Employment Rights Legal Service

31 March 2025

Addressing corporate misuse of the Fair Entitlements Guarantee

The Employment Rights Legal Service thanks the Department of Employment and Workplace Relations for the opportunity to provide a submission to potential reforms addressing corporate misuse of the Fair Entitlements Guarantee.

Acknowledgement

We wish to pay our deepest respect to Aboriginal and Torres Strait Islander Peoples as the traditional custodians of the lands and waters on which we work and live, and acknowledge that their sovereignty has never been ceded. We acknowledge the wisdom and strength of Aboriginal and Torres Strait Islander people. We are committed to fostering a culture of sharing knowledge and showing solidarity to support self-determination for Aboriginal and Torres Strait Islander peoples.

The Employment Rights Legal Service

The Employment Rights Legal Service ('**ERLS**') is a joint initiative of the Inner City Legal Centre, Kingsford Legal Centre and Redfern Legal Centre, providing clients across New South Wales with free employment law advice and representation. ERLS aims to address and remove the systematic barriers that prevent access to justice and allow for the exploitation of workers across the state.

The Fair Entitlements Guarantee

The Fair Entitlements Guarantee ('**FEG**') is a scheme implemented through the *Fair Entitlements Guarantee Act 2012* (Cth) that allows eligible employees to claim certain unpaid entitlements, where their employer is in liquidation or bankruptcy. We understand that the discussion paper published by the Department of Employment and Workplace Relations ('**Discussion Paper**') is intended to explore potential reforms to the legislative framework underpinning FEG to ensure that employers do not deliberately avoid their obligations to pay employee entitlements under the guise of insolvency.

The discussion paper outlines practices adopted by some businesses and their officers in order to avoid payment of employee entitlements, including:

- use of corporate group structures to separate a business' assets from its employee entitlement liabilities;
- illegal phoenix activities and arrangements;
- deliberate practices by directors, officers and advisors to unfairly manage an insolvency;

- inappropriate use of restructuring processes; and
- non-compliant controllers who do pay employee entitlements out of the proceeds of circulating assets of the business.

ERLS' expertise is in providing employment law advice and representation to disadvantaged workers across New South Wales. Accordingly, we are only able to comment on select key aspects in relation to the discussion paper.

1. **The use of corporate group structures to separate a business' assets from its employee entitlement liabilities**

ERLS supports reforms preventing companies from using group structures as a method of shifting or avoiding liability around paying outstanding employee entitlements, in circumstances where part or parts of the company have become insolvent.

Section 588ZA of the *Corporations Act 2001* (Cth) ('**Corporations Act**') allows certain entities in a group structure or "entities with a closely connected economic relationship"[1] to be liable for the payment of outstanding employee entitlements in the case where the employing entity has become insolvent, in circumstances where, among other requirements, those entities have "benefited, directly or indirectly, from work done by those employees".[2] This is known as an 'employee entitlements contribution order', which can be applied for by the liquidator of the insolvent employing entity, the Commissioner of Taxation, the Fair Work Ombudsman, or the Fair Entitlements Guarantee.[3] Specifically, affected employees of the insolvency whose entitlements have not been paid have no standing to make an application for this order.

Given this, when affected employees are faced with an insolvent employer and the possibility that funds to pay their entitlements are held within the larger corporate group, it is understandable that affected employees would prefer FEG as a way to recover their entitlements, even in situations where the larger corporate group has benefited from their labour. We note the Discussion Paper sets out the possibility of adapting a model of joint and several liability for employee entitlements in insolvency, similar to models that exist in certain state taxation systems. This would involve defining a group structure in a broader manner, including those who are related bodies corporate of an employing entity or where there is a controlling interest in each of the two businesses, and once the employing entity has been placed into liquidation, would

[1] Department of Employment and Workplace Relations, *Addressing corporate misuse of the Fair Entitlements Guarantee* (Discussion Paper, February 2025) 9 ('*Discussion Paper*').
[2] *Corporations Act 2001* (Cth) s 588ZA ('*Corporations Act*').
[3] *Corporations Act* (n 2) s 588ZB.

allow for other group entities to become jointly and severally liable for any outstanding employee entitlements.

Broadly, ERLS supports this potential reform option. However, further clarity is needed to ensure that such a reform is accessible by affected employees in a supported and practical way, so that they can make claims against related entities. Presently, once an individual's employer is placed into liquidation, that individual's option for recovery of their entitlements is generally an application to FEG, barring individuals who are ineligible. In certain circumstances, an employee entitlements contribution order may be appropriate, but as the Discussion Paper notes, to date, no contribution orders have been made by a court, nor do there seem to be any applications on foot made by a party with standing.[4] As such, it appears unlikely that affected employees have or will have access to such an order, and so, FEG remains the most suitable and appropriate option.

If the intention behind this potential reform is to reduce the reliance on FEG, then, any legislative change should provide clear standing for affected employees to commence proceedings against related entities. The reform should be structured to allow affected employees to commence what is an underpayment or unpaid wages claim against entities in the larger group structure, with an emphasis on reclaiming those entitlements that would ordinarily be the subject of a FEG claim, including but not limited to unpaid wages, unpaid annual leave and long service leave, payment in lieu of notice and redundancy pay.

