

9 July 2018

Mr Peter Krizmanits
Recovery and Litigation Branch
Workplace Relations Programmes Group
Department of Jobs and Small Business
10 Mort Street
CANBERRA ACT 2600

By email: ImprovingFEG@jobs.gov.au

Dear Sir

Proposed Reforms to the Corporations Act 2001 (Cth) to Address Corporate Misuse of the Fair Entitlements Guarantee Scheme

I refer to the Exposure Draft of the Corporations Amendment (Strengthening Protections for Employee Entitlements) Bill 2018.

I provide these comments having been engaged in the insolvency industry since 2000. I am a Liquidator and Bankruptcy Trustee, the Deputy Chair of the Qld State Division of ARITA and a current Council Member of the Qld Law Society. I have practiced almost exclusively in the micro, small and medium enterprise segment where phoenix practices are at almost endemic levels.

The stated aim of the Bill is strengthening

...enforcement and recovery options to deter inappropriate market behaviours which result in the avoidance of the payment of employment entitlements, resulting in the improper shift of some or all of these costs ultimately onto Australian taxpayers through the drain on the taxpayer funded Fair Entitlements Guarantee (FEG) scheme¹

Whilst the stated aims of the Bill are encouraging, I am concerned that in practical terms, the amendments will do little to deter illegal phoenix activity. This concern is based upon my experience in the SME market and the changing practices of the 'sharp operators' in this segment.

The rate of phoenixed business or asset transfers is on the rise particularly in appointments with disproportionately high tax debt. The evolution of phoenix practices has seen transactions actively avoiding engaging a FEG liability.

¹ corporations amendment (strengthening protections for employee entitlements) Bill 2018, Explanatory Memorandum, page 3.

As part of the 'consideration' for transferring business assets, sharp operators design processes where the phoenix company assumes current employees and any entitlements that would be covered by FEG if the vendor company is liquidated. The 'sharp' operators have identified that FEG is the only sheriff in town to be afraid of and will avoid leaving liabilities that will come under the auspices of the FEG scheme.

The resultant husk of the vendor company is stripped of assets and ongoing employees leaving the tax debt and other non-essential creditors behind.

The Government could make a significant impact upon the practice of leaving tax debt in the defunct company with a simple addition to the proposed Bill.

Section 596AA(2)(a) currently includes the following wording:

...wages payable by the company for services rendered to the company by the employee

It is submitted that the definition of "wages" for the purposes of Part 5.8 of the Act, should be expanded to include unremitted PAYG withholding. The addition of PAYGW debt to Part 5.8 widens the coverage of "relevant agreements and transactions" that are entered into with the intention of defeating the recovery of employee entitlements.

Including unpaid PAYGW within Part 5.8, gives liquidators a much broader scope to take action against not only the phoenix company and its directors but also the promoters. With the right legislative tools, liquidators can pursue civil action against promoters and participants in sharp practices without the current reliance upon FEG, the ATO or the ASIC to fund actions.

There is an opportunity here with a simple amendment to make a game changing shift of power back towards enforcement by liquidators and away from reliance upon public funding from regulators.

Should you have any queries in relation to this submission please do not hesitate to contact me.

Yours faithfully



Michael Brennan
Managing Partner