TEXTILE CLOTHING & FOOTWEAR
UNION OF AUSTRALIA

The Senate Education and Employment Legislation Committee

Inquiry into the provisions of the Fair Entitlements Guarantee Amendment Bill 2014

Submission of the Textile, Clothing and Footwear Union of Australia

(12 September 2014)

Submission
To the
Senate Education and Employment Legislation Committee

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Fair Entitlements Guarantee Amendment Bill 2014

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(12 September 2014)

INTRODUCTION

1. The Textile, Clothing and Footwear Union of Australia ('TCFUA') welcomes the opportunity to make this submission to the Senate Education and Employment Legislation Committee ('the Committee') Inquiry into the *Fair Entitlements Guarantee Amendment Bill 2014* ('the Amendment Bill').

2. The TCFUA is a registered organisation under the Fair Work (Registered Organisations) Act 2009 ('RO Act') with a national office in Melbourne and branches as follows:
   - TCFUA (Victorian Queensland Branch)
   - TCFUA (New South Wales, South Australian, Tasmanian Branch)
   - TCFUA (Western Australian Branch)

3. The TCFUA makes this submission on behalf of the national union and each of its branches.

4. The TCFUA is an affiliate of the Australian Council of Trade Unions ('ACTU') and support and adopt its submission made to the Inquiry in relation to the Amendment Bill.

5. The TCFUA provides this additional submission in order to specifically highlight its serious concerns regarding the proposed amendment to cap redundancy payments under the FEG Act to 16 weeks. We make these submissions generally, and in the context of the TCFUA's extensive experience regarding the impact of insolvency on employees in the textile, clothing and footwear industry ('TCF Industry').

6. We strongly oppose the contentions aspects of the Amendment Bill as referred to in the ACTU's submission; in particular, the reintroduction of the cap on payment of redundancy entitlements to 16 weeks. If passed into law, they will have a seriously detrimental effect on the lives and living standards of Australians who lose their wages and entitlements through no fault of their own. The proposed amendments will have a particularly disproportionate effect on older Australians with medium to long periods of service with their employer and who arguably have a reduced capacity to 'recover' from lost redundancy entitlements due to their age, more limited skill set and reduced working life. Such an outcome is inherently counter- productive to the government's other public policy objectives, including decreasing the reliance of older Australians on the aged pension as they transition into retirement.

7. In the TCFUA's submission, there is no reasonable policy justification for reversing a key provision of the Fair Entitlements Guarantee Act 2012 ('FEG Act'). It cannot be said that the government has a mandate for any legislative proposals which have the effect of diminishing the scheme underpinning the FEG Act. We note that whilst in Opposition, the Coalition's released policies[1] make no mention of its intention to reduce the quantum of entitlements claimable under the FEG Act or otherwise change current provisions to the detriment of workers.

8. As the primary national union which represents, and advocates for the industrial interests of workers in the TCF industry, the TCFUA is in a unique position to witness and document the working conditions and experiences of these workers, including in formal factory environments, sweatshops and at home. The TCFUA has been actively involved around the issues of corporate insolvency for over 20 years, given the huge impact of company collapses within the industry during that time.

9. The nature of the TCF industry and the demographic profile of its workforce set the context for why the provisions of the Fair Entitlements Guarantee Act 2010 ('FEG Act') are so critically important to supporting employees in circumstances when their employer becomes insolvent.

