



# Fair Entitlements Guarantee Amendment Bill 2014 Inquiry

## September 2014

## EXECUTIVE SUMMARY

ACCI welcomes the opportunity to make submissions in relation to the Senate Education and Employment Legislation Committee inquiry into the *Fair Entitlements Guarantee Amendment Bill 2014* (Bill) and makes this submission in support of the Bill's passage.

ACCI supports the adjustments to a scheme which provides protection for redundant employees in circumstances where a business is liquidated or declared bankrupt. The scheme must be one of last resort, financially sustainable and not cause distortions in the agreement making process. ACCI submits that the amendments proposed within the Bill will help to sustain an appropriate level of protection and will better align the Fair Entitlements Guarantee Scheme (FEGS) with the original intended objects of a publicly funded scheme.

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is the leading voice of business in Australia**

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# 1. BACKGROUND

Taxpayer funded safety net payments to eligible employees in the event of their employer's insolvency derive their origins from the Howard Government's introduction of a scheme of last resort in the form of the Employee Entitlements Support Scheme (EESS) in 2000 and the subsequent Government Entitlements and Redundancy Scheme (GEERS) in 2001.

GEERS originally provided for a maximum payment of eight weeks, consistent with the industrial standard set out in most federal and state awards. This standard within awards stemmed from the [Termination, Change Redundancy Case of 1984](#). ACCI expressed its support for GEERS in its original form as it had represented a proportionate and effective policy response. The introduction of the scheme represented a significant addition to the social safety net for employees in Australia.

In 2004 the Australian Industrial Relations Commission handed down [its Redundancy Case Decision \(PR032004\)](#) which increased (excessively in ACCI's view) the maximum redundancy entitlement in federal awards from eight weeks to 16 weeks. A number of significant changes to GEERS were affected subsequent to this decision.

In October 2005 the following changes to GEERS were administratively introduced:

- inclusion of assistance for underpaid wages, limited to a three-month period prior to the date of employer insolvency;
- expanded interpretation of 'notice' clauses such that assistance was to be provided for payment in lieu of notice even if that is not specifically mentioned in the relevant industrial instrument;
- expansion to include employees who resigned for whose employment was terminated no more than six months prior to the date of the insolvency;
- limited assistance for previously ineligible claimants resulting from aligning the definition of 'excluded employees' under GEERS with the definitions contained in section 556(1) of the *Corporations Act 2001*.

In 2006 the maximum payment under GEERS was increased to 16 weeks generally and eight in the case of small business employees, based on the redundancy standard set by the AIRC in 2004.

GEERS provided a considerable level of protection for employees, while allowing recovery to be made by the taxpayer from available monies once assets were distributed.

The *Fair Work Act 2009* (Cth) introduced the National Employment Standards (NES) which expanded the legislated safety net to include an entitlement to redundancy pay for national system employees. Relevantly, the maximum redundancy payment under the NES is 16 weeks.

The current Fair Entitlements Guarantee Scheme (FEGS) was introduced via the *Fair Entitlements Guarantee Act 2012* which received Royal Assent on 28 November 2012, replacing GEERS. FEGS provides financial assistance to former employees in the form of an ‘advance’ where the end of their employment is linked to the insolvency or bankruptcy of their employer. After making the advance the Commonwealth has the right to recover the amount that was advanced through the winding up or bankruptcy process of the employer. The amount of the ‘advance’ is determined in accordance with the person’s ‘governing instrument’ as defined in the statute (i.e. as set by an award, agreement, contract or legislative entitlement) and payment up to the following amounts may be made to eligible workers:

- redundancy pay of up to four weeks per full year of service;
- up to 13 weeks’ unpaid wages;
- annual leave and long service leave payments; and
- payment in lieu of notice of up to five weeks.

While FEGS largely picked up the conditions in GEERS, it converted the scheme from an administrative scheme to a legislative scheme and introduced more generous payments. Of particular note, there is no capping of the maximum amount of redundancy pay nor is there a correlation to the redundancy standard reflected in the NES. As noted in the First Report of the National Commission of Audit *‘Towards Responsible Government’*, under FEGS someone who has worked with the firm for 25 years could receive the equivalent of full pay for 100 weeks, plus other entitlements. Such a payment is well out of step with the general community standard of redundancy and the statutory minimum under the NES which is capped at 16 weeks.

There were risks created by the expansion of the scheme in this way and the Bill will help address such risks, although the conversion from an administrative scheme to a legislative scheme has removed the capacity of Governments to flexibly manage the scheme in the face of changing circumstances.

## 2. THE CASE FOR CHANGE

At the time of debating the *Fair Entitlements Guarantee Bill 2012* the then Opposition moved amendments in an attempt to see payments capped. It is unfortunate that the proposed amendments did not pass and views put forward in support of a cap remain valid. In particular:

- The design of the scheme currently has the potential to distort bargaining for agreements, with excessive redundancy entitlements sought in the knowledge that they will be protected under FEGS (i.e. four weeks per year of service) but ultimately placing upward pressure on an already generous legislative standard;
- It encourages an ‘all care and no responsibility’ dynamic because the Government (and ultimately the taxpayer) may end up picking up the tab for redundancy entitlements under the scheme. As was noted in the [Bill’s Second Reading on 4 September 2014](#) by the Hon. Christopher Pyne, Minister for Education, in reference to uncapped redundancy payments under FEGS:

*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.*

The First Report of the National Commission of Audit 'Towards Responsible Government' set out a number of recommendations aimed at ensuring that Government spending is placed on a sustainable long term footing. Of note Recommendation 47 contained within the First Report recommended the introduction of a cap of maximum redundancy payment equivalent to 16 weeks' pay as well as limiting the wage base of the scheme to Average Weekly Earnings.

