ICLC
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6 June 2017

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

By email only: ImprovingFEG@employment.gov.au

Dear Director,

RE: Reforms to Address Corporate Misuse of the FEG Scheme

The Inner City Legal Centre would like to submit the following comments in relation to reforming the FEG scheme to address corporate misuse.

1. Should Part 5.8A be amended?

We agree that Part 5.8A of the *Corporations Act 2001* (Cth) should be amended to ensure the burden of paying employees entitlements are not shifted to the Australian government (and therefore taxpayers) without it being a last resort.

Our support of amendments is very much in the context of protecting employees. Employees are less capable than other stakeholders to protect themselves against insolvency. Should a company enter insolvency (whether voluntarily or involuntarily), an employee must be able to claim all outstanding entitlements owing to them. The Part should protect employees as well as Australian taxpayers, and ensure companies are not deliberately structuring their business to avoid these obligations.

Further, we acknowledge, as set out in the Consultation Paper, that the Part has had no successful criminal or civil prosecutions. This arguably demonstrates that the current provisions are ineffective in protecting vulnerable employees and ultimately taxpayers.

2. What are the benefits and risks of the above options?

Option 1: this option has the benefit of addressing the problems with the current section that has led to difficulties in prosecuting contraventions. Specifically, widening the scope of determining subjective intention to include recklessness may make it easier to prove fault on the part of the employer. This provision shifts power away from the business owner and protects taxpayers. Although this will make it easier for ASIC to prosecute, it still requires a party to bring an action under the section

in order to benefit from its inclusion in the Act. Nonetheless, widening the scope for fault (together with increasing penalties) should work as an effective preventative measure so that companies do not deliberately structure their business in a way that prevents employee recovery of entitlements.

Option 2: as alluded to in the discussion of Option 1, introducing civil penalties are usually an effective method to prevent avoidance activities. However, whether this option will operate as a further preventative measure to the criminal penalties already operating under s 596AC of the Act is uncertain. Although s 596AC does not contain an objective test, it gives employees priority to claim any compensation recovered by a liquidator in insolvency. Therefore, if s 596AC were repealed, employee priority would need to be preserved in any new section implemented under this option. Ultimately, we see two ways to achieve the suggestions contained in option 2. First, s 596AC could be amended to include an objective test. Otherwise, if it is repealed and replaced by a new section containing civil penalties, then employee priority must be preserved in that new section. However, given that penalties for avoiding employee entitlements already exist under the Act, we do not think that option 2 is the most effective way to amend the Act to protect employees.

Option 2A: we submit that introducing a reasonable person test to section 596AC is more desirable than option 2. Not only is a reasonable person test used elsewhere in the Act and in the common law, it also (like option 1) broadens the scope for prosecuting company directors who fail to ensure that employee entitlements can be paid upon entering insolvency.

Option 2B: we support option 2B due to the inclusion of an objective test and the inclusion of guidelines/factors that would assist the court in determining the reasonableness of the agreement or transaction. Looking to the benefits and detriments of the transaction itself is an effective way to determine whether the transaction or agreement was made for the benefit of the company or for the purpose of avoiding payment of employee entitlements and shifting company obligations onto the FEG scheme. It addresses the current issues with the Part by providing an objective test, which shifts the assessment from the individual to the transaction itself. This may make the section easier for employees to bring an action under.

Option 3: we support the provision for expanding the types of stakeholders that have standing to bring an action under 596AC, especially allowing Fair Work to bring an action under the scheme. Many clients we meet are unwilling or hesitant to bring an action through the courts on their own. However, they are more willing to report to Fair Work and have the Ombudsman investigate on their behalf. We believe this option should be implemented in addition to another of the options that we have expressed support for above. However, the range of stakeholders that can bring an action should only be expanded to allow the other stakeholders to bring an action for the benefit of employees and not for their own or another party's benefit.

Option 4: given the problems the Part has had previously with a lack of prosecutions, we support redrafting the section to expand the application of the section to a broader range of circumstances. Like option 3, we believe this proposal can be implemented in addition to one of the earlier options. We believe this option is an effective response to some of the success issues identified in the current Part.

3. What are the specific drafting issues with the Part which should be addressed?

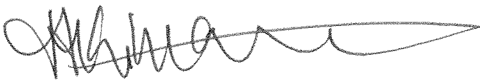
- Section 596AB(1)(b) includes a provision for 'significantly reducing the entitlements of employees of a company.' The use of the word significant is problematic because there is no case law from

the section detailing what may be thought of as 'significant.' We propose that this section be amended to include guidelines as to what constitutes 'significant' under this section. Alternatively, and in line with changing the subjective intention to reckless under Option 1, significantly could be replaced with 'deliberately or recklessly'.

- As detailed in the Consultation Paper under Option 4, a broader range of circumstances should be drafted into s 596AB(3) to include more than just 'relevant agreements or transactions.'

If you have any questions, please do not hesitate to contact our office on 9332 1966.

Yours sincerely,
INNER CITY LEGAL CENTRE



Hilary Kincaid
Principal Solicitor