

LABOR SENATORS' DISSENTING REPORT

1.1 Labor Senators are supportive of a publicly funded scheme to protect workers who are affected when their employers experience insolvency or bankruptcy, but assert that capping the entitlement to maximum redundancy pay at 16 weeks' pay is a government savings measure without justification.

The committee majority has failed to demonstrate justification for the bill

1.2 The intention of the bill is to align one part of the Fair Entitlements Guarantee (FEG), in this case redundancy, with the redundancy standard established under the National Employment Standards (NES) – the NES acts a safety net only, outlining the *minimum* conditions for workers.

1.3 Labor Senators were compelled by evidence expressing concerns that capping the redundancy entitlement at 16 weeks will result in some workers not being paid their full redundancy entitlement they are owed by their employer in the event that employer goes into liquidation or bankruptcy.¹

1.4 Labor Senators discount evidence from the Australian Industry Group (Ai Group) who assert that the scheme is overly generous.² The FEG is not a welfare payment, nor a safety net scheme. Payments under the FEG are entitlements owed to workers, earned during their employment, and agreed to either as part of a bargaining process, contracts of employment or awards negotiated with employers.

1.5 Ms Michele O'Neil, National Secretary, Textile Clothing and Footwear Union of Australia (TCFUA) stated:

To start with a very basic principle of law, workers who accrue, through long years of service, leave, superannuation and redundancy entitlements are entitled to be paid 100 per cent of those entitlements when they are made redundant.³

1.6 Mr Trevor Clarke, Director Industrial and Research, Australian Council of Trade Unions (ACTU) provided evidence to the committee:

Redundancy entitlements are set by awards, by enterprise agreements and by contract of employment. Sometimes unions are involved in setting the entitlements; sometimes they are not. Sometimes the Fair Work Commission is involved in setting those entitlements; sometimes it is not. Whoever sets those entitlements has reasons for doing what they do.

1 Slater and Gordon Lawyers, *Submission 11*, p. 3; Australian Manufacturing Workers' Union, *Submission 8*, p. 5; Queensland Nurses' Union, *Submission 10*, p. 3.

2 Australian Industry Group, *Submission 3*, p. 7.

3 Ms Michele O'Neil, National Secretary, Textile Clothing and Footwear Union of Australia, *Proof Committee Hansard*, 17 September 2014, p. 11.

It is not difficult to imagine why the entitlement at some workplaces is set in excess of the bare minimum provided by the law.

1.7 Both Ai Group and ACCI expressed the view that a publicly funded safety net scheme is necessary to protect workers whose employers went bankrupt. However, they stressed the importance that it should offer an appropriate level of protection. Ai Group stated:

When there is an insolvency, everyone is a loser. Often the managers lose their jobs. If it is a private company, the owners of the business often lose their houses. There are no winners. It is a matter of having the appropriate level of protection.⁴

1.8 This refutes any inference from the Ai Group, referenced by the majority committee report, that employers are being ‘coalesced’ by unions or workers represented by unions into implementing extremely generous redundancy packages in the lead up to insolvency.⁵ The TCFUA confirmed this, giving evidence in their submission that ‘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.’⁶ During evidence, the TCFUA state:

There is simply no evidence that the existence of provisions in the FEG Act providing for the payment of redundancy beyond 16 weeks creates an incentive for unsustainable bargaining.⁷

1.9 The AMWU presented similar evidence:

It is not true that since the introduction of the federal entitlement guarantee the AMWU has pressed a patent four-week claim. This is simply not the case.⁸

Nobody has shown a rise in the level of redundancy pay provided in agreement or contracts of employment, and even if they could do that it would be another thing to attribute a cause to it. It is pure speculation. Further, it ought to be remembered that redundancy terms are developed in the context of an expectation that business will continue. No business and

4 Mr Stephen Smith, Director, National Workplace Relations, Australian Industry Group, *Proof Committee Hansard*, p. 3.

5 Mr Stephen Smith, Director, National Workplace Relations, Australian Industry Group, *Proof Committee Hansard*, p. 1.

6 Textile Clothing and Footwear Union of Australia, *Submission 7*, p. 14.

7 Ms Michele O’Neil, National Secretary, Textile Clothing and Footwear Union of Australia, *Proof Committee Hansard*, 17 September 2014, p. 12.

8 Mr Steve Dargavel, Victorian State Secretary, *Proof Committee Hansard*, 17 September 2014, p. 10.

no worker wants to see a redundancy of some members of the workforce turn into the closure of the workplace on account of an incapacity to pay...⁹

1.10 The Ai Group, and in turn the committee majority and the government¹⁰ refer to this unfounded view as a ‘moral hazard’. Labor Senators note the strong views expressed during the hearing and by submission that a moral hazard in this context simply does not exist.

