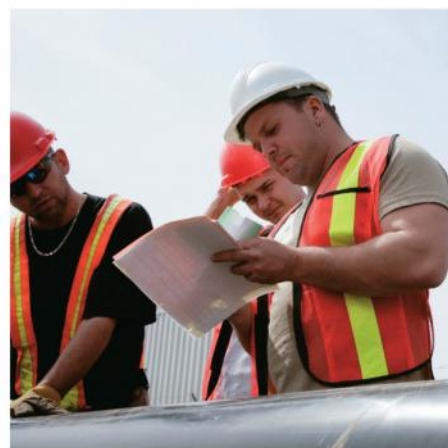


**Submission to the Senate Education and  
Employment Legislation Committee**

**12 September 2014**

**Fair Entitlements Guarantee Amendment Bill 2014**



## Introduction and earlier submissions

The Australian Industry Group (Ai Group) makes this submission to the Senate Education and Employment Legislation Committee's inquiry into the *Fair Entitlements Guarantee Amendment Bill 2014*.

Ai Group has been at the forefront of the public debate about the protection of employees' entitlements over many years and we have worked hard to ensure that mechanisms to protect entitlements are fair on both employees and employers, and are workable.

Before addressing the specific provisions of the Bill, we have set out below some extracts from relevant Ai Group submissions over the past six years about the protection of employees' entitlements in circumstances of insolvency:

### 1. An extract from Ai Group's June 2008 submission to the Bracks Review of the Australian Automotive Industry:

#### **"Protection of employees' entitlements**

Over the past seven years, the automotive industry has been targeted by unions as part of a campaign to implement costly and damaging arrangements for the protection of employees' entitlements in the event of insolvency, and to increase union power.

In 2001 and 2002, disputes at Tristar Steering and Suspension and Walker Australia, over the establishment of a union trust fund called Manusafe (later renamed NEST), brought the automotive industry to a halt. As set out in the Productivity Commission's 2002 *Review of Automotive Assistance Inquiry Report*, "estimates of the cost of lost production from these two disputes have been as high as \$300 million and \$130 million, respectively".

Given the level of industrial disputation which was occurring and being threatened in the automotive and other industries in 2001, Ai Group urged the Federal Government to introduce the General Employee Entitlements and Redundancy Scheme (GEERS) which came into operation in September 2001.

Ai Group and EEASA strongly support GEERS. The scheme has been very successful in allaying employee fears about the loss of their entitlements.

GEERS does not operate in isolation. Under the *Corporations Act*, Directors of companies have a legal duty not to trade insolvently and become personally liable for debts incurred if they do. Directors of a company also have a legal duty to ensure that care is taken in managing a company. This includes regularly reviewing the company's financial position. The *Corporations Act* was amended on 30 June 2000 to penalise companies and company directors who enter into transactions with the intention of avoiding the payment of employee entitlements. (Maximum penalty 10 year gaol term and/or \$110,000 fine).

Under Australian accounting standards, companies are required to provide for the amount of long service leave and annual leave that is due and is expected to be paid in the future. Further, if it is known that employees will be made redundant then the relevant amount of redundancy pay must be provided for. These amounts appear in a company's accounts and the amount of profit earned in the year is reduced accordingly.

The success of these mechanisms is obvious - 99.9% of employers pay entitlements when due.

The existing legislative provisions and other arrangements are operating effectively and provide appropriate protection for employees' entitlements.

However, now that GEERS has been in operation for nearly seven years it would be worthwhile to enshrine the scheme within legislation. Such an approach would undoubtedly attract wide public support. Further, it would negate consistent union criticism that the scheme is administrative in nature and could be amended or abolished at any time.

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GEERS is working effectively and has addressed the entitlement protection issue in a responsible and appropriate way....."

**2. An extract from a submission made on 1 October 2010 to then Minister for Workplace Relations, Senator the Hon Chris Evans:**

**"Announced changes to GEERS**

Ai Group is very concerned about the changes to GEERS which were announced during the lead-up to the Federal election. In our view the changes are unfair and risky, and would create major moral hazards. The changes were developed without industry involvement, despite the fact that Ai Group has been at the forefront of protection of entitlements developments over the past decade.

We strongly support GEERS. The scheme has been very successful in allaying employee fears about the loss of their entitlements. The annual cost of around \$178 million per annum is affordable and represents a responsible use of public funds.