In making its recommendation the National Commission of Audit had observed that total payments under the General Employee Entitlements and Redundancy Scheme and FEGS have increased significantly since 2007-08, even though growth in the number of insolvencies has been relatively stable. The trajectory of the increase in the cost of FEGS is concerning and ACCI submits that changes to the scheme should be made to better ensure its sustainability.

It is within this context that First Report of the National Commission of Audit stated:

*Consistent with the principle that government should not and cannot eliminate or insure every risk to the community, the Commission considers that there is a strong case for re-introducing caps into the payments available under the scheme. A cap of 16 weeks for redundancy pay could be introduced, with a 26 week cap for total payments under the scheme. A further option would be to change the wage base upon which the Fair Entitlements Guarantee Scheme applies. Currently the entitlements are paid up to a maximum wage of \$2,451 per week. This could be changed to Average Weekly Earnings, which are currently \$1,105 per week.*

It was open to the Government to adopt this recommendation in its entirety when formulating its 2014 Federal Budget however it has opted for a more tempered response. The 2014 Federal Budget proposed to introduce a 16 week cap on entitlements in line with the National Commission of Audit recommendation, but rather than bringing the wage base in line with Average Weekly Earnings, it instead adopted a freeze on indexation of the Maximum Weekly Wage (MWW) from 1 July 2014 to 30 June 2018. This response is balanced and reasonable, noting that employees claiming an entitlement above the amount paid under FEGS retain their rights as creditors to recoup any outstanding entitlements in the winding up process. ACCI supports the response which the Government predicts will save of \$87.7 million over four years.

### 3. ACCI'S SUPPORT OF THE BILL'S PROVISIONS

As noted above, ACCI supports the proposed changes as set out in Item 6 of the Bill seeking to cap the maximum redundancy payment under FEGS at 16 weeks. The scheme is intended to be one of last resort and in the current climate, there should be no taxpayer funded assistance to guarantee redundancy payments that exceeds the maximum prescribed entitlement in the NES.

ACCI also supports technical amendments contained within the Bill including:

- the inclusion of a new section 7A and consequential amendments which 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). ACCI notes that such a requirement becomes relevant when payment is made to the claimant;
- amendments which 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 inclusion of a new subsection 32(2A) which will clarify that when a debt owed by a claimant to his or her employer is greater than the employment entitlement an employee would otherwise receive under the FEGS , it can be offset;
- the inclusion of a new section 49A which will 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.

## 4. CONCLUDING COMMENTS

The non-payment of employee entitlements on insolvency is a relevant public policy concern. Any remedy must appropriately consider and balance the interests of employees, employers, creditors, taxpayers and the economy as a whole. While ACCI supports the Bill, the original conversion from an administrative scheme to a legislative scheme removed valuable flexibility and it should be recognised that the most effective measure to ensure the payment of employee entitlements is a solvent and profitable business and the broader policy response should be formulated in this context.

ACCI submits that the amendments proposed within the Bill will deliver a policy response that is more appropriate and proportionate to the extent of the problem. The amendments address the financial sustainability of the scheme and the potential for distortions in bargaining currently associated with FEGS.

## 5. ABOUT ACCI

### 5.1 Who We Are

The Australian Chamber of Commerce and Industry (ACCI) speaks on behalf of Australian business at a national and international level.

Australia's largest and most representative business advocate, ACCI develops and advocates policies that are in the best interests of Australian business, economy and community.

We achieve this through the collaborative action of our national member network which comprises:

- All eight state and territory chambers of commerce
- 29 national industry associations
- Bilateral and multilateral business organisations.

In this way, ACCI provides leadership for more than 300,000 businesses which:

- Operate in all industry sectors
- Includes small, medium and large businesses
- Are located throughout metropolitan and regional Australia.

## 5.2 What We Do

ACCI takes a leading role in advocating the views of Australian business to public policy decision makers and influencers including:

- Federal Government Ministers & Shadow Ministers
- Federal Parliamentarians
- Policy Advisors
- Commonwealth Public Servants
- Regulatory Authorities
- Federal Government Agencies.

Our objective is to ensure that the voice of Australian businesses is heard, whether they are one of the top 100 Australian companies or a small sole trader.

Our specific activities include:

- Representation and advocacy to Governments, parliaments, tribunals and policy makers both domestically and internationally;
- Business representation on a range of statutory and business boards and committees;
- Representing business in national forums including the Fair Work Commission, Safe Work Australia and many other bodies associated with economics, taxation, sustainability, small business, superannuation, employment, education and training, migration, trade, workplace relations and occupational health and safety;
- Representing business in international and global forums including the International Labour Organisation, International Organisation of Employers, International Chamber of Commerce, Business and Industry Advisory Committee to the Organisation for Economic Co-operation and Development, Confederation of Asia-Pacific Chambers of Commerce and Industry and Confederation of Asia-Pacific Employers;
- Research and policy development on issues concerning Australian business;
- The publication of leading business surveys and other information products; and
- Providing forums for collective discussion amongst businesses on matters of law and policy.

## ACCI MEMBERS

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