

# Jamieson Louttit & Associates

Insolvency & Advisory

Ref:69584 Admin FEG Submission.doc

5 June 2017

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

James Mason  
Financial System Division  
Markets Group  
The Treasury

By Email: [peter.krizmanits@employment.gov.au](mailto:peter.krizmanits@employment.gov.au)

By Email: [james.mason@treasury.gov.au](mailto:james.mason@treasury.gov.au)

Dear Sir

**Re: Reforms to address corporate misuse of the Fair Entitlements Guarantee Scheme ("Consultation Paper")**

I refer to the Consultation Paper dated May 2017 (the "Consultation Paper").

**Priority of Employee Entitlements**

This letter is to be considered a submission in response to the Consultation Paper and specifically point "8.2 Option 8: Clarify the priority of employee entitlements under sections 433 and 561 of the Corporations Act and align the sections" which states:

1. *"Corporations Act could be amended to align with their policy objectives".*
2. *"general costs of the receiver or liquidator do not have priority over either of these claims" in reference to certain employee entitlements.*
3. *"There is currently uncertainty regarding the priority of employee entitlements over the claims of the security holder and the general remuneration, costs and expenses of a liquidator of receiver from the realisation of assets covered by a circulating security interest".*
4. *"the policy intention underpinning both provisions is to provide a priority for the repayment of employee entitlements".*

Private & Confidential

---

A	<b>Sydney Office</b> Suite 73, Level 15 88 Pitt Street Sydney NSW 2000	<b>Postal Address</b> Suite 73, Level 15 88 Pitt Street Sydney NSW 2000	P	<b>02 9231 0505</b>
			F	02 9231 0303
			W	<a href="http://www.Louttit.com.au">www.Louttit.com.au</a>

## Liquidation

I was appointed Liquidator of Equada Pty Ltd (In Liquidation) Trading as "MPD Printing the News Everyday" ACN: 002 349 331 (the "Company" and /or "Equada") pursuant to resolutions passed at Meetings of Directors and Members on 1 December 2014.

Arnold Bloch Leibler, act for FEG in the Equada matter.

## Issue 1: FEG Legal Advice

I note that Arnold Bloch Leibler have provided advice to FEG (herein referred to as the "Advice") and that as a result FEG has relied on that Advice to make the following Decision (herein referred to as the "Decision"):

*"the relevant priority waterfall in Part 5.6 of the Corporations Act, in respect of assets covered by circulating security interest, is as follows:*

- 1. The liquidator's costs and expenses, including remuneration, referable to the realisation of circulating assets (Universal Distributing);*
- 2. Employee claims (section 561)*
- 3. The secured creditor, to the extent of amounts owing under the security;*
- 4. Unsecured creditors in accordance with priority waterfall in section 556, including a liquidator's general administrative expense.*

*By 'general administrative expenses' we mean all the costs and expenses, including remuneration, which are not directly referable to the liquidator's efforts in realising assets subject to a circulating security interest".*

It is my understanding that FEG has also received advice from other lawyer/s (or other advisor/s) on other matters (i.e. other than the Company), that contradict or at the very least differs in opinion to that provided by Arnold Bloch Leibler.

## Comment

The legal opinion relied upon in respect to the Decision is clearly in direct conflict with established industry practice of over 30 years.

My enquiries within the insolvency profession have indicated that FEG has written to a substantial number of liquidators on this very issue and it is my understanding that the Departments opinion may have an impact across the insolvency profession that could lead to disputed claims of many hundreds of millions of dollars (> \$100 million) which has already been distributed to creditors.

This has been an ongoing issue between Liquidators in the insolvency profession and FEG for over 12 months.

It is inappropriate for a government Department to be making demands from Liquidators, when it has received conflicting advice on this very issue.

As I have outlined with FEG, it beggars belief that FEG has not previously sought guidance from the profession prior to demanding and extracting substantial monies from Liquidators retrospectively.

I submit that the Corporations Act should be amended to reflect the priorities which are clear established industry practice of over 30 years (and not FEG's Legal Advice as outlined above).

