

Future of Work

Employee Entitlements

Background Paper

ACTU CONGRESS 2003

Quick Fact:

Protection of employee entitlements in Australia is far from adequate. It is believed that around 19,000 employees lose up to \$500 million each year in unpaid entitlements.

CONGRESS 2000

1. Congress 2000 carried the following resolution in relation to protection of employee entitlements:

There should be a scheme for the payment of workers' entitlements in full in cases of employment insolvency to be funded by employers through a levy. The Commission should be empowered to provide for this scheme through specified employee entitlements being paid into an industry trust fund established for the purpose.

The Corporations Law should be amended to:

- (i) define accrued and contingent employee entitlements to be debts of the company;*
- (ii) increase penalties for trading while insolvent;*
- (iii) place employee entitlements higher in priority than secured creditors;*
- (iv) allow recovery for employee entitlements against related corporations and individual directors, particularly where there has been deliberate restructuring or other arrangements in order to avoid liability;*
- (v) increase the ability of ASIC to prosecute directors involved in corporate arrangements designed to avoid obligations in relation to employee entitlements and disqualify directors*

found to be involved in such arrangements from holding office in other companies; and

- (vi) *create an offence of failing to make real provision for accrued employee entitlements.*

The Act should be amended to provide that a transmission of business includes where an employer ceases operations, and another company re-commences a similar business where that second company includes one or more of the same directors as the first company, whether or not the same assets are involved.

The Superannuation Guarantee Act should be amended to provide that superannuation contributions must be paid monthly.

DEVELOPMENTS SINCE CONGRESS 2000

2. Since Congress 2000 the Government has been subjected to continued pressure on the need for greater protection of employee entitlements, mainly as a result of a number of high-profile company collapses, particularly Ansett. Corporate fraud and mismanagement has also drawn a sharp distinction between the benefits received by directors and senior executives compared to the workers and their families who may suffer the loss of all their accumulated entitlements.
3. As a result of this pressure, a number of developments have occurred.
 - The *Corporations Act* has been amended to provide that directors could be subject to civil penalties and be held personally liable for "*uncommercial transactions*".
 - A new criminal offence has been created under the *Corporations Act* of entering into an agreement or transaction with the intention of preventing the recovery of employee entitlements.
 - The Government announced, prior to the last election, that it would legislate to vary the order of priorities in insolvency under the *Corporations Act* to place employee entitlements ahead of secured creditors. Since then, no legislation has been introduced, and the few details available indicate that only the payments already guaranteed under the GEERS scheme will receive higher priority, leaving employees no better off.
 - The *Corporations Act* has been amended to provide for recovery of "*unreasonable director-related transactions*" where these have occurred within four years of the company becoming insolvent.
 - Immediately following the collapse of Ansett, the Government introduced the General Employee Entitlements and Redundancy Scheme

(GEERS) to replace its former scheme, EESS, for all insolvencies occurring after 11 September 2001, together with a special scheme (SEESA) for the 16,000 retrenched Ansett employees. GEERS represented a significant advance on the grossly inadequate EESS scheme in that it covers all unpaid wages, accrued annual leave, pay in lieu of notice and long service leave. Its major deficiencies are the capping of redundancy pay at eight weeks and its failure to include superannuation, as well as an apparent lack of coverage in cases where an administrator or liquidator has not been appointed. GEERS, unlike SEESA, caps payments at an annual salary of \$81,500.

- A number of high profile industrial disputes have occurred in relation to the protection of entitlements, particularly in the manufacturing sector, where unions have demanded that employers contribute accrued entitlements to a trust fund, or use insurance bonds, charges over fixed assets or bank guarantees to secure entitlements. The issue is a priority in the current Campaign 2003 enterprise bargaining negotiations.
- The National Entitlements Security Trust (NEST) has been established which is a not-for-profit trust into which employers can pay employee entitlements such as long service leave. NEST holds the funds on trust until paid out to the employee.
- The Federal Court has found that a claim for payment of entitlements into a trust fund can be the subject of industrial action, although the decision in *Electrolux* is under appeal to the High Court.
- The superannuation legislation has been amended to provide for quarterly payments of contributions.

ISSUES FOR POLICY AT CONGRESS 2003

4. Protection of employee entitlements in Australia is far from adequate. It is believed that around 19,000 employees lose up to \$500 million each year in unpaid entitlements. In particular:
 - The legal system still places the shareholder at the centre of directors' responsibilities, with other stakeholders, including employees, with far fewer rights.
 - It is not proposed that all employee entitlements be placed above secured creditors in insolvency situations.
 - It is too difficult to make out the test for establishing that directors avoided paying entitlements and employees are rarely in a position to commence such actions.
 - GEERS does not cover all entitlements and does not apply in all insolvency situations.

- The provisions concerning repayment of unreasonable transactions does not apply to executives.
- Companies which may become insolvent are not always placed in administration early enough to enable possible avoidance of liquidation or maximisation of assets.
- Employees have no access to information about the financial position of the employers, even though they may bear the highest risk if the company becomes insolvent.
- Some employers are offering employees non-enforceable letters of comfort or avoidable cross guarantees between various companies in a group, rather than guaranteeing entitlements by paying them into a fund such as NEST.