1.11 The committee asked the department to expand on the theme of moral hazard, asking for evidence or examples of where employers have signed unsustainable redundancy payments in these circumstances.¹¹ The department provided the following advice:

... there has been an increase in redundancy payments in excess of 16 weeks in agreements since the scheme came in, that the proportion increased from 22.3 percent in 2011 to 28.3 per cent in June 201. That parallels the introduction of the more generous redundancy entitlement. No, we do not have evidence of the exact cause and effect, but there is certainly a pattern.¹²

1.12 When asked directly to provide evidence of this “moral hazard.” neither the Ai Group or ACCI were able to provide evidence to the committee that redundancy claims put forward during a bargaining process were presented because the FEG has an uncapped redundancy scheme. Given that both groups claim to represent large and significant sections of Australian employers and are involved in bargaining outcomes, Labor Senators believe the “moral hazard” claim is unfounded

1.13 Additionally, the committee received submissions and took evidence at the hearing that strongly supported the view that the bill is not justified in a supposed effort to protect employers against unjust claims. The Ai Group discussed that it is in fact a small percentage of employers who do the wrong thing, noting that '99.99 per cent of employers pay their entitlements when due.'¹³

1.14 Labor Senators therefore conclude that where the committee has failed to prove that the increase in redundancy payments in excess of 16 weeks in agreements has been caused by the introduction of the more generous redundancy entitlement, they fail to prove a moral hazard exists in this context.

9 Mr Trevor Clarke, Director, Industrial and Research, Australian Council of Trade Unions, *Proof Committee Hansard*, 17 September 2014, p. 9.

10 <http://www.theguardian.com/world/2014/sep/04/capping-redundancy-payments-fixes-moral-hazard-says-christopher-pyne>

11 *Proof Committee Hansard*, p. 23.

12 Ms Sandra Parker, Deputy Secretary, Workplace Relations and Economic Strategy, Department of Employment, *Proof Committee Hansard*, p. 23.

13 Mr Stephen Smith, Director, National Workplace Relations, Australian Industry Group, *Proof Committee Hansard*, pp. 4–5.

The bill punishes workers without addressing underlying issues or alternate savings measures

1.15 The department submitted the proportion of total scheme expenditure attributable to the redundancy pay has increased since the entitlement cap was increased in 2011, and the dollar value of redundancy pay entitlements has increased disproportionately to other entitlement types covered by the schemes.¹⁴ The incidence of agreements providing a total maximum redundancy payment of more than 16 weeks has also increased since 2011.¹⁵

1.16 Labor Senators do not refute this evidence, and in fact assert that the evidence given by the department demonstrates the requirement to explore options aside from the capping of redundancy pay in the FEG as a savings measure. However, Labor Senators note that the department failed to take into account the Global Financial Crisis, the average age of workers in the sectors hardest hit by liquidation and bankruptcy and other relevant factors.

1.17 The ACTU suggested during the hearing that other options should be explored before any reduction in entitlements under the Scheme is contemplated, including ranking employee entitlements above certain secured creditors. The ACTU's position is that 'more can and should be done to ensure that the government can maximise the returns it gets from the scheme and to discourage insolvencies that are brought about by misconduct.'¹⁶

1.18 Labor Senators assert that this could be more appropriately delivered by making appropriate changes to the Corporations Act 2001 and improving the ability of the Australian Securities and Investments Commission to enforce penalties on companies and directors when they trade while insolvent, as suggested in the Commission of Audit Report.¹⁷

1.19 We note that the amendments to the FEG happen to mirror recommendation 47 of the Commission of Audit's report:

Where a firm enters into liquidation and is unable to pay employee entitlements, the Fair Entitlements Guarantee Scheme makes certain payments to eligible workers. It is important that employers meet their obligations to fund worker entitlements. The Commission recommends changes be made to the Fair Entitlements Guarantee Scheme to introduce a

14 Department of Employment, *Submission 13*, p. 7.

15 Department of Employment, *Submission 13*, p. 11.

16 Mr Trevor Clarke, Director, Industrial and Research, Australian Council of Trade Unions, *Proof Committee Hansard*, 17 September 2014, p. 10.

17 National Commission of Audit Report, Appendix Volume 2, p. 117.

cap of a maximum redundancy payment equivalent to 16 weeks' pay and limit the wage base for the scheme to Average Weekly Earnings.¹⁸

1.20 It is of concern that the government has drafted amendments to the FEG that punish workers who have been made redundant, restricting their rights to their entitlements, without initiating amendments that work toward keeping businesses afloat.

The bill constitutes a broken promise from the government

1.21 The Coalition Government opposed the lifting of the 16-week cap within the FEG legislation in 2012 and then again in 2013.

1.22 Unlike the process undertaken when Labor introduced the uncapped redundancy within the scheme, evidence was given at the hearing that there was a distinct lack of consultation undertaken between the government and key stakeholders prior to the introduction of the amendments to the legislation.¹⁹

1.23 Labor Senators in particular point to evidence presented by the ACTU in their submission, a letter from Employment Minister, Senator Abetz, dated the 17th of July 2014, stating that workers could “be satisfied that there is no risk to your entitlements”.²⁰ These amendments categorically represent a risk to workers' entitlements.

1.24 Labor Senators therefore hold the view that aligning the FEG with the National Employment Standards is based solely on a view within the Coalition that Australian workers do not deserve any more than the bare minimum. We do not support this view.

Recommendation 1

1.25 The Labor Senators of the committee recommend the bill be rejected.

Senator Sue Lines
Deputy Chair

18 National Commission of Audit Report, Appendix Volume 2, p. 117.

19 Australian Chamber of Commerce and Industry, response to questions on notice, 18 September 2014, p.1.

20 Australian Council of Trade Unions, *Submission 5*, Appendix 2, P. 15

