

SUBMISSION OF THE MARITIME UNION OF AUSTRALIA ON REFORMS TO ADDRESS CORPORATE MISUSE OF THE FAIR ENTITLEMENTS GUARANTEE SCHEME

AUSTRALIAN GOVERNMENT 'REFORMS TO ADDRESS CORPORATE MISUSE OF THE FAIR ENTITLEMENTS GUARANTEE (FEG) SCHEME' CONSULTATION PAPER, MAY 2017

This submission responds to the 'Reforms to Address Corporate Misuse of The Fair Entitlements Guarantee (FEG) Scheme' (**Consultation Paper**).¹ The submission firstly provides a brief introduction about the Maritime Union of Australia (**MUA**) and then outlines the MUA views and recommendations in respect of several of the terms of reference, using a case study example.

The Maritime Union of Australia

The MUA represents some 13 000 Australian seafarers, stevedores and other maritime workers, equating to more than 90% of Australian maritime workers. It is an affiliate of the 4.5 million-member International Transport Workers' Federation. The MUA was formed in 1993 with merger of the Seamen's Union of Australia and the Waterside Workers Federation of Australia, which trace their formation to 1906 and 1872 respectively.

Case study – background

The MUA has recently been assisting a group of members whose employer has failed to pay superannuation guarantee (**SG**) contributions over a sustained period and more recently termination and redundancy payments. Although SG is not an employee entitlement covered by FEG, this case study is indicative of the kinds of 'inappropriate employer behaviours'² dealt with in the Consultation Paper that are used to avoid employee entitlement (**EE**) obligations.

For the first approximately 21 months after the business commenced, SG contributions were paid only intermittently. No SG contributions have been paid at all for almost four years. Attempts by the employees, the MUA on their behalf, the Australian Taxation Office (**ATO**), superannuation funds and accountants have all failed to engage the Director in any meaningful resolution process and have yielded no return of monies owing.

This year, three employees have been made redundant. The company has failed to pay the applicable notice of termination pay and redundancy pay. It was only after the MUA commenced legal action that the payments were made. The company has indicated that there are another four employees likely to be made redundant in the near future. A senior manager has indicated to the employees that there are insufficient funds and no intention to make termination or redundancy payments.

One of the issues faced by the employees in pursuing their EE is in identifying the employing entity. Since the business commenced more than five years ago, four different companies have been variously identified as the employer on employee payslips, PAYG summaries and superannuation statements (for the short period that superannuation contributions were being paid). The employees have not been advised of any transfer of business or change of employer nor completed any new tax file declarations or the like.

Australian Securities and Investment Commission (**ASIC**) company searches show that the company director is the same for all above-named companies. One of the companies was placed under external administration and has been liquidated. Another was deregistered, despite the employees having previously notified the ATO and the ATO having found, prior to the deregistration, that the company owed unpaid SG.

¹ Consultation Paper, May 2017, p. 2

² Consultation Paper, May 2017, p. 4

No recovery was made against the liquidated company with respect to SG or any other owing EE. The liquidator advised the MUA that the ATO and affected employees made claims for unpaid SG, but that all assets and funds had been removed from the company prior to external administration. The liquidator advised the MUA that it reported the company director to ASIC for suspected phoenix activities and breaches of director duties.

This case study – in which an employer has failed to pay any SG at all for a sustained period, and now is avoiding other EE obligations including termination and redundancy pay, and notwithstanding that this has been brought to the attention of the ATO and ASIC on multiple occasions by multiple parties – provides a good example of the need for law reform and other tangible measures to address sharp corporate practices and avoidable cost drivers of the FEG scheme.

Response to Consultation Paper

This submission addresses some of the specific questions posed in the Consultation Paper and provides alternative options at the end of the paper under '8. Other related reforms'.

5. Reform to Part 5.8A of the Corporations Act 2001 (Cth) (Corporations Act)

The MUA believes that reform to Part 5.8A of the Corporations Act is a necessary and important component of addressing sharp corporate practices and deliberate reliance on the FEG scheme by corrupt employers. Reform to this Part will only be effective if accompanied by other measures, outlined under '8. Other related reforms'.