10. Industrial tribunals have over many years acknowledge that the TCF industry is characterised as:
    - Being low paid;
    - Combining both formal and informal (outwork) sectors;
    - Being largely award compliant;
    - As having a high percentage of workers from a NESB, the majority of whom are women; and
    - That there is little bargaining power for employees within the sector.[2]

11. Widespread non-compliance with minimum wages and conditions in the TCF industry is common and persistent. Most workers in the industry live from week to week and have minimal discretionary income other than their wages and leave entitlements. Many who have been made redundant after a life time working in the industry, struggle to find full time or secure employment again. A sizeable number who are retrenched have carried workplace injuries for long periods of time severely restricting their capacity to find alternative work. For these classes

[1] See for example 'The Coalition's Policy to Improve the Fair Work Laws (May 2013).
[2] Part 10A Award Modernisation, [2008] AIRCFB 550, 20 June 2008, at para [94]

of low paid TCF workers, many of whom have low levels of formal education, current programs of labour adjustment support are totally inadequate to equip them to obtain new, and alternative employment in a rapidly changing economy.

12. For decades, the TCF industry has also suffered from significant levels of company collapse and insolvency, leaving many thousands of workers both without ongoing employment and their accrued wages and entitlements. A common feature of TCF Industry insolvency has been the creation of complex corporate structures which separate employees from the assets of the company (leaving workers in the 'shell entity') and the subsequent rise of phoenix arrangements with apparent impunity. This has been nothing less than a scandal. The immediate, and extended impact of employer insolvency on TCF workers, their families and communities has in many cases been devastating, leading to entrenched income insecurity and poverty.

13. The TCFUA asks, where is the true 'moral hazard' in the field of company collapses and corporate insolvency? It lies not with groups of employees who enter into enterprise bargaining agreements in good faith but with employers (and their advisors) who:
    - Fail to operate their businesses in a professional and sustainable manner;
    - Who treat employees entitlements (including employee's superannuation) as an interest-free loan for their company;
    - Who fail to make proper provision for their employees' accrued and contingent entitlements;
    - Who liquidate one company (to avoid debts) only to open up another the next day in a different name, at the same premises, with the same assets to perform the same work.

14. It is important to remember that employees have no say over how a business is run, and have no control over a business's financial affairs or a business' arrangements with banks and other financial institutions. Employees do not have access to a company's financial and Profit and Loss statements prior to a company becoming insolvent. And yet when a company becomes insolvent, it is the employees who are uniformly most negatively affected given the significant loss of wages, leave and other entitlements. Whilst the FEG Act does not cover unpaid superannuation contributions, insolvency is typically characterised by significant losses of employee superannuation (both employer and voluntary contributions).

15. Moral hazards proliferate when corporation law fails to effectively allocate responsibility to those persons and entities who through recklessness or conscious design, fail to secure and protect the entitlements of employees. A consideration of what constitutes a 'moral hazard' in this area, must by implication, question where the bulk of the risk should lie – with the employer and directors who control the company or with the employees (often low paid) who provide their labour in exchange for wages. When the system of regulation fails, it is demonstrably unfair that employees bear the greatest burden of that impact.

FEG AMENDMENT BILL 2014 – PROVISION TO CAP REDUNDANCY PAYMENTS AT 16 WEEKS

16. Item 6 of the Amendment Act repeals paragraph 23(b) of the FEG Act (which currently provides a payment for redundancy of up to 4 weeks per year of service) with a new maximum redundancy cap of 16 weeks. In support of this amendment, the Government asserts that the change:
    - Will align the maximum redundancy pay entitlement under the scheme with the maximum payment set by the National Employment Standards,[3] and that such an alignment is 'appropriate given the Scheme's status as a safety net for workers who are owed debts by their insolvent employer';[4]
    - That the current redundancy entitlements payable has the potential to undermine the Scheme's financial viability and result in payments above 'what is necessary to provide a social insurance scheme for people made redundant as a result of their employer's insolvency;[5]
    - That the reduction in the cap to 16 weeks redundancy will 'affect only around six percent of future claimants who are paid an advance under the Scheme';[6]
    - That when a claimant is owed more than 16 weeks redundancy pay by their insolvent employer, they will be able to pursue that portion of the debt not paid by the Scheme in accordance with the Corporations Act 2001;[7] and
    - That the current scheme creates a 'moral hazard' by providing 'an incentive for employers and unions to sign up to unsustainable redundancy entitlements.[8]

