



30 June 2017

Mr James Mason
Financial System Division
Markets Group
The Treasury

Mr Peter Krizmanits
Recovery and Litigation Branch
Workplace Relations Programmes Group
Department of Employment

Via email: ImprovingFEG@employment.gov.au

Dear Mr Mason and Mr Krizmanits

Reforms to address corporate misuse of the Fair Entitlements Guarantee scheme

Thank you for the opportunity to make a submission to the Australian Government's consultation into the Fair Entitlements Guarantee (**FEG**) scheme.

About WEstjustice and the Employment Law Project

WEstjustice (www.westjustice.org.au) is a community organisation that provides free legal assistance and financial counselling to people in the western suburbs of Melbourne on a range of everyday legal problems. With a long history of working with newly arrived communities, we identified a large unmet need for employment law assistance for these communities who are particularly vulnerable to exploitation at work.

In response, WEstjustice established the Employment Law Project (**Project**) in 2014, which seeks to improve employment outcomes for migrants and refugees. We do this by empowering migrant and refugee communities to understand and enforce their workplace rights, through:

- an employment law legal service that provides comprehensive assistance to client, including face to face legal advice and representation (**Casework**), and
- an education program targeted at informing newly arrived and refugee communities about employment and anti-discrimination laws (**Education Program**).

The Project works closely with these communities, through our Casework and Education Program, to identify systemic employment related issues, and advocate for change.

In the first two and a half years of operation, the Employment Law Project: provided legal assistance to over 200 migrant workers from 30 different countries, successfully recovering or obtaining orders for over \$270,000 in unpaid entitlements and in compensation for unlawful termination; and trained over 600 migrant workers, as well as many leaders from migrant and refugee communities and professionals supporting these communities.

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Overview

WEstjustice would like to emphasize the importance of Government schemes like the FEG for vulnerable workers. In our experience, eligible clients will find it much easier to recover entitlements through the FEG scheme, rather than pursuing financially strained or insolvent employers. We wish to note that the existence of the FEG scheme is not, in many cases, necessarily a contributor to corporate avoidance of legal responsibilities, specifically employer obligations under the *Fair Work Act 2009* (Cth) (**FW Act**). Rather, for our clients we encounter deliberate corporate avoidance of employee entitlements regardless of whether the employees involved will be able to rely on the FEG scheme or not. We are, therefore, pleased that this Consultation is looking at ways to deter illegal or unethical corporate practices and enhance recovery, rather than further limit access to the FEG scheme.

WEstjustice are of the strong view that this Consultation process creates an opportunity to consider broader reform to ensure that the most vulnerable workers are able to be paid their entitlements, and to deter corporate avoidance of the FW Act. We have a series of specific recommendations in relation to changes to the FW Act and the Fair Work Ombudsman's (**FWO**) powers to help hold individuals and corporates that receive the benefit of the employee's labour accountable. Relevantly for this Consultation, to stop wage exploitation, we also recommend the expansion of the FEG scheme or the introduction of a wages insurance scheme, along with additional measures to limit phoenix activity.

WEstjustice does not have specific expertise in Corporations Law, however in general we support legislative changes to the *Corporations Act 2001* (Cth) that also aims to hold individuals and corporates that receive the benefit of the employee's labour accountable. We note that the Melbourne University's Fair Entitlements Guarantee Consultation submission¹ contains recommendations in relation to the specific law reform options set out in the Consultation Paper (some of which also assist in limiting phoenix activity), along with additional reform suggestions to limit phoenix activity. WEstjustice endorses that submission, and its suggestion to undertake more extensive reforms which '*tackle[s] the wider systemic issues that allow abuse of corporate form to happen.*'²

In addition, we emphasise that a comprehensive approach to effectively addressing corporate avoidance of employee entitlements requires sufficient enforcement action to be undertaken by relevant regulators, and increased support for the community services that assist the most vulnerable clients to access their entitlements.

Wage exploitation of migrant and refugee workers in Australia and the role of FEG

Based on evidence from our work, and extensive research and consultation, WEstjustice has compiled the [Not Just Work Report](#).³ The Not Just Work Report documents systemic and widespread exploitation of migrant workers across numerous industries, and details ten critical steps to stop exploitation of migrant workers including improved laws and processes to stop wage theft.

¹ Prof Anderson H, Hedges J and Prof Ramsay I, 'Reforms to address corporate misuse of the Fair Entitlements Guarantee Scheme Submission, 2017.

² *Ibid.* p2.

