

15 June 2017

Director
Fair Entitlements Guarantee Recovery Team
Workplace Relations Programmes Group
The Department of Employment
12 Mort Street
CANBERRA ACT 2601

Email: ImprovingFEG@employment.gov.au

Dear Mr Krizmanits

Submission on consultation paper: Reforms to address corporate misuse of the Fair Entitlements Guarantee scheme

Chartered Accountants Australia and New Zealand (Chartered Accountants ANZ) welcome the opportunity to provide feedback and commentary on the matters outlined in the consultation paper (“the paper”). We support the development of clear, effective legislation which enables business and communities by providing a robust, enforceable framework for their operations to create prosperity. Consultation with those impacted by legislation is essential to enable this objective to be achieved. In light of this we have obtained feedback from a range of our members and in particular those involved in insolvency work, and those in business. These are overlaid with our mandate to promote broader public interest in our recommendations.

Overall observations

We note that that changes such as this are rarely effective when undertaken in isolation. There are other matters being considered by Government which could impact the effectiveness of such change, such as ability for the Australian Taxation Office to collect Super Guarantee debt. We strongly urge that legislation change addresses core issues rather than one-off matters.

We believe it is unclear in the paper what key outcome is being sought. There is commentary on the need to reduce the amount of claims being made under the Fair Entitlements Guarantee (FEG) scheme but also mention of a desire to change behaviour. Feedback from our members suggests that the legislative proposals, as they stand, are unlikely to assist in the reduction of claims. The most beneficial approach would be to encourage a change in behaviour which promote adherence to the existing legislation. In order to promote a change in behaviour the proposals need to be focused on three key principles – Detect, Enforce and Communicate.

Detection

Many of our members working in practice highlighted difficulties with accessing public data from ASIC as an inhibitor to detection of potential misusers of the system. The introduction of a Directors Identification Number has been raised through the Productivity Commission¹, and we believe this could assist some of the difficulties. However free and easier access to public filings through the ASIC Register would be most beneficial.

Enforcement

As identified in the paper, there are difficulties in funding actions against directors or advisors who have misused the system. Insolvency practitioners need to address the best interests of the creditors of the entity and this may not be the same as a wider public interest action. Part 5.8A of the Corporations Act is rarely used as the funds necessary to bring an action would be deducted from the amounts available to the creditors of the entity.

We do not believe that introducing a fault of “recklessness” would make it easier to prosecute or commence a civil recovery action and so we do not support Option 1.

We support introducing a civil penalty provision separate from the criminal offence provision - Option 2 in the paper. While we consider that options 2A and 2B would both introduce complexities and potential inadvertent drafting impacts for little additional benefit, our slight preference is for option 2B.

We also support expanding the parties who may initiate civil action – Option 3. The parties identified are appropriate. Initiatives such as the Black Economy Taskforce², for example, appear to support broader interaction between such government departments and a more active role in addressing issues.

Another route by which government could strengthen enforcement is by funding a scheme to assist liquidators taking action, along the lines of the Assetless Administration Fund.

The paper suggests that the identities of almost 1,300 directors who appear to have been related to subsequent failed companies are known. Utilising the Corporations Act disqualification provisions against these known individuals would seem to be the most effective way to effect a change of behaviour and protect the public.

We support application for disqualification to be available to the government agencies previously listed.

While we believe the provision is already implicit under section 206F of the Corporations Act, we support adding a specific sanction of more than one improper reliance on the FEG scheme as a cause for disqualification as a director (Option 6).

We suggest that application of section 79 of the Corporations Act (involvement in contraventions) could also be considered in relation to misuse of the FEG scheme.

Communication

In many instances, the perpetrators of misuse will no longer have funds. This reinforces the importance of communication of action by government bodies (if the expansion is adopted) to act as an incentive for changed behaviour. Our members believe that messaging around misuse is an important role for government bodies. This activity reinforces expectations of directors who otherwise may be unduly influenced by unregulated advisors. The fact that the government can report that it is aware of 1,300 directors who have potentially misused the scheme without apparent sanction, does not encourage others to challenge advice that may appear suspect.

Other proposals

We do not believe that expanding matters set out as Option 4 in the paper (such as definitions of “relevant agreements” and “transactions”) would greatly assist. The current drafting is sufficient

¹ Barriers to business set-up, transfer and closure report (December 2015)

² Black Economy Taskforce established by The Federal Treasury, chaired by Mr Michael Andrew AO

to cover potential behaviours. Our members report that the enforcement is the issue, not the framework.

Similarly we believe that the current legislation and regulation around corporate structures is sufficient to enforce actions where they are appropriate, for example holding company insolvent trading actions can be run. If there are non-commercial transactions due to common directors, there are adequate options to recover. Our members believe that action is not undertaken in this regard, not because of a shortcoming in the legislation but, because there are insufficient funds or potential for recovery available to justify such actions. As such we do not support Option 5 in the paper.

As stated above, we believe that many of the issues are due to practical considerations rather than legislative shortcomings. The inadvertent consequences of expanding provisions and changing long established principles including preferential payment processes, are high when considering changes in isolation.

Application of provisions, particularly order of priorities for unsecured creditors, in relation to trust property is uncertain and causes inefficiencies in practice. We support further work to provide clarity in this area (Option 7).

For behaviour to change, and misuse to be consistently brought to account, the parties responsible for enacting the legislation need to be able to have a constructive working relationship. This will be increasingly important should other government bodies be able to bring actions. Detection of potential misuse will require liquidators and agencies working together.

The suggestion to change priorities, and in particular to limit the ability of a liquidator to recover general costs from the circulating pool of asset realisations ahead of employee entitlements, is not supported. Our members have strong concerns in relation to the proposal and believe it would not be conducive to constructive working relationships. On this basis, we do not support Option 8 in the paper.

Summary

It should be noted that the pool of registered liquidators in Australia is small and proposals for Industry Funding for ASIC's supervisory and enforcement costs is predicted to result in a smaller pool yet. For a properly functioning insolvency regime, the availability of qualified professionals is essential. These professionals are the front line for investigating and detecting potential misuse and for assisting enforcement and communication in their communities. We believe that this element of the regime should be recognised through consultations such as this.

Our members in business support clear legislation where those not abiding by the requirements are held accountable. Proposals which increase complexity, confusion or impede effective working relationships between those involved in creating prosperity are not supported. This is the basis for the feedback provided in this submission.

In the Appendix we set out further detail in relation to Chartered Accountants ANZ. Should you have any questions or require further clarification of the points raised, please do not hesitate to contact me at liz.stamford@charteredaccountantsanz.com. We look forward to working with you further in relation to these matters.

Yours sincerely,



Liz Stamford
Head of Policy
Chartered Accountants Australia and New Zealand

Appendix

Chartered Accountants Australia and New Zealand

Chartered Accountants Australia and New Zealand is made up of over 100,000 diverse, talented and financially astute professionals who utilise their skills every day to make a difference for businesses the world over.

Members of Chartered Accountants Australia and New Zealand (CA ANZ) are known for professional integrity, principled judgment and financial discipline, and a forward-looking approach to business.

We focus on the education and lifelong learning of members, and engage in advocacy and thought leadership in areas that impact the economy and domestic and international capital markets.

We are represented on the Board of the International Federation of Accountants, and are connected globally through the 800,000-strong Global Accounting Alliance, and Chartered Accountants Worldwide, which brings together leading Institutes in Australia, England and Wales, Ireland, New Zealand, Scotland and South Africa to support and promote over 320,000 Chartered Accountants in more than 180 countries.