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HOUSE OF REPRESENTATIVES

Employee Protection (Wage Guarantee) Bill 1999

Explanatory Memorandum

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Outline

The purpose of this bill is to provide for the establishment and administration of a scheme to guarantee the payment of wages and certain other liabilities owed to employees in the event of employer insolvency and for related purposes.

Financial Impact

The Bill will have no major impact on Government expenditure. It is envisaged that the funds generated by the wage protection insurance scheme as outlined in this bill will be sufficient to cater for its administration as well as to provide the necessary outlays to workers owed entitlements due to their employer's insolvency.

Background

Prior to 1993, workers were treated as a group of creditors along with all other creditors to whom an insolvent company owed money. Workers in an insolvent company, however, are more than simply creditors. Worker's interests in keeping the enterprise to which they employed open are fundamentally different to external creditors. Accordingly, worker's interests were allocated preference over other external creditors, including the Tax Commissioner, following changes contained in the Insolvency (Tax Priorities) Legislation Amendment Bill 1993.

However, even when preference in the order of priority is accorded to workers following a company's insolvency, it often proves ineffective or meaningless. If a bankrupt enterprise no longer has any assets then workers, whatever their position in an order of priority, will not benefit.

Faced with this predicament, many national, state and provincial governments throughout the world (for example, The Netherlands in 1968, France and Finland in 1973, the UK in 1975, Spain in 1976, Ireland in 1984 and Portugal in 1985) have instituted wage guarantee funds to supplement - not replace - the systems of preferences in the case of company insolvency.

Wage guarantee funds operate on the notion of subrogation - if a company has become insolvent and there are no funds for paying worker's claims protected by creditor preference, then the insurance guarantee comes into effect.

All wage guarantee funds work on several broad criteria, including:

- (a) the principle of 'social solidarity' - the community of employers collectively guarantees the liabilities of each other for the service-related claims of their employees;
- (b) mandatory participation;
- (c) universal coverage; and
- (d) the belief that workers should not bear the financial risks of management's failure.

Explanatory notes on the bill

The principal means by which this bill aims to protect workers in the event of their employer's insolvency are the following:

- (a) to establish a scheme of wage protection insurance;
- (b) to require employers to insure their workforces under the scheme; and
- (c) to provide for the determination and enforcement of claims under the scheme.

Under the scheme an insurance policy of wage protection is taken out by an employer with an approved insurer to insure the workforce of the employer against loss resulting from the insolvency of the employer.

An 'approved insurer' is an insurer which enters an agreement with the Insurance and Superannuation Commissioner (the body which has responsibility for the general administration of the Act subject to the directions of the Treasurer) under which the insurer accedes to meet all requirements under the legislation.

A company is considered to have become insolvent based on the provisions contained in clause 7 of the bill.

The bill also allows for a broader definition of insolvency to come into effect if a company finds itself unable to pay its debts without any formal steps towards insolvency having been taken.

An employee is protected for liabilities of the following:

- (a) a liability for unpaid wages;
- (b) a liability resulting from termination of employment without notice or with insufficient notice;
- (c) a liability for annual leave or long service leave;
- (d) a liability for repayment of a premium or other amount paid by the employee to the employer for training in a particular trade or profession.

All employers must take out, and maintain, a policy of wage protection insurance with an approved insurer for the employer's workforce.

This bill does not apply to a contract of employment, or the parties to a contract of employment, if:

- (a) the employer is the Crown, or an agency, instrumentality or representative of the Crown, in right of the Commonwealth, a State or a Territory; or
- (b) the employer is a body established under a law of the Commonwealth, a State or a Territory conferring powers of local government on the body.

An employer is exempt from the requirement to hold a policy of wage protection insurance if:

- (a) the employer's employees are not employed for the purposes of a trade or business carried on by the employer; and
- (b) the employer's annual payroll does not exceed \$7,800 (indexed) on the basis of principles fixed by regulation.

The Commissioner is to be regarded as the nominal insurer under a policy of wage protection insurance of employees of an employer who:

- (a) is exempt from insurance under this Act; or
- (b) fails to hold a policy of wage protection insurance for the benefit of the employer's workforce as required under this Act.

An approved insurer must contribute towards the nominal insurer's cost on a basis determined by the Commissioner and at a level that is approximately the same for each approved insurer.

An employee is entitled to make a claim under a policy of wage protection insurance if:

- (a) the employer is insolvent; and
- (b) an amount covered by the policy has fallen due for payment by the employer; and
- (c) the employer has failed to pay the unpaid amount in full within 14 days after receiving a written claim for payment made by or on behalf of the employee.

The employee's right (if any) to make a claim under the policy of wage protection insurance is extinguished if the claim is not brought within 4 months after the date the written notice was given.

The bill requires the Insurance Commissioner and insurers participating in the scheme to participate in a *'bad risk cross-subsidisation'* program.

Under such a program, an insurer will be required to accept an insurance proposal - even from an employer considered a bad risk - at a rate of premium not exceeding a maximum fixed by the Commissioner.

The '*bad risk cross-subsidisation*' scheme allows for the transfer of some of the burden of bad risks away from the individual insurer to the total body of insurers.

If a claim under a policy of wage protection insurance is disputed, either the insurer or the claimant may refer the dispute for conciliation in accordance with the relevant conciliation procedures set by the Commissioner.

Penalty Units - The value of a penalty unit is as set out in the *Crimes Act 1914*. One penalty unit equals \$110.