16 June, 2017

Director
Fair Entitlements Guarantee Recovery Team
Workplace Relations Programs Group
The Department of Employment
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CANBERRA ACT 2601

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To the Director,

The Australian Manufacturing Workers' Union represents over 70,000 workers who create, make and maintain. We have a proud history of fighting for the rights of workers who are made redundant due to the insolvency of their employer.

The AMWU believes that all employees have the right to be paid all that they are owed for the work that they do, including the prompt payment of entitlements following their termination. The Fair Entitlement Guarantee (FEG) provides this for employees in circumstances where their employer does not pay their entitlements due to insolvency.

Executive Summary

The AMWU supports the goals of the reforms to the FEG, as set out on page 7. Any practice which employers engage in to reduce or avoid the full and timely payment of all wages, entitlements and superannuation to employees should be met with swift and significant penalties.

However, we believe that the Department mischaracterizes the problem which is at the core of this issue. Rather than an "improper reliance on the FEG scheme", the core issue is the culture of wage theft among some businesses in Australia. The culture of wage theft results in employees being reliant on FEG, but only in circumstances of insolvency and only relation to wages and entitlements.

Without addressing the issue of wage theft – which includes, but goes well beyond the "sharp practices" outlined in the consultation paper – the government will be unable to avoid circumstances where employees are owed money by companies that have gone into insolvency.

This submission will begin with some observations about the FEG scheme and improvements that should be made to improve that scheme and conclude with feedback on the options presented in the consultation paper.

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General Observations about the FEG

Prevalence of wage theft

It is the responsibility of the employer to pay all of an employee's wages and entitlements when they fall due, including redundancy, notice of termination and superannuation contributions.

The information contained in the consultation paper confirms that the failure of employers to discharge this responsibility is wide spread. This culture of wage theft been detailed in the media many times, most recently in relation to the Labor Hire industry[1], 7/11[2], Dominoes[3], the Made Establishment Group[4] and GPS cleaning[5]. There are also countless other examples where the AMWU and other unions have pursued employers for underpayment of wages across all industries.

Data from ASIC contained in the submission by the Department of Employment to the Senate inquiry into Superannuation Guarantee non-payment shows that 42% of companies are wound up owing unpaid superannuation and 16% owing wages and entitlements to their employees[6].

The failure to pay wages and entitlements to employees is wage theft. This practice is wide spread in trading companies as well as those that become insolvent, as shown above.

Moral Hazard

The AMWU completely rejects the argument that the FEG creates a moral hazard for employers because there is no evidence to support this claim.

The lack of swift and severe penalties for employers who rip off their staff has created the environment where the reliance of the FEG has been allowed to flourish. The moral hazard at the centre of the current debate is caused by the ability of employers to avoid paying their workers and suffer no personal consequences, not the FEG.

The data from the Department presented above does not support the arguments advanced in the discussion paper about the existence of a moral hazard as a driving force behind the increased reliance on the FEG.

The argument goes that employers are willing to leave their companies with insufficient funds to pay their employees' entitlements because they know the government will step in and look after them.

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[1] ABC 4 Corners, "Slaving Away" http://www.abc.net.au/4corners/stories/2015/05/04/4227055.htm
[2] Sydney Morning Herald, "Revealed: How 7 Eleven is ripping off its workers", http://www.smh.com.au/interactive/2015/7-eleven-revealed/
[3] Sydney Morning Herald, "The Dominoes Effect", http://www.smh.com.au/interactive/2017/the-dominos-effect/
[4] Sydney Morning Herald, "George Calombaris' restaurants underpaid staff $2.6 million", http://www.smh.com.au/business/workplace-relations/george-calombaris-restaurants-underpaid-staff-26-million-20170403-gvctvq.html
[5] Sydney Morning Herald, "GPS cleaning company treated vulnerable employees as 'slaves': court", http://www.smh.com.au/business/workplace-relations/gps-cleaning-company-treated-vulnerable-employees-as-slaves-court-20170607-gwm6z0.html
[6] Department of Employment, 2017, *Submission to the Inquiry into Superannuation Guarantee non-payment*, paragraph 34.

