EXPLANATORY STATEMENT

Select Legislative Instrument 2013 No. 182

Issued by the authority of the Minister for Workplace Relations

Subject –  
Fair Entitlements Guarantee Act 2012

Fair Entitlements Guarantee (Indexation of Maximum Weekly Wage) Regulation 2013

The Fair Entitlements Guarantee Act 2012 (the Act) establishes a scheme for the provision of financial assistance (called an ‘advance’) to former employees where the end of their employment is linked to the insolvency or bankruptcy of their employer.

Division 2 of Part 3 of the Act sets out how a person’s employment entitlements are calculated. This involves working out the basic entitlements for each of the employment entitlements a person is owed and then deducting a range of specified sums.

Sections 26 and 27 in Division 2 of Part 3 provide for a ‘maximum weekly wage cap’, which effectively limits the weekly rate at which an entitlement will be paid to an individual. These sections affect a person’s employment entitlements if their weekly rate of pay, as determined in accordance with the governing instrument for his or her employment (or subsection 27(4)), exceeded the maximum weekly wage rate at the end of his or her employment.

The term ‘maximum weekly wage’ is defined in section 5 of the Act to mean $2,364 or the result of indexation of that figure in accordance with the regulations, Section 5 provides that indexing is to be done by reference to estimates of full-time adult average weekly ordinary time earnings published by the Australian Statistician.

The Fair Entitlements Guarantee (Indexation of Maximum Weekly Wage) Regulation 2013 (the Regulation) provides for the annual indexation of the ‘maximum weekly wage’ figure in accordance with section 5 of the Act. After the initial indexation takes place on 1 August 2013, indexation will occur annually on 1 July and will be done using the most recent estimates of full-time adult average weekly ordinary time earnings published by the Australian Statistician that are available at 1 July when the indexation is due to occur.

The first indexation of the ‘maximum weekly wage’ figure is set out in subsection 5(2). This would set the ‘maximum weekly wage’ for the period 1 August 2013 to 30 June 2014. The steps to be undertaken in subsequent indexations are set out in subsections 5(3) and (4).

Representatives from employer and employee groups, as well as insolvency practitioners, were consulted during the preparation of the Act. As the Regulation gives effect to indexation mechanism described by section 5 of the Act, no additional consultation was undertaken.

A Statement of Compatibility with Human Rights has been completed for the Regulation, in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011. The Statement’s
assessment is that the Regulation is compatible with human rights. A copy of the Statement is attached.

The Act does not impose any conditions that need to be satisfied before the power to make the Regulation may be exercised.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Office of Best Practice Regulation advised that a Regulation Impact Statement was not required (reference 15109).

The Regulation commences the day after it is registered on the Federal Register of Legislative Instruments.
Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Fair Entitlements Guarantee (Indexation of Maximum Weekly Wage) Regulation 2013

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview of the Legislative Instrument

The Fair Entitlements Guarantee Act 2012 (the Act) establishes a scheme for the provision of financial assistance (called an ‘advance’) to former employees where the end of their employment is linked to the insolvency or bankruptcy of their employer.

Division 2 of Part 3 of the Act sets out how a person’s employment entitlements are worked out. This involves working out the basic entitlements for each of the employment entitlements a person is owed and then deducting a range of specified sums.

Sections 26 and 27 in Division 2 of Part 3 provide for a ‘maximum weekly wage cap’, which effectively limits the weekly rate at which an entitlement will be paid to an individual. These sections affect a person’s employment entitlements if their weekly rate of pay, as determined in accordance with the governing instrument for his or her employment (or subsection 27(4)), exceeded the maximum weekly wage rate at the end of his or her employment.

The term ‘maximum weekly wage’ is defined in section 5 of the Act to mean $2,364 or the result of indexation of that figure in accordance with the regulations. Section 5 provides that indexing is to be done by reference to estimates of full-time adult average weekly ordinary time earnings published by the Australian Statistician.

The Fair Entitlements Guarantee (Indexation of Maximum Weekly Wage) Regulation 2013 (the Regulation) provides for the annual indexation of the ‘maximum weekly wage’ figure in accordance with section 5 of the Act. After the first indexation, which will occur on 1 August, this indexation will occur annually on 1 July.

Human Rights Implications

Right to Social Security

Article 9 of the International Covenant on Economic, Social and Cultural Rights (the ICESCR) provides that, ‘the States Parties to the present Covenant recognise the right of everyone to social security, including social insurance.’ The Committee on Economic, Social and Cultural Rights has stated that the right to social security encompasses the right to access
benefits, whether in cash or in kind, without discrimination in order to secure protection from lack of work-related income caused by unemployment.¹

The Act establishes an assistance scheme, which is intended to operate as a safety net for persons whose employment has ended due to the insolvency or bankruptcy of their employer. This safety net could be characterised as ‘social insurance’ because it ensures that employees’ unpaid entitlements are met when their employer becomes insolvent. It therefore seeks to protect individuals from lack of work-related income due to unemployment, and in this way, promotes the right to social security.

Reflecting its nature as a safety net for individuals, the Act contains limits on the amount of unpaid entitlements that individuals are to be advanced, including through the application of a ‘maximum weekly wage cap’ to limit the weekly rate at which an entitlement will be paid. When the weekly rate under the employee’s governing instrument is greater than the ‘maximum weekly wage cap’ a claimant’s advance will not cover all of that weekly rate, however it is considered that the provisions strike an appropriate balance in terms of the safety net provided. In addition the person’s right to pursue the remaining amount in the winding up or bankruptcy process is not affected.

The Regulation ensures that the maximum weekly wage cap increases in line with the designated full-time adult average weekly ordinary time earnings as published by the Australian Statistician. Indexation is necessary to ensure that the relevant wage caps continue to give effect to the intention that the scheme be a ‘safety net’ and it is considered that indexing the maximum weekly wage by reference to the designated full-time adult average weekly ordinary time earnings is appropriate in this context.

Conclusion

The Legislative Instrument is compatible with human rights.

William Richard Shorten, Minister for Workplace Relations