³ Hemingway C, 'Not Just Work: Ending the exploitation of refugee and migrant workers', WEstjustice Employment Law Project Final Report, available at <www.westjustice.org.au/publications/policy-reports-121>.

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Underpayment (or non-payment) of wages and/or entitlements is the single-most common employment related problem that members of newly arrived and refugee communities present with at our service. For example, we have numerous clients who were paid less than the legal minimum wage, including some paid as little as \$8 an hour and two workers paid one salary between them. We have also seen multiple clients who were working more than 12 hours a day, six or seven days a week but were not paid penalty rates (for example, for working on the weekend) or overtime as required by law.

As we have already noted, for eligible clients the FEG scheme is sometimes critical, and the only option for our clients to recover their entitlements. In our experience, for our clients it is much easier to make a FEG claim than to pursue a recalcitrant or insolvent employer. However, in many instances our clients are unable to pursue the employer or make a FEG claim.

"I can't believe it takes this long to be even nowhere near to getting your money back. But I'm really thankful for your efforts."

The above comment was made by a client who had taken his underpayments matter all the way through to a Small Claims hearing, which he had won. However, the employer did not comply with the order. A number of WEstjustice clients have found themselves in this situation. In some cases, employer companies were deregistered shortly after an order was made, or just before proceedings were commenced. In the absence of the appointment of a liquidator, these clients are not eligible for the FEG scheme, and are left with a Court order but no avenue to enforce it.

Many of our clients are unable to recover unpaid wages through no fault of their own. In some instances, an employer has provided false details, or has simply "disappeared". We have contacted employers on a number of occasions only to be provided with fake email addresses, fake postal addresses, and false promises of repayment. Several of our clients have brought claims to the Federal Circuit Court or VCAT at considerable personal expense. These clients have won their case, only to discover that the employing company has been deregistered, or the employer simply will not comply with the Order. Enforcement action is complex, futile, and often ill-advised where companies no longer hold any assets.

Some workers can lodge a FEG claim. However, the situations in which our clients are likely to be able to make a successful FEG claim are limited in that:

1. The FEG scheme is only available to citizens, holders of permanent visas or a special category visa (so international students and other temporary visa holders are excluded)⁴
2. payments are limited⁵ and
3. The FEG scheme is only available to employees, not independent contractors, and it is an additional hurdle for workers to provide sufficient evidence of their employment status to prove sham contracting arrangements
4. Awareness of the FEG scheme is low and the time-frames in which claims can be brought are relatively short (an underpayment or non-payment of entitlements claim under the FW Act has a 6 year limitation period),
5. It can be difficult to provide evidence of the casual connection between the end of employment where neither the employee nor the employer have kept detailed records,
6. It can be difficult to provide sufficient evidence where an employer has not kept proper employer records as required by the FW Act, and
7. Eligibility only arises following an insolvency event (e.g. the appointment of a liquidator or an employer to become bankrupt).⁶ We discuss the impact of the limitations of the definition of insolvency event in greater detail below.

⁴ Fair Entitlements Guarantee Act 2012 (Cth) s 10(1)(g).

⁵ Payments are limited to 13 weeks' unpaid wages, unpaid annual leave and long service leave, payment in lieu of notice up to five weeks, and redundancy pay up to four weeks per year of service: Department of Employment, Australian Government, Fair Entitlements Guarantee (FEG) available at <<https://www.employment.gov.au/fair-entitlements-guarantee-feg>>.

FEG scheme limitations in the definition of insolvency event

There are two main issues with the definition of an insolvency event that limit its utility in protecting the most vulnerable workers:

- An insolvent company that doesn't have any assets is not required to appoint a liquidator and therefore does not meet this definition, and
- Deregistration does not fall within the definition of an insolvency event.

In cases involving an insolvency event, we are sometimes able to assist our clients to claim their employment entitlements through the FEG scheme. Where a company becomes insolvent and is unable to pay its employees their outstanding employment entitlements (and the end of employment is connected with the insolvency), the employee can ordinarily apply for the FEG (subject to limitation periods).

However, in order to qualify for the FEG, a claimant must be able to demonstrate that an insolvency event has occurred. Section 5 of the *Fair Entitlements Guarantee Act 2012* (Cth) defines insolvency event as follows:

insolvency event: an insolvency event happens to an employer of a person:

- (a) when a liquidator of the employer is appointed (provisionally or otherwise) under the Corporations Act 2001; or*
- (b) when the employer becomes a bankrupt under the Bankruptcy Act 1966; or*
- (c) if the person is or was employed for a partnership by 2 or more of the partners—at the first time an event described in paragraph (a) or (b) happens, or has happened, to all of the partners by whom the person is or was employed.*

Example: If a person is employed for a partnership by 2 partners, one of whom becomes bankrupt on 15 October 2013 and the other of whom becomes bankrupt on 1 November 2013, the insolvency event happens on 1 November 2013 (because that is the first time when both the partners have become bankrupt).