Proposed Options 1 and 2, to 'extend fault element in s 596AB to include recklessness and increase the maximum penalty' and 'introduce a separate civil penalty provision with an objective test' are not mutually exclusive and the MUA recommends implementation of both. We also support the findings and recommendations of Anderson et al that these amendments should be made 'in addition to the criminal offence'.³

The MUA believes that expanding the fault element to 'recklessness' will help secure convictions by addressing the current difficulties in proving intent under s 596AB and enable Courts to enforce the object of s 596AB, being 'to deter the misuse of company structures and of other schemes to avoid the payment of amounts to employees that they are entitled to prove for on liquidation of their employer'⁴.

In our case study, the company director has been able to conduct his businesses in a way that allows him to avoid the payment of EE. The MUA believes the evidence suggests deliberate reckless behaviour. It is imperative the Act be strengthened in the above terms to secure prosecutions and deter future phoenix activity and other associated adverse corporate activity.

6. Preventing abuse of corporate group structures to avoid paying employee entitlements

We support proposed Option 5 'corporate groups to provide a contribution equivalent to any unpaid EE in some limited circumstances' on the basis that a system exists whereby large corporate groups can arrange their affairs in a way that allows them to avoid liability when employing entities become insolvent, even when any other of the group's solvent companies are able to pay out EE.

In such situations, liability should be allocated to those most capable of bearing it, that is, the parent entity providing the line(s) of credit. Limits to transferring liability should be reduced wherever possible. If the funds exist elsewhere in the corporate group and can pay the EE without jeopardising the operation of the other company, or the employment and payment of other group employees, then it is 'just and equitable'⁵ to order a contribution.

³ Anderson, H, Ramsay, I and Welsh, M, *Phoenix Activity: Recommendations on detection, disruption and enforcement*, Report, February 2017, pp 93-98. (Anderson et al).

⁴ *Explanatory Memorandum, Corporations Law Amendment (Employee Entitlements) Bill 2000 (Cth)*

⁵ Consultation Paper, May 2017, p. 16

The MUA rejects the Government's assertions that Unions rely on the FEG scheme in order to negotiate preferable redundancy clauses in enterprise agreements.⁶ We have not seen any evidence to support this assertion and note that enterprise agreements are made by agreement. Responsible employers should ensure that they have sufficient funds to meet any EE that they agree to include in an enterprise agreement. Attention is drawn to the examples provided under Section 6 of the Government's own consultation paper and counter that the moral hazard instead lies in the ability for, and choice by, Directors and corporate Officers to circumvent their EE obligations with minimal threat of prosecution or deterring penalty.

7. Sanctioning Directors and Officers with a track record of involvement in insolvencies where FEG is relied upon

The MUA supports sanctions for repeat offender Directors and Officers however these should not be limited to a FEG specific sanction as proposed under Option 6.

In accordance with the research and recommendations of Anderson et al,⁷ amendments to ss 206D and F should be made to:

- introduce restricted directorships;
- prioritise director disqualification in the phoenix context;
- increase the maximum duration of ASIC disqualification;
- give other regulators the power to seek disqualification orders;
- increase the penalties for managing companies while disqualified; and
- check applicants for an Australian Business Number against restricted and disqualified registers.

As shown in our case study, a single company director can repeatedly establish new companies to avoid meeting EE obligations, placing further avoidable strains on workers, taxpayers, compliant businesses and other government departments. Reforms that look beyond FEG specific sanctions will encompass such instances as our case study, and significantly contribute to deterring, disrupting, and enforcing against company directors and officers who repeatedly and deliberately employing harmful and exploitative corporate behaviours.

Any such reform to better capture and penalise repeat offenders must be accompanied by additional measures as outlined at '8. Other related reforms'.

8. Other related reforms

The MUA supports Option 8 'Clarify the priority of employee entitlements under sections 433 and 561 of the Corporations Act and align the sections'. In instances of insolvency, priority is currently given to secured investors, and extends to the payment of fees for appointed Receivers and Administrators. This diminishes the availability and amount of funds left to cover EE. Reform to these sections must clearly stipulate EE as a priority above secured investors and Receiver/Administrator fees.