[3] Fair Entitlements Guarantee Amendment Bill 2014; Explanatory Memorandum (House of Representatives) (4 September 2014) paras [15] & [16]
[4] Ibid; Explanatory Memorandum; Statement of Compatibility with Human Rights (p2)
[5] Ibid; (p3)
[6] Ibid; (p3)
[7] Ibid; (p3)
[8] Fair Entitlements Guarantee Amendment Bill 2014; Second Reading Speech (4 Sep 2014)

17. In the TCFUA's submission these grounds are not supportable in context of:

- the legislative purpose of the FEG Act;
- the reality of insolvency as it is impacts on affected employees who lose their entitlements;
- the multiple limitations of the Corporations law in protecting employee entitlements;
- the extremely low possibility that funds are available to employee creditors in an insolvency to meet their unpaid redundancy entitlements; and
- a consideration of the statutory safety net and its relationship to enterprise bargaining under the FW Act.

18. The objects of the FEG Act are:

> ***3. Objects of this Act***
> *The main objects of this Act are:*
> *(a) To provide for the Commonwealth to pay advances on account of unpaid employment entitlements of former employees of employers in cases where:*
> *(i) The employers are insolvent or bankrupt; and*
> *(ii) The end of the employment of the former employees was connected with that insolvency or bankruptcy; and*
> *(iii) The former employees cannot get payment of the entitlements from other sources.*
> *(b) To allow the Commonwealth to recover the advances through the winding up or bankruptcy of the employees and from other payments the former employees receive for the entitlements.*

19. It is clear from the Objects of the Act, that there was no legislative intention to 'align the payment of unpaid employee entitlements' to the level provided for under the National Employment Standards (NES). To the contrary, the history of the development of the FEG Act illustrates an intention by the then Labor government to 'provide the strongest protection of employee entitlements working Australians have ever seen'.[9] The FEG Act replaced the General Employee Entitlements and Redundancy Scheme and in doing so 'enshrined the Fair Entitlements Guarantee in legislation.'[10] This implemented the Labor party's clear policy[11] regarding the protection of employee entitlements released prior to the 2010 federal election which stated, in part:

[9] Fair Entitlements Bill 2013; Second Reading Speech
[10] Fair Entitlements Bill 2012; Second Reading Speech
[11] 'Protecting Workers' Entitlements Package'; Labor Policy document (25 July 2010)

'Every year, thousands of Australians are made redundant when the company they work for goes into liquidation – only to find out that the company had not set aside enough money to pay their entitlements.

Workers who lose their job in these circumstances have enough to worry about. They should not have to worry about being paid what they have already earned.
That is why the Gillard Labor Government will introduce a legislated Fair Entitlements Guarantee to ensure that workers' entitlements are protected even if the company they work for enters liquidation and cannot pay them what they are owed.
The Fair Entitlements Guarantee will protect redundancy pay, up to a maximum of four weeks for each year of service. This will mean that almost all workers will receive all of the redundancy entitlement they are owed…
The Fair Entitlements Scheme will replace the existing General Employee Entitlements and Redundancy Scheme (GEERS). Currently only 16 weeks of redundancy pay is covered by GEERS, even if employees have worked for the same company for decades.' [our emphasis]

20. It is self-evident, that the FEG Act was intended to provide a level of security or 'guarantee' for employees in relation to their accrued and contingent entitlements (including redundancy) in circumstances where those entitlements remained unpaid upon insolvency. In the description of the scheme established under FEG Bill 2012 as a 'safety net', the Explanatory Memorandum provided that:

    'This safety net could be characterised as 'social insurance' because it insures that employees' unpaid entitlements are met when their employer becomes insolvent. It thus seeks to protect individuals from lack of work-related income due to unemployment, and in this way promotes the right to social security.'[12] [our emphasis]

21. Employees have a justifiable and reasonable expectation that their entitlements (which form part of their contract of employment) are legally enforceable rights protected by the law. Many find it incomprehensible, that after long periods of service to one employer that those rights can be effectively extinguished (in a practical recovery sense) as a result of corporate insolvency.