However, nearly half of all companies are wound up owing superannuation to their employees, despite there being no guarantee to cover unpaid superannuation. The Department expects that over the next four years employees will lose around $800m in unrecovered unpaid superannuation due to the insolvency of their employer[7].

This compares with $876 in unrecovered unpaid wages and entitlements that will be paid under the existing FEG scheme over the same period[8].

If the Department's position is correct, we would expected there to be fewer companies winding up owing superannuation and more companies winding up owing unpaid wages. In fact, the number of workers affected by unpaid superannuation is higher and the quantum of money left unpaid and unrecovered is almost as large.

This completely undermines the argument being put by the Department that the FEG creates a moral hazard for employers.

It is not the presence of the FEG that leads employers not to pay their staff, it is an entrenched culture of wage theft. The belief that paying your staff is optional has been allowed to take root and grow by governments (through ASIC and the FWO) that are unwilling or unable to prosecute those responsible.

If the wage theft, including through insolvency, was properly investigated, prosecuted and punished, there would be a significant reduction in the reliance on the FEG.

The consultation paper also makes the following assertion, in relation to the moral hazard as it relates to union bargaining:

> "There is also some evidence indicating that unions, during bargaining for enterprise agreements, negotiate higher redundancy entitlements knowing that the FEG scheme can cover this in the event of an employer's insolvency."

There is no evidence provided in the consultation paper to support this claim. An AMWU analysis of redundancy clause data since 2011 does not support this claim. The examination to the operation of FEG must be both transparent and done on the basis of fact. The Department should either present data in support of this argument, or cease making unsubstantiated statements that on the face of it appear to be politically motivated.

Growing use of the scheme

The AMWU does not dispute the proposition that there has been an increase in this particular set of sharp corporate practices, which has lead to a larger reliance on the FEG. However, there is no evidence that the existence of the FEG has caused this growth in "sharp practices."

As outlined above, the AMWU believes that this is just the latest evolution of the ongoing desire of some employers to pay their workers as little as possible and to avoid paying them at all, if they can get away with it.

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[7] Department of Employment, 2017, *Submission to the Inquiry into Superannuation Guarantee non-payment*, paragraph 36.

[8] Portfolio Budget Statement, 2017, Department of Education, p 29.

This inquiry into the practices of employers has only come about because it directly impacts on the government's bottom line. Similar interest has been shown in issues like sham contracting and the black economy because they cost the government taxation revenue. None of these issues has come to a head because workers are losing their workplace entitlements or having their wages stolen.

The reliance on the FEG is a symptom of the much larger problem of wage theft in Australia.

Indeed, the FEG is the only way that the damage caused by employer wage theft is shared across the community. If the FEG were curtailed or limited in any way, the damage of wage theft would fall entirely on vulnerable employees.

It should also be noted that the growing number of claimants over the life of the scheme is broadly in line with the number of companies being wound up. The following table was provided by the Department in its submission to the Senate Inquiry into Superannuation Guarantee non-payment[9]:

Period	Claimants Paid	Total Cost
1 July 2004 – 30 June 2008	32,441	$249.7 million
1 July 2008 – 30 June 2012	56,047	$600.7 million
1 July 2012 – 30 June 2016	60,908	$1.05 billion

It shows a stead growth in the use of the scheme for each of the four year periods since 2004.

An analysis of ASIC data[10] over the same periods shows a similar growth in the number of companies that were wound up over the same periods:

Period	**Wind-ups (Court or Creditor)**
1 July 2004 - 30 June 2008	18,370
1 July 2008 - 30 June 2012	27,975
1 July 2012 - 30 June 2016	30,144

These details aside, there are clearly employers are ripping off their workers by not paying them their full wages and entitlements. The AMWU welcomes any action by the government to prevent this from happening and to punish employers and directors who engage in wage theft.

Individuals shouldn't bear the costs when they are the victims of theft

If someone has their car stolen, the government pays for a police force to catch the criminal, lawyers to ensure that the individual responsible is punished and if their car is recovered, it is given back to the victim at no cost.

[9] Department of Employment, 2017, *Submission to the Inquiry into Superannuation Guarantee non-payment*, paragraph 18

[10] ASIC, 2017, Insolvency Statistics – Series 1: Companies entering external administration, Table 1.3

If an employer steals a worker's wages, entitlements and superannuation then goes broke, then the worker and other creditors are asked to pay for the cost of investigation, some methods of prosecution and recovery of the money owed to them.