In addition to the above, the MUA supports the following measures as tangible means to reduce the occurrence of sharp corporate practices and deferral to the FEG scheme where it could otherwise be avoided:

Employee representation

Employees are the least well-placed participants in the economy to directly absorb the costs of corporate insolvency, particularly given that their loss of EE coincides with their loss of income. Reform that allows employees to elect their trade union as a representative to act on their behalf in attempts to recover unpaid EE, including but not limited to, direct contact with company directors,

⁶ Consultation Paper, May 2017

⁷ Anderson et al, pp 51-69.

legal proceedings, dealings with Administrators/Receivers, and dealings with Regulators, is necessary to help to protect and support employees in this vulnerable position. Allowing union representation would provide additional resourcing to recovery pursuits at no cost to the taxpayer or Government, and would reduce or avoid mental and emotional stressors for affected employees by allowing their case to be run 'at arm's length' from them. In our case study, the employees do not have the financial means to pursue their entitlements and are being assisted by the MUA to do so.

Introduce a Director Identification Number (DIN)

It is currently very easy to become a company director. No identification is required on application to be a company director, nor are any other checks undertaken. Establishing a DIN system, accompanied by 100-point certified identification checks akin to those that apply to passport, bank account and driver licence applications, is a simple and cost-effective way to prevent, detect and deter sharp corporate practices. It will also:

- enable employees, small businesses, liquidators, enforcement agencies and 'allies' such as unions, superannuation funds and creditors, to access director history;
- provide a simple and easy-to-use tracking and disruption mechanism;
- generate revenue as applications will require payment of a fee prior to being processed;
- provide enforcement agencies and regulators, namely ASIC, 'whole picture' information on repeat offenders, contributing to their ability to prosecute; and
- deter not only inappropriate reliance on FEG, but avoidance of meeting other EE obligations such as payment of SG.⁸

Improve information sharing between regulators, departments and institutes

The ALP has supported the Government's information exchange reform in the *Treasury Laws Amendment (2017 Measures No. 1) Bill 2017* (Cth), which allows for the sharing of confidential information between ASIC and the Commissioner of Taxation. This Bill goes some way to addressing barriers to information sharing that prevent the detection and prosecution of sharp corporate practices however, comprehensive reform should include measures enabling:

- increased information sharing between regulators (ASIC, ATO and Fair Work Ombudsman);
- increased information sharing between trade and others (e.g. ASIC, ATO, FWO and superannuation funds).⁹

On this last point, the MUA draws attention to Anderson et al.

Superannuation funds, trade unions, and credit reporting agencies are the 'canaries in the coal mine' when it comes to harmful phoenix activity.... Unions become aware of the non-payment of wages through member complaints. They may know of notorious directors who have resurfaced time and again.¹⁰

Our case study suggests that the resources and coordination between government agencies and other stakeholders to prevent [SG] non-payment are inadequate. There has been no indication that the sustained and systematic non-payment by the company (or the actions of the company director) is being monitored, or a response being coordinated, across government agencies and stakeholders. This lack of sharing and coordination limits the ability to prevent and prosecute non-payment of SG in a comprehensive, timely and effective manner. The MUA recommends that ASIC be automatically notified when the ATO, FWO or superannuation funds become aware of sustained and systematic non-payment of the SG (and other EE, and that notification work the other ways around) so that appropriate investigations and enforcement of relevant duties of company directors can commence in a timely manner. This lack of coordination and information sharing is also relevant to detecting, deterring, and enforcing against non-payment of FEG-covered entitlements.

⁸ Anderson et al, pp. 2-7 and Andrew Leigh MP, 'Exposing Dodgy Directors', May 2017

⁹ Anderson et al, pp. 21-29, 41-44

¹⁰ Anderson et al, p 40.

Conclusion

The MUA welcomes the dialogue on addressing the burdens placed on the FEG scheme, and working Australians, when company directors undertake phoenix activity and other sharp corporate practices to avoid their EE obligations.

We strongly support reform of the Act in the above outlined ways and reaffirm our position that this must be accompanied by the simple and cost-effective measures detailed under point 8. This comprehensive approach will alleviate the considerable economic and social burdens that accompany exploitative corporate behaviours.