22. Prior to the introduction into the GEERS Scheme of the enhanced redundancy payments, the TCFUA had regular examples of where employees lost significant amounts of redundancy benefits resulting from the insolvency of their employer. The following case studies are provided as illustrations of this point:

[12] Fair Entitlements Bill 2012; Explanatory Memorandum; Statement of Compatibility with Human Rights; p5

CASESTUDY 1: (2009)

MELBATEX PTY LTD t/as MELBA INDUSTRIES (IN LIQUIDATION)

- Longstanding Union collective agreements were in place at both of the company's plants (Geelong and Thomastown). Both agreements provided enhanced redundancy including 3.5 weeks per year of service plus (uncapped at Geelong, capped at 52.5 weeks at Thomastown). In addition, as part of the redundancy package, employees over 45 years of age received an extra 15% on the severance amount and a pay out of all accrued sick leave.
- The company became insolvent in early February 2009, Administrators (Grant Thornton) were appointed on 23/2/09.
- Liquidation commenced on 30/4/09. The Administrator continued to trade the business until late May 2009, however the business could not be sold as a going concern and all employees were terminated on 29/5/09.
- On 30 October 2009, GEERS paid out up to the GEERS cap of 16 weeks' severance (as it was then). The majority of employees had extensive periods of service and the company had no assets to pay the enhanced redundancy or the accrued sick leave.
- Total employee entitlements owed (for production employees) were approximately $6.5 million. Of this, approx. 4.7 mill was redundancy/severance & approximately. $875,000 was accrued sick leave.
- In respect of redundancy, overall, employees received (through GEERS) approximately one third of severance payable under their EBA's. The percentage received in relation to severance varied dramatically depending on the individual employee's length of service; i.e. the GEERS cap (as it was then) weighted less beneficially against long serving employees who have a higher severance entitlement but receive the same amount (16 weeks) as much shorter serving employees.
- **Example 1 – 59 year old male employee**
  - Over 43 years of service at time of termination
  - worked permanent 40 hour week
  - under EBA owed 169.95 weeks' severance ($115,461) and 1646 hrs ($29,599) for accrued sick leave
  - paid 16 weeks' severance by GEERS ($11,788 approx.)
  - difference between EBA severance and GEERS severance = 153.95 weeks ($103,673 approx.) Ultimately received (as part of dividend by Liquidator) 5 cents in the dollar for balance of severance owed – approximately. $5,183). This left approximately $98,500 in unpaid severance.
- **Example 2 – 63 year old female employee**
  - Just under 40 years of service at time of termination
  - worked permanent 40 hour week

- under EBA owed 156.98 weeks' severance ($119,316) and 944.45 hours ($18,891) for accrued sick leave
- paid 16 weeks' severance by GEERS ($13,120)
- Difference between EBA severance and GEERS severance = $106,196 (approx.). Received (as part of second dividend by Liquidator) approximately 5 cents in the dollar of balance of severance owed - approximately $5309.80. This left approximately $100,000 severance unpaid

CASE STUDY 2: (2006)

AUSTRALIAN TEXTILE COMPANY PTY LTD (IN LIQUIDATION)

