



Reforms to address corporate misuse of the Fair Entitlements Guarantee scheme.

Prepared by:

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i. Introduction

Job Watch Inc. (JobWatch) is pleased to contribute to the Commonwealth Government's inquiry into potential reforms to address corporate misuse of the Fair Entitlements Guarantee (FEG) scheme. JobWatch supports any amendments to the FEG scheme that better protect against corporate misuse of the scheme and that saves Australian taxpayer's money so long as there is no negative effect on the actual employee entitlements that are guaranteed by FEG.

This submission focuses on amendments to relevant laws that, if made, could better protect against corporate misuse of the FEG scheme whilst also highlighting a number of current deficiencies in the FEG scheme that JobWatch hopes will be the subject of further law reform in the near future.

ii. About JobWatch

JobWatch is an employment rights community legal centre which is committed to improving the lives of workers, particularly the most vulnerable and disadvantaged. It is an independent, not-for-profit organisation which is a member of the Federation of Community Legal Centres (Victoria).

JobWatch was established in 1980 and is the only service of its type in Australia. The centre is funded by State and Federal funding bodies to do the following:

- a) provide information and referrals to Victorian, Queensland and Tasmanian workers via a free and confidential telephone information service (TIS);
- b) engage in community legal education through a variety of publications and interactive seminars aimed at workers, students, lawyers, community groups and other appropriate organisations;
- c) represent and advise vulnerable and disadvantaged workers; and
- d) conduct law reform work with a view to promoting workplace justice and equity for all workers.

Since 1999, JobWatch has maintained a comprehensive database of the callers who contact our telephone information service. To date we have collected over **186,000** caller records with each record usually canvassing multiple workplace problems including, for example, contract negotiation, discrimination, bullying and unfair dismissal as well as the circumstances giving rise to those problems. Relevantly, JobWatch's database also records when a caller's problems arise from employer insolvency.

Our database allows us to follow trends and report on our callers' experiences, including the problems they face when their employer becomes insolvent and the effect this has on callers' ability to recover their minimum entitlements. JobWatch currently responds to approximately **10,000** calls per year.

The contents of this submission is based on the experiences of callers to and clients of JobWatch and the knowledge and experience of JobWatch's legal practice. Case studies have been utilised to highlight particular issues where we have deemed it appropriate to do so. The case studies which we have used are those of actual but de-identified callers to JobWatch's TIS and/or legal practice clients.

Statistical analysis

The following information provides an overview of the employment status, coverage and union membership of callers to JobWatch over the past 2 years. It shows the vulnerability of many of our callers and the precarious nature of their employment. There is also an overview of calls relating to employer insolvency in Victoria over the past five years. It highlights the relevance of the FEG scheme to our callers, as well as the number of callers that are experiencing employer insolvency related problems.

Table 1: Employment status of callers to JobWatch in the period of 1 July 2014 to 30 June 2016

Employment Status	Count	Percentage of total calls
Casual Part Time	1,243	8.21%
Casual Full Time	729	4.82%
Independent Contractor	407	2.69%
Fixed Term Contract	259	1.71%
Apprentice/Trainee	208	1.37%

1,972 callers identified as casual employees, 407 callers identified as independent contractors, 259 callers were on fixed term contracts and 208 callers were apprentices or trainees.

Casual employees, independent contractors, fixed term contract employees and apprentices/trainees are vulnerable workers because they lack certainty that they have ongoing employment. This fear of losing their job often results in them being hesitant to enforce their legal rights.

Table 2: Coverage of callers to JobWatch in the period of 1 July 2014 to 30 June 2016

Coverage	Count	Percentage of total calls
Caller does not know	3,676	24.28%
Modern Award	3,980	26.29%
Enterprise Agreement	1,838	12.14%

1,838 callers (approximately 12% of callers) were covered by an enterprise agreement.

Employees who are covered by an enterprise agreement generally have the benefit of more generous conditions than those who are only covered by the minimum statutory protections¹ and, more often than not, there is a strong trade union presence hence why there is an enterprise agreement in the first place.