We support the FEG Recovery Program as it provides funding to ensure that proper investigations are undertaken. The FEG Recovery Program increases the likelihood that improper conduct can be uncovered and brought to light. By providing funding the program ensures that any money that can be recovered goes to employees (particularly those who are owed unpaid superannuation) and creditors and is not spent on investigating employer malfeasance.

This program should be expanded more broadly to ensure that where employees wages, entitlements and superannuation have not been paid, the costs of investigation, prosecution and recovery are borne by the government, as they would be in any other situation where an individual is the victim of theft.

Support for Whistleblowers

The AMWU also believes that the government should do more to encourage and support whistleblowing that many allow prosecution of improper practices by directors.

By providing incentives to anyone who dobs in a dodgy director, the government may be able to better understand how avoidance schemes are developed and work more efficiently to uncover them.

Response to the Consultation Paper

Reform to part 5.8A of the Corporations Act – Option 1

The AMWU broadly supports the proposed option to reduce the burden for prosecution and to increase the penalties to directors. As shown above, an increasing number of employers are choosing not to properly pay their employees. An increase in successful prosecutions for breaches of section 596AB, with harsh penalties handed out, may help to curtail this behaviour.

However, recklessness may still be difficult to show where there are numerous transactions in quick succession, as the impact of any individual decisions may be difficult to show.

Rather, it should be expected at all times that corporations should have at the forefront of their minds their ability to ensure that they can meet employee liabilities when they fall due. If they fail to secure and protect those liabilities they should be assumed to have breached section 596AB and be prosecuted.

In the view of the AMWU, this should be a strict liability offence. If the arrangement or agreement entered into prevents the recovery of employee entitlements or avoids the company's employee entitlement liabilities, then the directors should be convicted.

If a company enters into an arrangement or agreement that has the effect of preventing the recovery of some or all of the company's employee entitlement liabilities then the directors of that company need to be scrutinised closely.

We do not need individuals who do not pay their staff running companies in Australia.

Employee entitlements have priority over other unsecured creditors and this reflects the unique nature of wages, entitlements and superannuation for employees. These payments are not treated like other debt and for good reason. Any director that manages a company that is unable to meet these uniquely important payments should be prevented for managing companies in future.

Going a step further

If a company wishes to undertake a transaction that may have an impact on their ability to pay the wages, entitlements and superannuation, then employees should be made aware of the transaction and be given a say in whether the company can proceed with it. For example, where a director wishes to move assets from the company that engages the employees to another company within the corporate group, or to another company, it should be the subject of consultation and approval by employees.

Employers may say that they need to enter into some types of arrangements to effectively run the business successfully. We do not seek to interfere with their ability to do this where it is genuine. The evidence before the review is that in many circumstances, these sharp practices are not a genuine attempt to restructure but a sharp practice aimed to avoiding payment of employee entitlements.

To allow careful scrutiny of any such transactions, employees should be made aware of and be involved in that decision making.
The *Competition and Consumer Act* (CCA) has a range of mechanisms which allow companies to engage in anti-competitive conduct if they give notice and receive authorisation.

We propose that authorisation may be approved by a majority of employees and where there is a union member present, the agreement of the Union also and, as in the CCA, a regulator could also be required to give approval.

While there may be some concerns around timing and resources for time sensitive transactions, these are likely to be the minority of cases. For the types of transactions used as examples in the consultation paper – moving assets to other entities within a corporate group – there should be plenty of time for the appropriate level of disclosure and discussion to take place.

Reform to part 5.8A of the Corporations Act – Option 2

The AMWU broadly supports the inclusion of a separate civil penalty to the criminal penalty included in section 596AB. While both options have merit, the AMWU believes that option 2B – an objective assessment of the transactions or agreements – should be the preferred approach.

This will allow the government, through the crafting of the clause, to ensure that the right of employees to be paid the full wages, entitlements and superannuation are put front and centre of the assessment that is being done. In order to make the test more transparent, and to give employees certainty about their entitlements being protected, it should be a strict liability offence.