We have argued for several years that GEERS should be incorporated within legislation to address union criticism that the scheme could be abolished at any time, and we support this aspect of the pre-election announcement. However, we are very concerned about the proposed increase in the level of redundancy pay protection to a maximum of four weeks per year of service. The anticipated additional cost of \$60.8 million over 4 years (i.e. \$15.2 million per year) appears to be very optimistic and risky as highlighted by the following example:

**Example**

A company with 2000 employees pays its employees an average of \$70,000 per year. The company becomes insolvent and is unable to pay entitlements. The company has a redundancy agreement which provides entitlements of

four weeks per year of service. The average service of each employee is 8 years.

The cost to the scheme of the redundancy entitlements at this one company would be:

2000 employees x (\$70,000 / 52) x 4 weeks x 8 years = \$86.2 million

Ai Group is very concerned that the collapse of even one large company could lead to a major funding shortfall and could lead to union calls for the publicly funded scheme to be replaced with a scheme funded by an employer levy. An employer funded scheme would operate as a tax on employment and would lead to the 99.99% of employers who do not become insolvent and fail to pay employee entitlements, funding the obligations of failed companies.

We are also concerned about the unfairness of the announced changes on employees in most workplaces. In our view it is unfair for a national scheme to pay generous compensation to the employees of one insolvent company and much less to those working for another company. Generous over-award redundancy packages tend to operate in large unionised workplaces. However, a much larger number of employees work in other enterprises where such schemes do not operate.

Four weeks per year of service with no cap (other than the salary cap) is a relatively uncommon and very generous redundancy entitlement, at the top end of entitlements even in unionised workplaces. Replacing the recognised community standard of a maximum of 16 weeks with this extremely generous redundancy entitlement would undoubtedly fuel union claims for employers to agree to such redundancy benefits in enterprise agreements with a consequent increase in disputation and reduction in the ability of companies to restructure to remain competitive.

In the past, redundancy packages have typically been negotiated when a business has needed to adjust staffing levels to remain efficient and competitive. The idea that every employee would some day become entitled to the redundancy package was not contemplated or intended. It does not follow that these redundancy packages should apply if a business becomes insolvent. Insolvency is a totally different context. Business failures are hard on both employers and employees. The current GEERS provision of up to 16 weeks' redundancy pay cushions the blow for employees and enables employees to search for another job over a reasonable period without experiencing hardship.

A further concern relates to the obvious moral hazards associated with the proposed changes. What would prevent an employer under industrial duress in the lead up to insolvency agreeing to a redundancy package of four weeks' per year of service and leaving the tax-payer to pick up the tab?"

**3. An Extract from Ai Group's February 2014 submission to the Productivity Commission's Review of the Australian Automotive Manufacturing Industry, including an extract from a May 2011 submission to the Labor Government:**

**"Funding for the Fair Entitlements Guarantee (FEG)**

The Australian Government provides assistance to people owed outstanding employee entitlements following the insolvency or bankruptcy of employers. This help is available through the Fair Entitlements Guarantee (FEG) which replaced the General Employee Entitlements and Redundancy Scheme (GEERS) from December 2012.

When the FEG was implemented by the Labor Government in 2012, Ai Group expressed great concern about the risks associated with implementing such a generous level of redundancy entitlement protection. The following extract from the submission which Ai Group made to the Labor Government in May 2011 is relevant:

"Ai Group has been at the forefront of the public debate about the protection of employees' entitlements over the past decade and we have worked hard to ensure that mechanisms to protect entitlements are fair on both employees and employers, and are workable. We appreciate being consulted about the FEG even though we continue to hold substantial concerns about various aspects of the scheme.

The Federal Budget Papers had a lot to say about the restructuring of the Australian Economy which is in train due to the mining boom, and the impacts upon sectors such as manufacturing. As this restructuring gathers pace over the next few years, corporate failures will unfortunately most likely be part of the picture. In this environment, the increase in the level of redundancy pay protection to a maximum of four weeks per year of service constitutes in our view a very serious risk.

Our concerns include:

- The Government's estimate of the additional cost appears to be very optimistic.
- The collapse of even one large company could lead to a major funding shortfall.
- It is inequitable for a publicly funded scheme to pay generous compensation to the employees of one insolvent company and much less to those working for another company. Generous over-award redundancy packages tend to operate in large unionised workplaces. However, a much larger number of employees work in other enterprises.
- Implementing a maximum redundancy entitlement of four weeks per year of service with no cap (other than the salary cap) will lead to union claims for such redundancy benefits to be included within enterprise agreements, with a consequent increase in disputation and reduction in the ability of companies to restructure to remain competitive.

If the increased level of redundancy pay protection proves to be unworkable, we are very concerned that there would be calls for business to make up the shortfall. Employer funding for the FEG would operate as a tax on employment and would lead to the 99.99% of employers who do not become insolvent and fail to pay employee entitlements, funding the obligations of failed companies.