An employer that cannot afford to pay its employees their wages and other entitlements is technically insolvent in that it is unable to pay its debts as and when they become due.⁷ However if the company has no assets to disperse, then there is no need to appoint a liquidator, with the result that there is no insolvency event for the purposes of the FEG. Consequently, many deserving people for whom the legislation is supposed to operate are missing out on their entitlements.

The following three de-identified client stories illustrate the scenarios we are encountering:

Client story: Gurminda

Gurminda worked as a welder and was told by his employer that there was no work for him. He was asked to leave and was not paid for his final three weeks of work, nor did he receive his termination entitlements. Gurminda made several demands to be paid to no avail. We helped by writing letters of demand. When this didn't work we assisted the client to bring his claim to the small claims list. There was an Order made in his favour for the full amount (excluding super). The employer didn't comply with the Order. The company was then de-registered and it was the end of the road for the client.

⁶ *Fair Entitlements Guarantee Act 2012* (Cth) s 5.

⁷ *Corporations Act 2001* (Cth) s 95A.

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Client story: Oliver

Oliver worked as a cleaner for a business for around 2 years. For a period of six weeks, he wasn't paid at all. A number of other workers were not paid during this time. The business was taken over by new Owners who alleged the debt was owed to Oliver by the previous owners. By the time Oliver received legal advice from WEstjustice, the company who owed Oliver the wages had been de-registered. There was no avenue for Oliver to recover his entitlements.

Client story: Ali

Ali worked as a truck driver for a small business that contracted its employees out to other trucking companies. Ali worked six days per week, 12 hours per day. He was underpaid throughout the engagement. Ali was told he was a contractor and was therefore only entitled to a flat rate. Ali left his employment due to illness he developed as a result of working so many hours. He came to WEstjustice as he had not been paid the last three weeks that he worked. WEstjustice advised Ali that he was really an employee of the company, not a contractor, and he had been significantly underpaid. The matter was referred to the Fair Work Ombudsman, who agreed with WEstjustice's assessment of the matter. Unfortunately by the time they made this assessment, the company was insolvent. Ali is not entitled to make a FEG claim because he did not meet the strict eligibility criteria.

Many of the clients we assist have worked for, and have not been paid by a company that has subsequently been de-registered. We suspect that in many instances the director/s of these companies then go on to phoenix.

It is not possible to pursue a small claim through the Federal Circuit Court small claims list against a de-registered company. It is only possible to bring action against a de-registered company if it can be shown that the director, or any other person involved in the company was involved in the contravention of the FW Act. As section 550 of the FW Act requires 'actual knowledge' of a breach of the FW Act, and that the said conduct was in breach of the FW Act, it is difficult to bring a claim against a person involved in the company. This type of application can only be pursued in limited cases.

The de-registration of a company does not fall within the criteria of an 'insolvency event', as part of the eligibility criteria for a FEG claim. As such many of our clients have no legal recourse to recover their unpaid entitlements.

Recommendations for stopping wage theft

The Not Just Work report in Part 6 sets out multiple recommendations to improve laws and processes and stop wage theft. These include changes to the FW Act to ensure that anyone who benefits from the exploitation of vulnerable workers is held accountable (including supply chain heads and labour hire hosts, as well as franchisor entities and holding companies) and enhanced Fair Work Ombudsman (**FWO**) powers. We have made detailed recommendations about our suggested reforms to the Senate Inquiry into the Vulnerable Workers Bill.⁸

⁸ WEstjustice, 'Submission Senate Education and Employment Legislation Committee Inquiry into the Fair Work Act (Protecting Vulnerable Workers) Bill 2017' Submission < http://www.westjustice.org.au/cms_uploads/docs/westjustice-inquiry-into-vulnerable-workers-bill-submission.pdf>.

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However, most relevantly for this Consultation, The Not Just Work Report also includes recommendations to expand the FEG scheme or introducing a wage insurance scheme, and supports additional measures to limit phoenix activity.

Expansion of the FEG scheme

WEstjustice recommends an expansion of the FEG scheme to cover workers that have meritorious claims and are unable to obtain back payment from their employers.

