Corporate misuse of the Fair Entitlements Guarantee

Submission on the Exposure Draft of the *Corporations Amendment (Strengthening Protections for Employee Entitlements) Bill 2018*

ACTU Submission, 9 July 2018
ACTU D. No 154/2018

1. The Australian Council of Trade Unions ('ACTU') welcomes consultation on the exposure draft of the *Corporations Amendment (Strengthening Protections for Employee Entitlements) Bill 2018.* The ACTU is the peak body representing almost 2 million working Australians. The ACTU and its affiliated unions have a long and proud history of representing workers' industrial and legal rights and advocating for improvements to legislation to protect these rights.

2. We have participated in all open policy development consultations concerning the Fair Entitlements Guarantee ('FEG') and its predecessors and our affiliates have worked closely with the Department in the day to day implementation of each of them. Most recently we participated in the multi agency and stakeholder roundtable in Melbourne on 21 June 2018 regarding the current exposure draft, which followed our participation in earlier roundtables and the provision of a written submission regarding the present and related issues in mid 2017. Our affiliates are also regular participants in committees of creditors appointed to work with insolvency practitioners during the administration and/or winding up of employing entities and have witnessed first hand the consequences of the types of practices which amendments proposed in the exposure draft seek to address.

3. We provide the following comments on the terms of the exposure draft.

Part 1 of Schedule 1

4. We are broadly supportive of the amendments proposed to sections 596AB and 596AC and the supporting consequential amendments . We are hopeful that the amendments will see these anti-avoidance provisions move beyond a mere dead letter to becoming a significant deterrent and enforcement tool. Having said that, there are some further minor amendments that ought to be considered in order to give full effect to the policy intention.

Accessorial liability

5. Paragraph 2.21 of the accompanying Explanatory Memorandum suggests that the amended provisions are intended to apply to "a range of parties both internal and external to the company (for example, pre insolvency advisors)". However, we are

concerned that some of the language used in the provisions as drafted may be a barrier to achieving that end.

6. Generally, the proposed provisions operate where a "relevant agreement or transaction" has been "entered into"[1]. Whilst the general definition of "relevant agreement" provided in section 9 of the *Corporations Act* is suitably broad, we are concerned that confining the provision to persons who "enter into" relevant agreements or transactions may operate to excessively confine the class of persons who may be liable under the new provisions.

7. In particular, persons who devise "relevant agreements or transactions", or advise parties to give effect to them, seem to be outside the reach of provisions. We suggest some thought be given to expanding their reach. One suggestion worth considering would be to adapt the accessorial liability provision located at section 79 of the *Corporations Act* for this purpose.

8. We accept that, in order to not risk unintentionally compromising the effectiveness of section 79 for other purposes, it may be more desirable to insert a new provision (e.g. after proposed section 596AB(2) [for the criminal provisions], with proposed section 596AB(2A) renumbered to 596(2B) accordingly; and [for the civil provision] after section 596AC(2), as section 596AC(2A)). Such new provisions could provide that a person "contravenes this subsection" if the person has "aided, abetted, counselled or procured" the entering into of a relevant agreement or transaction" under [subsections (1) or (1A) for the criminal provision, subsection (1) for the civil provision], or "has induced, whether by threats, promises or otherwise" the entering into of such relevant agreement or transaction, and so on (adapting the wording of sections 79(a)-(d) accordingly). Further, and whether or not the changes we suggest above are accepted, we suggest a complementary amendment be made to proposed section 596ACA(1)(b) to expand its reach to "..action taken to give effect to the relevant agreement or transaction *by any person".*

1 See for example proposed provisions at 596AA(1)(b), 596AB(1), 596AB(1A)(a)

Knowledge

9. Whilst we welcome the adoption of the "reasonable person" test to supplement actual knowledge in proposed section 596AC(1), we are concerned that the threshold regarding "*significantly"* reducing the amount of employee entitlements is too high. Whilst we accept that the Commonwealth might wish to set a high bar in relation to an offence, we do not believe it is appropriate to duplicate that in the civil penalty and loss recovery provisions. Beyond deterrence, the focus of the civil liability and loss recovery provisions ought to be the employees. The current legislative framework for the enforcement of employee rights to payment under industrial instruments provides zero tolerance for non payments of amounts to any employee. The proposed amendments ought to reflect this. We accordingly suggest that "significantly" be removed from proposed section 586AC(1)(b)(ii).

10. A proposed revision of section 596AC(1) was circulated at the roundtable we attended in Melbourne on the morning of 21 June 2018. We support the alternative formulation of the reasonable person test provided in that document, with two qualifiers. Firstly, and for the reasons above, we propose that the word "significantly" be removed. Secondly, we suggest that the reasonable person test proposed therein be preceded with "the person knows, or…", to ensure that actual knowledge also remains a criterion for liability.

Enforcement

11. Whilst we support the broader range of parties being given rights to pursue compensation under proposed section 596AF, we remain of the view that unions ought be identified as within the range of potential litigants. In all other underpayment matters, the Fair Work Ombudsman, the employee and their union are given equal status to pursue employees' rights. We see no basis for a different approach here. We add that the explanatory memorandum notes that no employee has brought an individual action under the existing provision.[2] Circumstances may arise where the Fair Work Ombudsman or other Commonwealth agencies are unwilling to pursue a matter, perhaps for instance if the funds at issue are comparatively small relative to amounts that those agencies are accustomed to dealing with. Unions may be in a better position to recover

2 At paragraph 2.120

amounts for their members which, individually or collectively, are regarded as not significant enough to warrant the action of an interagency taskforce. Affected employees should have the option of asking their union to seek to recover their losses on a representative basis. Where this occurs, the compensation recovered ought to be treated as employee funds (rather a debt owed to the company), as is contemplated in proposed section 596CA(4) in relation to individual employee actions.

Part 2 of Schedule 1

12. We support the amendments proposed, however once again we believe there is a legitimate role for unions in enforcing them. We note that, unlike proposed section 596(CA)(4), there is no mechanism to effectively ring-fence the funds recovered from other creditors. Whilst we accept that employee entitlements do have priority among debts owed to other unsecured creditors, we are concerned about the extent to which insolvency costs might intrude into the amounts recovered[3]. If unions are to be given a right of enforcement as we propose, such protection is all the more important as the liquidators who were not inclined to pursue the actions themselves would nonetheless likely be necessary participants in some form (e.g. through subpoaenas etc).

Part 3 of Schedule 1

13. We support there being enhanced disqualification provisions in connection with contraventions of the law that result in the non-payment of entitlements. Whilst we would agree that inflicting substantial cost on the public revenue is a matter which ought to be considered when either ASIC or the Court is considering disqualification, we are concerned that the proposed sections 206EAB and 206GAA treat this as a basis for liability, rather than as an aggravating factor.

14. The social harm which the provisions ought to treat as the criterion for liability is unlawful behaviour leading to resort to the *Fair Entitlements Guarantee.* In our view,

[3] We note also there was some unresolved discussion at the roundtable we attended about the extent to which the shortfall in dealing with any secured assets may also lead to claims against recovered amounts.

consideration of the proportion of the advance that Commonwealth has succeeded in recovering through legal proceedings (dealt with in subsections (2)(c) and (3) of proposed sections 206EAB and 206GAA) ought to occur only after a decision to disqualify has been made, as a discretionary factor guiding the length of the disqualification period.

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154/2018