- Synthetic Dyeworks Industries t/as Australian Dyeing Company ("ADC") operated a commissions dyeing business (textiles/fabrics) at a site in Clifton Hill (Victoria) for over 30 years until Dec 2006. At the commencement of 2006, ADC employed approximately 50 textile production employees, the majority of whom were long serving.
- ADC had generational union collective agreement in place on the workplace from 1996, including further enterprise agreements in 2002 and 2005. These agreements provided an entitlement to enhanced redundancy and severance including severance of 2.5 weeks per year of service (uncapped) and pay out of all accrued sick leave.
- Australian Textile Company Pty Ltd ("ATC") was incorporated on 25/1/2006 with the 2 same directors as ADC;
- In early 2006, ATC received a $2.8 million subsidy from Commonwealth government;
- Between Sep – Dec 2006, the operations of ADC were transmitted from ADC to ATC and the plant relocated form Clifton Hill to Sunshine (Victoria);
- A significant majority of employees of ADC were effectively forced to take up employment with the new entity at the new location ('acceptable alternative employment'), despite their and the TCFUA's real concerns as to the financial viability of the company;
- Administrators appointed to ATC on 4/2/2008 and continued to trade the business until 22/2/2008 at which time all employees were terminated. The Administrators determined that the business could not be sold as a going concern and the company was placed into liquidation on 28/2/2008.
- The Liquidators determined that approx. $2.3 million was owed by ATC for accrued and contingent entitlements (including enhanced severance and sick leave for approximately 60 employees);
- In Aug 2008, GEERS paid out accrued leave and up to 16 weeks' severance almost 6 months after all the employees had been made redundant prior to that.
- The Liquidators, in the liquidation of the assets of ATC, paid outstanding superannuation, a small percentage of accrued sick leave and nothing for enhanced

redundancy (over and above the 16 weeks already paid through GEERS). As per the priority rules of the Corporations Act 2001, the advances made by DEEWR for annual leave and LSL were repaid;

- The outcome ensured that the employees, received only a fraction of what they were entitled to under the EBA – many employees in their 50's and 60's had between 20 – 35/40 years' service, and were owed between 50 – 100 weeks' severance (of which they only received the GEERS advance of 16 weeks).

23. The TCFUA rejects the government's assertion that the level of current redundancy entitlements under the scheme places at risk the financial viability of the scheme. Based on the government's own assessment of the projected estimated numbers of workers who would be eligible for the higher redundancy entitlements under the scheme (approximately 6%) contradicts this contention. It also ignores the reality that any Commonwealth money 'saved' by reducing the level of redundancy payments payable under the scheme, will simply be offset by a corresponding increase in the Commonwealth's social security liability as redundant workers shift to Newstart and other payments earlier once their lower redundancy amounts are extinguished.

24. This unrecognised transfer of Commonwealth responsibility for income support from the FEG scheme to the social security system is no more than a shifting of the deck chairs resulting from the significant loss of employee entitlements from corporate insolvency. It comes at the expense of older, long serving employees who have collectively entered into enterprise agreements in good faith, but who will be forced to bear the brunt of their employer's failure to manage their business operations and make proper provision for their severance and other entitlements.

25. It is also counter-productive in context of a redundant worker's capacity to access substantive and appropriate retraining post redundancy. In the TCFUA's experience, in examining the long term employment prospects of workers retrenched in the industry, one of the greatest barriers to retraining is the need for workers to find any type of employment quickly in order to support themselves and their families. Typically, in the TCF industry, many workers do not have substantial savings or assets which can buffer them from an extended period of unemployment. This results in workers being effectively forced to take any form of low paid work they can find, usually casual or otherwise precarious employment. Consequently, many experience employment 'churning' as they move from one short term casual job to another, interspersed by

periods of unemployment and no income. In such circumstances, the potential to commit to a process of medium to longer term retraining programs is very limited**.**

26. The multiple barriers facing redundant TCF industry workers in obtaining appropriate retraining and alternative employment post retrenchment has been well documented over the last decade. For example, a landmark Monash University (Victoria) study[13] of 370 retrenched TCF workers in 2003 identified:
    - 36% had worked in their last job for 10 years or more prior to being retrenched
    - 96% of those retrenched had been working full time
    - For nearly 25%, the job from which they were retrenched was their first job
    - The mean time since retrenchment was 39 months
    - Only 54% of those surveyed had found work and only one in five had found work commensurate with their former TCF job in terms of hours, pay and conditions
    - Although 96% had worked full time, only 21% now worked full time, one fifth of the sample had found only casual employment after being retrenched their jobs
    - 81% had received no instrumental assistance from their past employer, the government or any agency since retrenchment.[14]