Ai Group supports the maintenance of the existing 16 week limit on redundancy pay protection.”

The 2013-14 Budget Papers contain an estimate of expenditure on the FEG, of \$192,430 for the year.

There is a significant risk of insolvencies amongst Tier 1, Tier 2 and Tier 3 suppliers to the automotive industry. Many automotive component companies have generous redundancy entitlements in their enterprise agreements of up to four weeks per year of service with no cap on payments.

The financial risk can be seen from the following example:

**Example**

5,000 automotive component employees earn an average of \$75,000 per year. Their employers become insolvent and are unable to pay entitlements. The companies have redundancy provisions in their enterprise agreements which provide entitlements of four weeks per year of service. The average service of each employee is 10 years.

The cost to the FEG of the redundancy entitlements alone of these employees would be:

5,000 employees x (\$75,000 / 52) x 4 weeks x 10 years

= over \$288 million

Clearly, the Government is facing a potentially huge budget blowout due to the potential insolvency of many automotive component manufacturers with very generous redundancy schemes unless the *Fair Entitlements Guarantee Act 2012* is amended to reduce the generosity of the scheme or funding is increased very substantially. The current Budget allocation of \$192,430 is to cover entitlements across all industries.”

It can be seen from the above submissions that Ai Group:

- Strongly supported GEERS;
- Strongly opposed the increase in redundancy entitlement protection from a cap of 16 weeks, to up to four weeks’ pay per year of service, which was announced by the Labor Government in the lead-up to the August 2010 Federal Election without any consultation with industry;
- Warned of the inevitable blow-out in public expenditure that would result from the 2011 changes;

- Has continued to warn of the risks associated with maintaining the existing level of redundancy protection.

## **Ai Group's position on the *Fair Entitlement Guarantee Bill 2014***

Ai Group supports the *Fair Entitlements Guarantee Bill 2014* which would restore the former cap on redundancy pay of 16 weeks' from 1 January 2015.

The 16 week cap mirrors the entitlement to redundancy under the National Employment Standards<sup>1</sup> and hence reflects community standards.

The problems associated with the existing level of redundancy pay protection are discussed in the extracts from Ai Group's earlier submissions, as reproduced above.

It is unfair for a publicly funded scheme to pay extremely generous compensation to the employees of one insolvent company and much less to those working for another company. Generous over-award redundancy packages tend to operate in large, unionised workplaces. However, a much larger number of employees work in small enterprises and non-unionised enterprises. The inequity in the current level of redundancy entitlement protection can be seen in the fact that 75 claimants have recently received redundancy payments of more than \$100,000 with one claimant receiving approximately \$300,000 for redundancy pay.<sup>2</sup> Prior to the change in 2011, the highest payment for redundancy was \$43,200.

The explanatory memorandum refers to the 2014/2015 Budget Papers which reveal that restoring the 16 week cap on redundancy payment will achieve savings of \$87.7 million over four years. In the year 2014-15 alone, the Australian Government expects to save \$10 million, with more than \$20 million worth of savings each year until 2018.<sup>3</sup> These savings are very important given the need to put the Budget back on a firm long-term footing, and to rein in spending growth.

In addition to the redundancy pay changes, the Bill makes the following technical amendments to:

- Clarify that where a claimant is eligible for an advance under the Scheme the claimant's initial entitlement under the Act will be calculated without reference to any amounts required to be withheld by law, such as pay as you go tax withholding;
- Establish a funding source in the legislation for certain legal costs associated with applications to the Administrative Appeals Tribunal for review of decisions made by the Department;

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<sup>1</sup> *Fair Work Act 2009* (Cth), s.119(2).

<sup>2</sup> See the Explanatory Memorandum to the Bill, p.3.

<sup>3</sup> See 2014–15 Budget Measure, Department of Employment, <[http://budget.gov.au/2014-15/content/bp2/html/bp2\\_expense-10.htm](http://budget.gov.au/2014-15/content/bp2/html/bp2_expense-10.htm)>.

- Clarify that the death of a person does not prevent the person being eligible for an advance, to enable the next of kin or estate to pursue a claim;
- Clarify that when a debt owed by a claimant to his or her employee is greater than the employment entitlement to which it relates, it can be offset proportionally against any of the claimant's other employment entitlements under the Scheme; and
- Remove the eligibility requirement that a person who was owed debts prior to the insolvency event happening to their employer must have taken reasonable steps to be paid those debts and instead allow the Secretary of the Department to reduce a person's entitlement by the amount of any debts that he or she did not take reasonable steps to be paid.

The above technical changes are modest and sensible.

We urge the Committee to recommend that the Bill be passed without delay.