



Australian Private Equity &
Venture Capital Association Limited

15 June 2017

Mr James Mason
Financial System Division
Markets Group
The Treasury

Mr Peter Krizmanits
Recovery and Litigation Branch
Workplace Relations Programmes Group
Department of Employment

Via email: ImprovingFEG@employment.gov.au

Dear Mr Mason and Mr Krizmanits,

Reforms to address corporate misuse of the Fair Entitlements Guarantee Scheme

Thank you for opportunity to comment on the proposed reforms to address corporate misuse of the Fair Entitlements Guarantee scheme outlined in the Australian Government's consultation paper issued May 2017. (Consultation Paper).

The Australian Private Equity & Venture Capital Association (AVCAL) is a national association which represents the private equity (PE) and venture capital (VC) industry. AVCAL's members comprise most of the active private equity and venture capital firms in Australia, who together manage around \$27 billion on behalf of Australian and offshore superannuation and pension funds, sovereign wealth funds, family offices, and other investors. Together, the industry supports, directly and indirectly, around 500,000 jobs nationally.

AVCAL strongly endorses the Government's efforts to improve the Fair Entitlements Guarantee (FEG) scheme, noting that the Government has evidence of abuse of the current framework, and that the broader taxpayer base is having to pay for the sharp business practices of some corporates. As a major employer within Australia, the PE and VC industry takes employee entitlements seriously, recognising that making adequate provision for such workers' rights, is a basic, non-negotiable obligation. Further, those companies that do not make adequate provision operate at an unfair advantage compared to their competitors.

Our comments in relation to some of the proposed areas for reform outlined in the Consultation Paper are set out below.

Reforms to Part 5.8A of the *Corporations Act 2001 (Cth)*

As the Consultation Paper notes, Part 5.8 of the Corporations Act, despite its policy intent, has not led to any successful civil or criminal actions against persons involved in circumventing their employee entitlement obligations. Given the Government has stated it has evidence of the current system being abused, it seems apparent that the current statutory test for liability is too stringent. Accordingly, AVCAL would welcome a relaxation of the (currently subjective) test so as to increase prospects for successful actions against persons abusing Part 5.8A of the Corporations Act.

While we note that Option 1 outlined in the Consultation Paper would appear to be an improvement on the status quo, legal precedent suggests that a "recklessness" test may also be unduly difficult to satisfy, particularly given the legal test for criminal matters remains establishing the offence beyond reasonable doubt. Instead, in our view,

Option 2 would be a preferable option, involving the introduction of a civil penalty provision with an objective test to supplement the current criminal offence provision.

In particular Option 2A is to be commended given that it would see the introduction of a 'reasonable person' test, whereby an assessment is made of what such a person knew or would be expected to have known in the actual circumstances of the case. As noted in the Consultation Paper, this option also has the benefit of referring to a well-understood and established legal test (that of the reasonable person). All other things being equal, such a new provision should lead to stronger protections of employee entitlements, as persons will become civilly liable if the case is made against them on the balance of probabilities (cf beyond reasonable doubt for criminal offences).

While expanding the list of parties which may initiate civil action may be helpful (see Option 3), it might prove unnecessary if a new civil penalty provision is introduced which would make it much easier for liquidators to pursue civil actions in appropriate circumstances (Option 2). Option 3, if introduced in isolation from Option 2, is unlikely to lead to any material change in corporate behaviour given the civil action would remain contingent on first establishing criminal liability (which, as noted above, is very difficult to do).

Preventing abuse of corporate group structures

While AVCAL supports the intention behind Option 5 (i.e. to prevent abuses of corporate group structures in order to circumvent employee entitlement obligations), any such provision, if pursued, would need to be carefully drafted and subject to detailed industry consultation. In particular, it would be important that there be a clear nexus between the company that has become insolvent and any other company from which recovery is sought, so as to justify the imposition of liability. It should not be sufficient that they are merely part of the same corporate group given such structures can involve a range of disparate businesses which are, in many respects, unrelated.

Accordingly, AVCAL believes there may be merit in further exploring this proposal, with a view to introducing a very targeted provision that better protects employee entitlements and the integrity of the FEG scheme, at the same time as not unduly restricting legitimate, and long-established corporate practices.

Director sanctions


AVCAL encourages the Government to introduce a more robust sanctions regime for directors which repeatedly engage in conduct leading to improper reliance on the FEG scheme. Option 6 (allowing for the disqualification of directors) appears to be a fair proposal which would act as an effective deterrent to those directors who regularly seek to abuse the current system. In particular, we note the data in the Consultation Paper indicating that there are many persons who may be in such a category.

We support sanctions only being imposed in circumstances where there are other contraventions of the Corporations Act, given that repeated recourse to the FEG scheme does not, of itself, *necessarily* indicate unlawful conduct.

Next steps

We would like to thank you for the opportunity to provide a submission. Please do not hesitate to contact me or Christian Gergis, Head of Policy & Research, if you would like to discuss any aspect of this submission further.

Yours sincerely,



Yasser El-Ansary
Chief Executive