3,980 callers (26.29% of callers) were covered by a modern award. The Modern Award is designed to work in conjunction with the National Employment Standards to provide statutory minimum standards.²

3,676 callers (24.28% of callers) in that period did not know whether they were covered by an industrial instrument. This is concerning because they set out minimum terms and conditions of employment.

Table 3: Union membership of callers to JobWatch in the period of 1 July 2014 to 30 June 2016

Union Membership	Count	Percentage of total calls
Yes	760	5.02%
No	8,084	53.39%
Unknown	6,296	41.59%

760 JobWatch callers (5.02% of callers) identified as union members. Union membership became a mandatory field in the TIS form during September 2015. However, JobWatch believes that this figure is reasonably accurate because where the union is involved, it is usually raised in the context of the conversation with the TIS advisor.

¹ Section 193 of the Fair Work Act 2009 provides that the Fair Work Commission must be satisfied that employees covered by an enterprise agreement must be better off overall under the enterprise agreement than under the modern award

² Andrew Stewart, Stewart's Guide to Employment Law, Fifth Edition, 2015.

Workers who are not members of a union are vulnerable to exploitation as they do not have the benefit of advice on minimum wages, minimum terms and conditions of employment, legal representation and collective bargaining.

Table 4: JobWatch referrals to the Fair entitlements Guarantee Scheme Hotline

Year	Number of referrals	Percentage of total referrals
2012	54	0.33%
2013	65	0.31%
2014	64	0.33%
2015	83	0.36%
2016	59	0.34%
2017 (to May 31 2017)	26	0.32%

The number of Victorian referrals to the FEG Hotline has remained consistent throughout the five years since 2012. There is a notable spike of 83 referrals in 2015 (0.36% of referrals). However, referrals in other years have remained between 54 and 65, with 2017 on track to fall in this range.

Referrals include cases where the caller is uncertain of the financial position of the employer, and those who are conducting preliminary enquiries should their employer become insolvent. It provides an indication of the number of cases where the FEG scheme is, or might become, relevant.

Table 5: JobWatch callers with a problem relating to employer insolvency

Year	Number of calls relating to employer insolvency	Percentage of total calls
2012	9	0.08%
2013	18	0.31%
2014	20	0.14%
2015	44	0.25%
2016	35	0.20%
2017 (to May 31 2017)	20	0.27%

The number of Victorian callers experiencing problems relating to their employer's insolvency has gradually increased since 2012 with a large spike in 2015.

These calls usually involve situations where the employer has already ceased to trade due to insolvency and so the employment relationship is also usually at an end. Table 5, therefore, provides a fair indication of the number of JobWatch callers who are experiencing non-payment of entitlements issues and have or are likely to make a FEG application.

iii. The importance of FEG

From JobWatch's perspective, the FEG scheme recognises the devastating impact a loss of employment due to employer insolvency and the consequential loss of employee entitlements has on individual employees, their families, the tax payer (e.g. via increased Centrelink benefits being paid and the use of related services e.g. public/emergency housing etc) and the potential flow on effects to social inclusion and cohesion. Even the usual extended delay in payment of entitlements in the standard insolvency process can be equally devastating.

The FEG scheme goes a long way to ameliorating these problems whilst also giving the Australian Government the opportunity to recover any advance payments made to employees by FEG by allowing it to step into the shoes of the employees in the liquidation process.

In addition to advocating for certain improvements to the FEG scheme regarding payable entitlements and eligibility criteria, JobWatch also suggests amendments be made to relevant laws to improve the prospects of the Australian Government recovering FEG advances through the liquidation process among other recommendations.

iv. Improving the FEG scheme

There are a number of ways the FEG scheme could be improved for the benefit of employees who have not been paid their entitlements on their employer becoming insolvent. Nevertheless, for the purposes of this submission, JobWatch will focus on superannuation and the ineligibility of foreign employees.