27. Since the above Report, the TCFUA has consistently identified in various submissions and reports, the deeply entrenched and structural problems facing retrenched TCF workers in accessing retraining and alternative employment.[15] One of the key conclusions drawn from our experience is the need for retrenched workers to have guaranteed income support whilst they complete longer term vocational education and training.[16]

[13] 'The Long Goodbye: TCF Workers, unemployment and tariff regulation'; A Report for the Department of Innovation, Industry and Regional Development (Victorian Government) prepared by the Centre for Work and Society in the Global Era, Monash University (August 2003)
[14] Ibid; pp4-5
[15] See the Reports: (TCFUA) 'Empty Promises'; A Report on the Textile Clothing and Footwear Structural Adjustment Package (SAP), 1 July 2005 – 30 July 2006 (1 October 2006); (TCFUA) 'More Empty Promises'; An update on the 'Empty Promises' Report on the Textile, Clothing and Footwear Structural Adjustment Package (TCF-SAP); (July 2008); (TCFUA) Submission to the Review of the Australian Textile, Clothing and Footwear Industries 2008 (May 2008)
[16] (TCFUA) Submission to the Review of the Australian Textile, Clothing and Footwear Industries 2008 (May 2008); p46

28. If an older, redundant worker received their full redundancy entitlements, they are in a demonstrably better position to prioritise retraining for alternative work because they have a level of income support for a longer period of time. This is important for many reasons, including enhancing social inclusion, and in encouraging the deferral of premature entry into early retirement because of lack of employment options.

29. This illustrates that the proposed amendment to cap redundancy payments under the FEG Act to 16 weeks makes poor economic sense as well as constituting poor public policy, disadvantaging those workers who have already unfairly borne the brunt of corporate collapse.

30. The government's contention that an employee is not prevented from pursuing their redundancy entitlements in excess of the 16 week cap in accordance with the Corporations Act 2001 may be technically correct. However, it conveniently ignores the reality of the majority of liquidations in the TCF industry, where there is little, if any, assets left in the insolvent entity which can be pursued by priority employee creditors. In the majority of cases there is simply no money available for any additional payments to employee creditors.

31. Prior to the changed GEERS scheme which provided for the greater redundancy entitlement, the TCFUA experienced numerous examples over decades where employees lost many millions of dollars in unpaid entitlements, in particular, redundancy and severance payments to which they were entitled under an enterprise agreement. In nearly every case, there was no effective capacity for the employee to reclaim that money through the liquidation process; either because there was insufficient realisable assets remaining in the insolvent entity and/or because the employee had no resources (having been made redundant with no money) to pursue such claims against the directors personally (for example, for breaches of the Corporations Act 2001, such as insolvent trading, uncommercial transactions etc.).

32. In any event, even where there are assets remaining in an insolvent company, the prospect of even partial redundancy and severance entitlements being paid out of the pool is rare. Section 556 of the Corporations Act 2001, sets out the order in which debts and claims must be paid in priority to all other unsecured debts and claims. After all expenses, expenses and costs of the liquidation and/or administration of the company, priority employee entitlements are required to be paid out by the insolvency practitioner in the order of (in summary):

- Wages);[17]
- Superannuation contributions and superannuation guarantee charge payable by the company;[18]
- Amounts due in respect to injury compensation;[19]
- Amounts due to employees under an industrial instrument in relation to leave of absence;[20]
- Retrenchment payments payable to employees. [21]

33. It is clear that for the great majority of employees owed redundancy entitlements (in excess of 16 weeks) arising from an insolvency, the potential of recovering the unpaid portion via the Corporations Act 2001 is extremely small. This theoretical possibility is not a justification for the government's proposed removal of current rights to redundancy payments under the FEG Act.

