EXPLANATORY STATEMENT

Select Legislative Instrument No. 58, 2014

Issued by the authority of the Minister for Employment

Subject – Fair Entitlements Guarantee Act 2012

Fair Entitlements Guarantee (Indexation of Maximum Weekly Wage) Amendment Regulation 2014

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’ amount, which 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 initially be $2364. Paragraph (b) of the definition provides that the maximum weekly wage will be indexed by reference to estimates of full-time adult average weekly ordinary time earnings published by the Australian Statistician. The baseline amount for indexation will be the most recently indexed iteration of the maximum weekly wage. For example, the first indexation was applied to the initial maximum weekly wage of $2364 on 1 August 2013. This resulted in a new maximum weekly wage of $2451. This new maximum weekly wage applies until the next indexation, at which point the new figure will be used as the baseline amount to determine the next maximum weekly wage.

The Fair Entitlements Guarantee (Indexation of Maximum Weekly Wage) Amendment Regulation 2014 (the Amending Regulation) amends the Indexation Regulation to provide that the ‘maximum weekly wage’ figure as at 1 August 2013 will continue to apply for an additional four years. That is, the next annual indexation of the maximum weekly wage figure will occur on 1 July 2018 is the same manner as provided for by the Indexation Regulation, noting that the figure used for maximum weekly wage for the previous year will be the 1 August 2013 figure.

No consultation was undertaken in the preparation of the Amending Regulation as, for the purposes of section 18 of the Legislative Instruments Act 2003, the measure being adopted gives effect to the alteration of an entitlement in terms announced in the Budget.

A Statement of Compatibility with Human Rights has been completed for the Amending Regulation, in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011. The
Statement’s assessment is that the Amending 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 Amending Regulation may be exercised.

The Amending 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 16498).

The Amending 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) Amendment Regulation 2014

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 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’ amount, 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.

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Human Rights Implications

The Amending Regulation engages the right to social security, including social insurance, under Article 9 of the International Covenant on Economic, Social and Cultural Rights (the ICESCR). 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 a basic payment scheme for persons whose employment has ended due to the insolvency or bankruptcy of their employer. The scheme could be characterised as ‘social insurance’ because it provides a safety net for individuals by ensuring that certain unpaid entitlements are met when a person’s 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 basic payment that has the effect of providing a safety net for individuals, the Act contains limits on the amount of unpaid entitlements that individuals are to be advanced, including through the use of a ‘maximum weekly wage’ amount to cap 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’ amount a claimant’s advance will not cover all of that weekly rate. However, a claimant can still pursue the remaining amount in the winding up or bankruptcy process.

The Amending Regulation pauses the annual indexation of the maximum weekly wage amount, thereby having the effect of limiting the right to social security. However, the amendment is considered compatible with the right for a number of reasons.

First, in the current economic climate the trajectory of increasing costs in the scheme is not economically sustainable. As a demand driven scheme it is difficult to predict the impact of insolvency events and the associated costs on the scheme. The amendment is a fiscally responsible measure to address concerns about rising costs of the scheme in light of the worsening Budget situation. The pausing of indexation therefore pursues the legitimate objective of assisting to restore Australia’s budgetary position in accordance with the Government’s election commitment. As such, it is a reasonable, necessary and proportionate measure.

Second, the pausing of the indexation of the maximum weekly wage amount does not affect the eligibility criteria for the scheme.

Third, only a small proportion of claimants under the scheme have had payments capped. For example, out of over 36000 claims processed between 1 July 2011 and 31 December 2013, only 1532 claimants did not receive their full weekly rate. For a claimant to have their payment capped, they must have an annual income of over $127000. Finally, the maximum weekly wage amount only affects the amount of the advance that an applicant is entitled to receive under the scheme and does not restrict their ability to seek to recover the full entitlements owed.

through other avenues, for example by claiming the remainder of those entitlements through the winding up of their employer.

Conclusion

The amendment is compatible with human rights because it seeks to maintain the viability of the scheme of financial assistance and to the extent that the amendments may limit rights, those limitations are reasonable, necessary and proportionate to that legitimate objective.

Senator The Hon. Eric Abetz, Minister for Employment