Superannuation

Currently, the FEG scheme only covers 5 basic employment entitlements being unpaid wages (capped at 13 weeks), annual leave, long service leave, payment in lieu of notice and redundancy pay. One of the most common inquiries to JobWatch concerns the fact that the FEG scheme does not pay unpaid superannuation.

Case study – Unpaid superannuation in employer's insolvency

Wei wei works as a full-time campaign manager at a consulting firm, and has done so for 9 months.

She has recently noticed that over the course of her employment, she has not received any superannuation contributions to her nominated account. She consults her employer and queries the payments, to which she is told that if she was to pursue them in court, the business will go bankrupt and she wouldn't receive anything anyway. Wei wei believes the statements to be true, and cannot afford to lose her job.

JobWatch recommends that unpaid superannuation be added to the list of entitlements paid by the FEG scheme as clause 21 of modern awards now deals with superannuation making superannuation a safety-net entitlement. For example, clause 21.2 of the Fast Food Industry Award 2010 states as follows:

21.2 Employer contributions

An employer must make such superannuation contributions to a superannuation fund for the benefit of an employee as will avoid the employer being required to pay the superannuation guarantee charge under superannuation legislation with respect to that employee.

If unpaid superannuation was added to FEG's list of payable entitlements, the Australian Government (possibly via the Australian Tax Office) may be able to recover any advance via the liquidation process in the usual manner.

By adding superannuation to FEG's list of payable entitlements, employees' superannuation funds will be increased therefore reducing the need for employees to rely on the aged pension thereby saving Australian tax payers' money.

Recommendation 1: That superannuation be included in FEG's list of payable entitlements.

Foreign workers

Currently, under the FEG Scheme, foreign employees are not entitled to a FEG advance.

In other words, to be eligible for FEG the employee has to be, at the time his or her employment ends, an Australian citizen or, under the Migration Act 1958, the holder of a permanent visa (i.e. a visa that allows the employee to live in Australia indefinitely) or special category visa (i.e. the employee's current visa allows the employee to stay and work in Australia as long as the employee remains a New Zealand citizen).

Case study – FEG ineligibility based on Visa type

Lin is working as a Trainer and Assessor for a Registered Training Organisation (RTO) under a Temporary protection visa.

Lin's employer has recently indicated that it will go into liquidation, and that there are not enough assets to satisfy everyone's wages and accrued entitlements. As such, the company has referred Lin and her fellow employees to the FEG scheme in order to obtain their entitlements.

However, since contacting FEG, Lin has been made aware that due to her visa status, she is not entitled to FEG assistance.

JobWatch does not understand why most foreign employees, e.g. 457 and student visa workers, are ineligible for FEG. Foreign employees pay PAYE tax, are entitled to superannuation contributions and have all of the protections of the Fair Work Act 2009, e.g. unfair dismissal and general protections including discrimination, yet these employees, being some of the most vulnerable and exploited workers, such as cleaners, are not eligible for FEG assistance because of their nationality.

The exclusion of foreign employees from the FEG scheme simply amounts to authorised race and/or national extraction discrimination and is without justification. Therefore, foreign employees whose visa allows them to work in Australia should not be excluded from the FEG scheme.

Recommendation 2: Foreign employees with visa work rights should not be excluded from receiving FEG assistance.

v. Tackling corporate misuse of the FEG scheme

In JobWatch's opinion, all of the proposals for reform of the FEG scheme to address corporate misuse of the scheme have merit with the primary concern being to attempt to save tax payers' money.

Nevertheless, a balance needs to be struck between deterring and punishing deliberate or reckless misuse of the scheme and not unnecessarily hindering what may be genuine entrepreneurial ventures. For example, a company director whose insolvent companies have relied on FEG in the past may be unwilling to be innovative or attempt to commercialise new business ideas for fear of being personally financially penalised if that new business venture fails. Obviously, this impact of any changes to the FEG scheme is to be avoided.

Worse still, such a director may simply be willing to have a friend or family member be named as a director of a new company but he or she will really be the true or shadow director. It is therefore in the interests of all parties, e.g. employees, the Australian Government, the business community, Australian Securities and Investment Commission, insolvency practitioners and the Courts, not to unnecessarily hinder entrepreneurialism and economic development nor drive disreputable directors to take unlawful action to avoid personal financial penalties.