As per the Not Just Work Report, to achieve this we have two key recommendations to expand the FEG scheme:

- To cover employees with a Court order where a company has been deregistered, and
- To cover temporary migrant workers.

We would be keen to be involved in a discussion about other potential changes to the FEG criteria and/or procedures to address some additional issues we have raised in relation to the limited ability of our clients to access the FEG scheme due to lack of awareness, time-frames and evidentiary issues.

Introduction of a wage insurance scheme

In situations where an employee is simply unable to pursue a debt, WEstjustice suggest a wages compensation scheme should be implemented to cover their losses.

Such a fund could be available to all workers; or by application for those who are particularly vulnerable. The scheme could be funded by employer premiums, similar to the WorkCover scheme and/or penalties obtained by the FWO for breaches of the FW Act.

Examples of other similar schemes include:

- WorkCover, for workplace injury—an insurance scheme where all employers pay a premium
- Motor Car Traders Guarantee Fund—funded by motor car traders' licensing fees, for consumers who have suffered loss where the trader has failed to comply with the Motor Car Traders Act 1986⁹
- Victorian Property Fund—funded by estate agent fees, fines and penalties, and interest—provides compensation for 'misused or misappropriated trust money or property',¹⁰
- In California, the CLEAN Carwash coalition successfully lobbied for specific legislation for car wash companies. The law requires all car wash companies to register with the Department, but 'no car wash can register or renew its registration (as required annually) unless it has obtained a surety bond of at least US\$150,000. The purpose of the bond requirement is to ensure that workers who are not paid in accordance with the law can be compensated if their employer disappears or is otherwise unable to pay wages or benefits owed to the employees. The legislation creates an exception to the bond requirement, however, for car washes that are party to collective bargaining agreements.¹¹

⁹ Consumer Affairs Victoria, State Government of Victoria (2016) <<https://www.consumer.vic.gov.au/about-us/who-we-are-and-what-we-do/funds-we-administer/motor-car-traders-guarantee-fund>>

¹⁰ Consumer Affairs Victoria, State Government of Victoria (2016) available at <<https://www.consumer.vic.gov.au/housing/buying-and-selling-property/compensation-claims>>.

¹¹ Janice Fine, 'Alternative labour protection movements in the United States: Reshaping industrial relations?' (2015) *International Labour Review* 154(1), 20.

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Measures to limit phoenix activity

A significant problem for WEstjustice clients is the phenomenon of phoenix companies—whereby directors close down companies to avoid paying debts, and proceed to open a new company without penalty. It is estimated that such phoenix activity results in lost employee entitlements of between \$191,253,476.00 and \$655,202,019.00 every year.¹²

Helen Anderson suggests numerous measures to address phoenix activity, including the introduction of a director identity number (which requires directors to establish their identity using 100 points of identity proof and enables regulators to track suspicious activity more easily) and improvements to the company registration process to enable ASIC to gather more information at the time a company is formed.¹³ WEstjustice supports these recommendations and also refers the committee to the detailed joint Melbourne and Monash University Report released in February earlier this year: *'Phoenix Activity: Recommendations on detection, disruption and enforcement'*.¹⁴

Concluding comments

WEstjustice suggests a range of measure to stop wage theft and protect the most vulnerable workers. In this context, we endorse changes to the *Corporations Act 2001* (Cth)¹⁵ to address corporate avoidance of employee entitlements, along with complimentary mechanisms recommended by the Not Just Work Report. Of particular relevance to this Consultation are our recommendations to expand the FEG scheme or establish a wage insurance scheme, and additional measures to limit phoenix activity.

In addition, we re-iterate that a comprehensive approach to effectively addressing corporate avoidance of employee entitlements requires sufficient enforcement action to be undertaken by relevant regulators, and increased support for the community services that assist the most vulnerable clients to access their entitlements.

Kind regards,



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¹² Helen Anderson, 'Sunlight as the disinfectant for phoenix activity' (2016) 24 C&SLJ 257, 258.

¹³ Ibid, 263-267.

¹⁴ See e.g. Professor Helen Anderson, Professor Ian Ramsay, Professor Michelle Welsh and Mr Jasper Hedges, Research Fellow, *Phoenix Activity: Recommendations on detection, disruption and enforcement*, February 2017, Melbourne University and Monash University, available at < <http://law.unimelb.edu.au/centres/cclsr/research/major-research-projects/regulating-fraudulent-phoenix-activity>>.

¹⁵ *Corporations Act 2001* (Cth).