## **Issue 2: "Honourable" remuneration and expenses**

### **'Honourable' Trading Losses – FEG's conceded position**

In accordance with FEG's Decision, all Trading Losses incurred in a matter would be categorised as part of point 4 above; that is, they would specifically rank behind FEG/ Employees claims being point 2 above.

It was my understanding that Henry Carr of FEG, at a meeting with insolvency industry professionals, had conceded the position that all 'honourable' Trading Losses would have a higher priority and would specifically rank ahead of FEG/ Employee claims being point 2 above.

However, after seeking clarification on this issue from FEG, I received a letter dated 28 April 2017 from Arnold Bloch Leibler, who act for FEG in the Equada matter, and note at point 5

*"The Department (i.e. FEG) has **not** made a general concession that all trading losses, however incurred and in whatever circumstances, will have the priority afforded to costs and expenses incurred in realising secured assets".*

### **Other 'Honourable Expenses (including Liquidator's remuneration)**

In accordance with FEG's Decision, all Other 'honourable' Expenses incurred in a matter would be categorised as part of point 4 above; that is, they would specifically rank behind FEG/ Employees claims being point 2 above.

These Other 'honourable' Expenses may include but not limited to the following:

1. Legal Costs in seeking advice on:
  - 1.1. Uncommercial Transactions (Section 588FB), including 'Phoenix' transactions
  - 1.2. Insolvent Trading (Section 588G)
  - 1.3. Undue Preferences (Section 565)

- 1.4. Voidable Transactions (Section 588FA)
- 1.5. Transactions to avoid Employee Entitlements (Section 588AC)
2. Liquidator's Remuneration in respect to points 1.1 to 1.5 above.
3. Investigations by Liquidators generally, including reporting and seeking funding from regulatory bodies such as:
  - 3.1. the Australian Securities & Investments Commission
  - 3.2. Australian Taxation Office
  - 3.3. FEG
4. Reporting, convening and holding Meetings of Creditors to seek a direction or seek creditor's opinions as to the recovery of Assets or transaction in respect to points 1.1 to 1.5 above.
5. Liaising, calculating, verifying and admitting Employee claims (whether partially reimbursed by FEG or otherwise).
6. Issuing Statements of Prosecution and attending court in respect to the Directors non-compliance with providing the Report as to Affairs and/or Books and Records of the company.

There are many other examples of Other 'honourable' Expenses incurred and this is by far not an exhaustive list.

It follows that there are Other 'honourable' Expenses (including Liquidator's remuneration) that are properly and appropriately incurred that utilise circulating assets, with the legitimate expectation that by doing so, it would produce a superior result for creditors; but (for whatever reason) they ultimately result in less being recovered than spent. That is Other "honourable Expenses incurred result in a nett Loss to Circulating Assets.

### **Submission**

I invite you to clarify whether you and/or FEG conceded your position that 'Honourable' Trading Losses would also have a higher priority and would specifically rank ahead of FEG/ Employee claims being point 2 above.

I invite you to clarify whether you and/or FEG conceded your position that Other 'Honourable' Losses would also have a higher priority and would specifically rank ahead of FEG/ Employee claims being point 2 above.

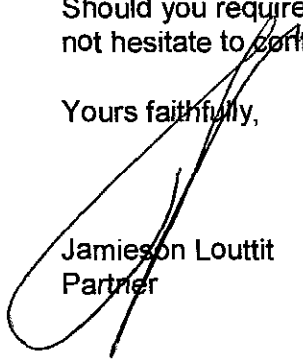
Further, I note that there is no definition under the Corporations Act in respect to 'honourable' Trading Losses or Other 'Honourable Losses, and I invite you and/or FEG to provide an explanation of your understanding of the definition/ interpretation.

**General Comment**

As I have outlined above, it beggars belief that FEG has not previously sought guidance from the profession prior to demanding and extracting substantial monies from Liquidators retrospectively.

Should you require any further information and/or have any enquiries please do not hesitate to contact me directly.

Yours faithfully,



Jamieson Louttit  
Partner