34. A further ground provided by the government to support the capping of redundancy payments to 16 weeks, is the so called 'moral hazard' that the enhanced redundancy payments purportedly represent under the FEG Act. It is contended that the inclusion of the greater redundancy entitlements 'incentivises' employers and unions to bargain for 'unsustainable redundancy entitlements' in the knowledge that if circumstances where the company fails, the FEG Act and the Australian taxpayer will pay for it.[22]

35. In the TCFUA's experience, there is simply no evidence that this is borne out in enterprise bargaining since the commencement of the enhanced GEERS scheme and the FEG Act. On the contrary, in the TCF industry, those workplaces which have enterprise agreements which contain redundancy entitlements in excess of the NES safety net have almost uniformly had generational enterprise agreements going back 10, 15, 20 years with identical or similar redundancy provisions i.e. the elements of the 'bargain' in respect to redundancy is completely disconnected from the existence of the former GEERS scheme or the current provisions of the FEG Act. Enterprise bargaining by nature, is often characterised by hard bargaining by both sides and it is simply unheard of that an employer would 'agree' to a claim of enhanced redundancy entitlements on the basis of the current provisions in the FEG Act.

[17] Corporations Act 2001; s556(1)(e)(i)
[18] Ibid; s556(1)(e)(i)
[19] Ibid; s556(1)(f)
[20] Ibid; s556(1)(g)(i) – (iv)
[21] Ibid; s556(1)(h)
[22] Fair Entitlements Guarantee Amendment Bill 2012; Second Reading Speech (4 Sep 2014); p1

36. It is also worth noting that as part of the process of enterprise bargaining, there is commonly a trade-off of some terms and conditions in exchange for others; thus, a group of workers may negotiate for better redundancy entitlements at the expense of increased flexibility for the employer or dropping off on other claims. The integrity of the bargain reached in such circumstances is important to the legislative industrial framework. A significant part of the FW Act[23] is devoted to providing a detailed schema which governs the rules under which enterprise bargaining and the taking of industrial action can take place. The statutory safety net of terms and conditions comprising of modern awards, the NES and the minimum wage under the FW Act, represents the minimum 'floor' upon which the framework of enterprise bargaining is premised. One of the key objects of the FW Act is:

    'achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action'.[24]

37. Similarly, the modern awards objective (s134) includes a requirement that the Fair Work Commission expressly take into account 'the need to encourage collective bargaining'. Enterprise bargaining is a key and critical component of the national industrial relations system in Australian. Yet, the government's approach to the security of employee entitlements in respect to redundancy is completely inconsistent. The effect of the FEG Bill is to essentially say to employees who have collectively bargained in good faith, that the basis of their 'bargain' relating to redundancy entitlements will not be recognised for the purposes of the entitlements guarantee. So having done what the Fair Work legislation expressly encourages parties to do (i.e. bargain at the enterprise level), employees who are made redundant as a result of their employer's actions otherwise lose the benefit of their EBA redundancy entitlements.

38. A recent example of an insolvency in the TCF industry, illustrates the difference between the impact on employees of claiming under the current FEG Act, as compared to the previous GEERS scheme under which redundancy entitlements were capped at 16 weeks (i.e. prior to 1 January 2011).

[23] Fair Work Act 2009; Part 2-4 (Enterprise Agreements); Part 3-3 (Industrial Action)
[24] Ibid; section 3(f)

CASESTUDY 3: (2014)
BRUCK TEXTILES TECHNOLOGIES PTY LTD

- On 11 July 2014, Bruck Textile Technologies Pty Ltd went into liquidation. As a result, approximately 60 employees were made redundant. The company, having sold its business and assets to a related company – Australian Textile Mills Pty Ltd – , was able to avoid paying those employees the entitlements due to them under the National Employment Standards and their enterprise agreement, the *Bruck Textiles Enterprise Agreement 2011*. Employees received no payment in respect of their wages or other entitlements payable under the *Bruck Textiles Enterprise Agreement 2011*, at the time that their employment ended.

