



Australian Government



Australian  
**Small Business and  
Family Enterprise**  
Ombudsman

23 June 2017

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

By email: [ImprovingFEG@employment.gov.au](mailto:ImprovingFEG@employment.gov.au)

Dear Sir/Madam

**RE: REFORMS TO ADDRESS CORPORATE MISUSE OF THE FEG SCHEME**

Thank you for the opportunity to submit a response to the consultation on reforms to address corporate misuse of the Fair Entitlements Guarantee (FEG) scheme.

The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) assists with alternative dispute resolution and acts as an advocate for small businesses and family enterprises in relation to key policies and laws which impact on small business.

We support initiatives to reform corporate misuse of the FEG scheme. We agree these measures should be considered in conjunction with sharp practices relating to insolvency laws and phoenix activities.

During the course of advocacy and assistance functions by our office, we have considered situations where the best interests of small business and family enterprise have been compromised by sharp practices by businesses of all sizes but usually medium to larger businesses. We have balanced this against the needs of other small businesses who often are also creditors of a business in liquidation.

We have evaluated the options provided in the issues paper and offer the following comments:

***Option 1 – extending the fault element to include recklessness***

We support the option to include recklessness as sufficient to support a criminal penalty which will assist with the evidentiary burden and should allow the provision to be used more frequently.

T 1300 650 460 E [info@asbfeo.gov.au](mailto:info@asbfeo.gov.au)  
[www.asbfeo.gov.au](http://www.asbfeo.gov.au)

Office of the Australian Small Business and Family Enterprise Ombudsman  
GPO Box 1791, Canberra City ACT 2601

### ***Option 2a – Test based on a reasonable person test***

We are cautious about the use of reasonable person test because they are always limited by the opaqueness of internal management decisions and the financial position of an entity to an external party. For instance, other non-related small businesses may continue to trade with the entity prior to insolvency but have no ability to determine if the entity is engaging in sharp practices to avoid employee entitlements.

### ***Option 2b – Test based on an objective assessment of the transaction or agreement***

We support this option in principle but further clarity around any guidelines of how it would be used by a court would be useful. Our concern rests is who would undertake the assessment.

### ***Option 3 – Extend the parties who could initiate civil action***

We support this option but note the challenge will be to financing the cost of any action by the parties identified in the issues paper (i.e ATO, Dept of Employment etc.).

### ***Option 4 – Addressing other issues with the part's drafting***

We support the alignment of definitions across legislation relevant to insolvent companies.

### ***Option 5 – Corporate Group contributions***

We are supportive of adopting the use of a framework similar to contribution orders used in New Zealand and Ireland. We would suggest that the definition of a corporate group be expanded to include past and future entities associated with the Directors (and shadow directors) of an insolvent entity.

It is important to remove the incentive of sharp practices by tying a future company to the corporate group. We would suggest a prospective period of up to 3 years to allow the capturing of assets which may have been stripped or otherwise shifted to enable a future enterprise. We believe this could work in conjunction with Option 3 and Option 6. We would seek to align the requirement with the Government's proposed National Innovation and Science Agenda proposal of safe harbours for directors as a balance needs to be attained of assisting companies in difficulty to be turned around, dis-incentivising illegal behaviours and avoiding the risks to be transferred to the taxpayer.



Australian Government



Australian  
**Small Business and  
Family Enterprise**  
Ombudsman

***Option 6 – Specific FEG sanctions for Directors***

We support option 6 to increase the ability to disqualify directors but would recommend the thresholds be reduced. For instance a director should not be allowed to rely on multiple uses of the FEG for failed ventures before being disqualified.

***Option 7 – Reform the law for trust assets.***

We are supportive of this reform as it is inequitable that unsecured creditors of a corporate trustee should take priority over employees in a related entity.

***Option 8 – Clarify the priority of employee entitlements***

We are supportive of this reform as employees entitlements should be among the first priorities to be satisfied from the assets of an insolvent entity.

We trust these comments will assist you and we welcome the opportunity to discuss these matters with you further if required. Please feel free to contact either myself or Ms Suzanne Webbey, by telephone 02 6263 1500 or email [suzanne.webbey@asbfeo.gov.au](mailto:suzanne.webbey@asbfeo.gov.au)

Yours sincerely,

**Kate Carnell AO**

Australian Small Business and Family Enterprise Ombudsman

T 1300 650 460 E [info@asbfeo.gov.au](mailto:info@asbfeo.gov.au)  
[www.asbfeo.gov.au](http://www.asbfeo.gov.au)

Office of the Australian Small Business and Family Enterprise Ombudsman  
GPO Box 1791, Canberra City ACT 2601