The AMWU supports the separate civil penalty, because it will allow a greater number of parties to bring a claim. A greater number of claims being brought would help to stamp out the culture of wage theft which is at the core of the problems outlined in the consultation paper.

Reform to part 5.8A of the Corporations Act – Option 3

The AMWU supports expanding the number of parties that can bring claims under section 596AC. We believe that any affected party should be able to bring civil claims.

This should include allowing superannuation funds to take action on behalf of members who are owed superannuation guarantee contributions. While the ATO is responsible for recovering superannuation guarantee funds, the employee in question have no relationship with the ATO – they do have a relationship with their superannuation fund.

On a practical level, in many workplaces most workers will contribute to the same superannuation fund. This may provide economies of scale that would allow superannuation funds to take efficient action to recover unpaid funds on behalf of their members.

According to the ATO's submission to the Senate Inquiry into Superannuation Guarantee non-payment around hundreds of millions in superannuation goes unpaid due to insolvency every year[11]. There was around $2.8bn in superannuation guarantee debt raised for nearly 32,000 companies in the last 5 financial years, with only just over half of that (55%) recovered.

Clearly more needs to be done to ensure that employees receive the wages, entitlements and superannuation for the work that they perform.

Unions should also be included in the list of parties that can bring civil claims under this section. Unions, like industry superannuation funds, always act in the best interests of their members. Where their members could benefit from civil recovery actions under 596AC, they should be granted standing.

Reform to part 5.8A of the Corporations Act – Option 4

The AMWU supports improved clarity and in the drafting of part 5.8A. We also believe that it would be useful to define specific types of arrangements or agreements that are of interest. This could be done in a similar fashion to the CCA, which also defines specific types of anti-competitive behaviour.

Reform to Corporate Group Structures – Option 5

The AWMU believes that if an entity goes into liquidation, entities in a group structure should have an obligation to meet the unpaid employee entitlements of their related entity in all circumstances.

This should include any outstanding wages and entitlements (which may be in excess of the FEG) and any unpaid superannuation guarantee contributions.

This shared liability to meet employee entitlements should also apply any entities that may be related by shared directorships, rather than simply those within a single corporate entity. This would apply in instances where a company received any benefit from the wound up company and the two shared companies a director.

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[11] Australian Taxation Office, 2017, Australian Taxation Office Submission: Inquiry into the impact of the non-payment of the Superannuation Guarantee, paragraph 173

Any reform in this area must make it easier for those seeking to recover funds to 'pierce the corporate veil' in pursuit of unpaid employee entitlements. As established earlier, these debts are unique and non-negotiable; their avoidance should not be described as an "effective strategy to quarantine risk."

If the government is serious about preventing wage theft through insolvency, it must make it easier to recover these debts. If the payments owed to workers for wages, entitlements and superannuation must be paid by other parts of a corporate group, other companies under the control of the same director(s), or recovered through civil action, then not paying your staff will immediately become a much less attractive option for those running a business in Australia.

Where a director is unable to show that they took all reasonable steps to ensure that all wages, entitlements and superannuation could be paid to employees, they should be held personally responsible for any outstanding debts owed to their employees.

The government must have a zero tolerance approach to employers that don't pay their workers.

Reform to part 2.D6 of the Corporations Act – Option 6

The AMWU does not support the reforms proposed under option 6. In order for them to have effect, a director would have to have ripped off two companies worth of workers and for the insolvency process to have completed for both of those companies. In some cases, this could take years, leaving other workers vulnerable to predatory operators that should not be running a business.

The AMWU believes that any director of a company that is wound up without being able to pay the full wages, entitlements and superannuation of its workers should be automatically disqualified from managing a corporation. This could be subject to appeal, allowing those managers with a reasonable excuse to seek to be reinstated.

This approach ensure that the importance of paying your employees remains at the centre of the government's message to Australian business owners and reduces the workload for ASIC. Rather than being required to build a case to prove a director should be disqualified, the automatic disqualification would require the director to meet the burden of proof to show that they should be reinstated.

The message should be simply, directors that are unable to pay their employees should not be running businesses in Australia.

The AMWU supports the automatic disqualification of directors for offences under the Fair Work Act.

Yours sincerely,

PAUL BASTIAN
NATIONAL SECRETARY