- The *Bruck Textiles Enterprise Agreement 2011*, was approved by the Fair Work Commission on 25 January 2012 and had a nominal expiry date of 25 January 2015. The *Bruck Textiles Enterprise Agreement 2011* also incorporated the relevant modern award, the *Textile, Clothing, Footwear and Associated Industries Award 2010* (at clause 6 and Appendix 1) and the *Bruck Textiles Pty Ltd Redundancy Agreement 1997* (at clause 20.7 and Appendix 2).

- The *Bruck Textiles Pty Ltd Redundancy Agreement 1997* provided for redundancy payments in relation to years of service together with payment of accumulated sick leave. The calculation for years of service was up to 3.5 weeks for each year of service, calculated on a pro-rata on completed months of service and capped at 75 weeks. The Redundancy Agreement also provided for additional notice, consultation obligations and a selection process.

- The *Bruck Textiles Pty Ltd Redundancy Agreement 1997* was negotiated between workers and the company from around 1994, and its inclusion in all enterprise agreements has been negotiated for each subsequent enterprise agreement since that time. It is not a recent feature of the enterprise agreement, nor made in collusion to provide workers with a benefit under FEG or any of the predecessor schemes.

- Redundancy payments are compensation for the loss of employment through no fault of the employee. The compensation recognises the hardship an employee experiences as a result of termination of employment due to redundancy and the amount of the redundancy payment is intended to compensate for loss of accrued but contingent benefits, including loss of sick leave. The standard minima in the NES does not recognise loss of contingent benefits, except in a generalised way, leaving enterprise agreements to negotiate the relevant amount for their particular circumstances. In the negotiated agreement that covers the employment of the employees of Bruck, the parties have expressly recognised that the loss of sick leave should be compensated at a level that differs for each employee based on the amount of personal leave they have accrued, and the amount they have used or not used.

- The reduction to 16 weeks pay as the maximum entitlement of redundancy pay punishes workers when their employment has ended under circumstances over which they had no control. About 80% of the Bruck employees who were made

redundant had more than 10 years of service. More than 50% of the Bruck employees who were made redundanct had more than 20 years of service.

- The reduction to 16 weeks pay as the maximum entitlement would leave workers like the Bruck employees out of pocket by tens of thousands. This change has no effect on recovering funds from the company or its directors, and allows the company and its directors to get away with avoidance of employee entitlements.

- Former employees of Bruck were offered work with the related company, Australian Textile Mills Pty Ltd. These workers were effectively forced to accept the employment offer with the related entity, doing the same work at the same location. These workers have real concerns about the financial viability of the related company, given the history. A majority of these workers have greater than 10 years' service with Bruck. These proposed changes would have direct and highly detrimentally effects for these workers.

CONCLUSION

39. Corporate insolvency is one of the most damaging and distressing experiences to which a worker can be subjected. It leaves a worker both retrenched and without some or all of their wages and accrued leave and redundancy entitlements. For many, accessing retraining and finding alternative work is made doubly difficult when they have no or minimum income support for an extended period of time. Workers rightly expect that the law should protect them and their entitlements in circumstances of insolvency. It is demonstrably evident that the Corporations Law has failed in this regard. In the TCFUA's submission it unfair and both socially and economically regressive that workers should bear the disproportionate burden of the effects of insolvency.

40. It is for these reasons that the TCFUA strongly opposes the reduction in the amount of redundancy payment (capped at 16 weeks) advanced under the FEG Act as proposed in the Amendment Bill. In conclusion, the TCFUA urges the Senate Education and Employment Legislation Committee to reject the amendment and retain the current scheme under the FEG Act.

Textile, Clothing and Footwear Union of Australia

(National Office)

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