As JobWatch is not an expert in corporations/insolvency law, JobWatch's comments will be more in the form of broad recommendations rather than a discussion of specific amendments to specific sections of the *Corporations Act 2001* (Cth).

In JobWatch's opinion, it is not really relevant whether companies care or not if their employees are paid their entitlements when corporate insolvency occurs. The FEG scheme and its predecessors did not arise out of corporate compassion for unpaid employees, rather it arose for political reasons in relation to one or more high profile insolvencies. In this sense, there is no real 'moral hazard' regarding the FEG scheme because, if it didn't exist, insolvent companies would still be in the same position regarding unpaid employee entitlements. That is, employee entitlements (or FEG) either get paid, or proportionally paid, out of the insolvency process or not.

In economic terms, a moral hazard occurs when one person takes more risks because someone else bears the cost of those risks. However, in relation to FEG, due to the corporate veil, a director of an insolvent company is not taking any more risk than he or she otherwise would because he or she is not going to be personally liable for employee entitlements anyway unless the company has been trading whilst insolvent. Even then, other secured or priority creditors will usually come first before employee entitlements. Likewise, if a company heading into insolvency paid out employee entitlements prior to becoming insolvent, those payments would likely be clawed back by the liquidator as unlawful priority payments.

Therefore, as the FEG scheme is going to remain in place, which obviously it should, the best way to protect the Australian tax payer against corporate misuse, or any use of the scheme really, is to increase the priority of payment of employee entitlements in the liquidation of a company so that the likelihood of FEG recovering any advance it has made to employees is greatly improved.

Currently, in the winding-up of a company, secured creditors are paid first followed by unsecured creditors which includes employee entitlements. One possible solution to better protect tax payers from corporate misuse of FEG is to simply put the list of 5 FEG employee entitlements before secured creditors in the priority rank for the payment of creditors of insolvent companies. This amendment to the *Corporations Act 2001* (Cth) would greatly increase the likelihood of FEG recovering any advances made under the scheme and would be a simpler and easier way to save tax payers' money as opposed to spending tax payers' money on legal action attempting to recover payments from directors personally or seeking penalties against individual, and likely impecunious, directors. Nevertheless, the FEG scheme would still be required due to the inordinate delay that occurs in the winding-up of companies due to insolvency.

Whilst JobWatch admits that the recommendation to place employees' FEG entitlements before secured creditors in the priority rankings of creditor payments in corporate insolvency seems radical, upon further consideration it does make a lot of sense. This is because an employee of a company shouldn't bear any financial risk because a normal employee is not a shareholder, director or other investor, e.g. a lender. Employment by its very nature is meant to be about stability and security. In other words, employees give up the chance to make a profit or get paid dividends in exchange for not bearing any risk if the company fails. As the priority creditor ranking system stands at the moment, employees, but for the FEG scheme, do bear the risk of losing some or all of their entitlements where they have not engaged in in risk taking behavior.

Recommendation 3: The entitlements paid to employees by FEG should take priority over secured creditors in the creditor payment ranking system of insolvent companies.

Conclusion

JobWatch believes that increasing the FEG entitlements to include superannuation is justifiable on the basis that superannuation is now a modern award entitlement and that foreign employees with visa work rights should be eligible for FEG assistance on the basis that it is discriminatory to exclude them on the basis of their race and/or national extraction. Whilst JobWatch supports the suggested options for reform put forward in the consultation paper on the basis there is no negative impact on the entitlements paid by FEG and that any reforms don't unnecessarily hinder entrepreneurialism, JobWatch suggests a better way to save tax payers' money would be to make the 5 FEG entitlements payable before secured creditors when paying out creditors of insolvent companies.

Thank you for considering our submission. We would welcome the opportunity to discuss any aspect of this submission further.

Please contact Ian Scott on 9662 9458 if you have any queries.

Yours sincerely,

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