALIA - THE SENATE

17th July, 2013

Autodom Workers

Senator the Hon

Eric Abetz

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

Dear [REDACTED]

Thank you for your letter of 1st 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.