Recommendations

- That an accessible model for joint and several liability for employment entitlements across related bodies corporate and other group entities be implemented in situations where one group entity is placed in liquidation, with an ability for affected employees to recover their unpaid wages and entitlements through the model.

2. Superannuation contributions and the Superannuation Guarantee Charge

As of 1 January 2024, national system employees have a right to superannuation contributions under the *Fair Work Act 2009* (Cth) ('**FW Act**').[5] On 19 November 2024, the Australian Taxation Office reported they had recovered approximately $932 million

[4] *Discussion Paper* (n 1).
[5] *Fair Work Act 2009* (Cth) s 116B ('*FW Act*').

dollars of unpaid superannuation in the preceding year,[6] which shows the significant level of superannuation contributions not being paid to Australian workers. Superannuation is not an entitlement that can be paid as part of a FEG advance,[7] even though this is an entitlement that national system employees have under the National Employment Standards.

Where a business has been placed in liquidation, an employee who is seeking to recover superannuation entitlements may report their unpaid superannuation to the Australian Taxation Office, who will then submit a claim in the liquidation for the superannuation contributions and Superannuation Guarantee charge owed. Only if there are funds available, will an employee receive a return on their unpaid superannuation entitlements, which is a remote chance in most circumstances; even where this does occur, the employee only receives as a dividend, a fraction of what they are owed. Given these issues, it is entirely appropriate for superannuation contributions to be included in the list of employee entitlements that can be recovered through FEG, particularly considering recent changes that have included these contributions as part of the National Employment Standards.

Case Study

We advised Ashok* whose employer had been placed in external administration. Ashok was eligible for the Fair Entitlements Guarantee, but he was aware that he would not be able to recover his superannuation through the scheme. His employer owed upwards of $300,000 in unpaid superannuation contributions to all employees. Unfortunately, due to the state of the business and the funds available, it appeared unlikely that Ashok would be able to recover the entirety of his superannuation entitlement through the insolvency process.

* name changed for confidentiality

ERLS clients whose employers have been placed into liquidation report that their superannuation contributions have often not been paid for an extended period of time, which leads to a significant disparity in terms of funds available to workers in retirement and with little option for recovery. Ordinarily, where an employee reported unpaid superannuation, particularly for extended periods of time, the Superannuation Guarantee Charge would be payable,[8] which is intended to act as a disincentive and

[6] Australian Taxation Office, 'Super action sees over $900 million dollars super returned' (Media Release, 20 November 2024).
[7] *Fair Entitlements Guarantee Act 2012* (Cth) s 5.
[8] *Superannuation Guarantee (Administration) Act 1992* (Cth) s 46.

penalty for employers who fail to meet their superannuation obligations. This reasoning supports the suggested reform in the Discussion Paper that the Superannuation Guarantee Charge be added to the list of employee entitlements that can be recovered through a contribution order under Part 5.8A of the Corporations Act, but in a context where affected employees are able to access these pathways to recover their entitlements.

Recommendations

- That the *Fair Entitlements Guarantee Act 2012* (Cth) be amended to include superannuation contributions as an 'employee entitlement' that can be paid as an advance to an eligible employee.
- That the Superannuation Guarantee Charge be added to the list of employee entitlements that can be recovered through a contribution order under Part 5.8A of the *Corporations Act 2001* (Cth).

3. Director accountability

Section 550 of the FW Act allows for directors to be held liable for contraventions of the FW Act, where they have been 'involved in' the contraventions. The provision[9] acts as an important incentive for directors to ensure compliance, and provides recourse for employees to recover unpaid wages and entitlements from directors and other persons who have contributed to wage theft and loss of entitlements.

However, the provisions are underutilised, as the processes to recover unpaid wages and entitlements can be too overwhelming and complicated for the majority of the workforce to navigate without assistance. This is compounded when workers need to firstly establish their claim, and then further establish whether a director had been 'involved in' the contravention that led to their loss of entitlements. The threshold to establish involvement has been notably high in the past.[10]

These claims are difficult for legal professionals, let alone for individuals to undertake on their own. ERLS clients report fatigue in seeing a claim through to its conclusion. The median time between filing and judgment in the general division of the Federal Circuit Court and Family Court of Australia is 14.1 months, a figure which is not specific to the Fair Work Division.[11] In comparison, FEG aims to process claims within 16

[9] *FW Act* (n 5) s 550.
[10] Fair Work Ombudsman, *A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven* (Report, April 2016) 71.
[11] Federal Circuit and Family Court of Australia, *Annual Report 2023-24* (2024) 122.

weeks of receiving an effective claim.[12] Workers would prefer to lodge an application with FEG than pursue court proceedings under section 550 of the FW Act.

Case Study

We advised Valentina* who worked as a chef for a restaurant for a period of nine months and was underpaid her wages and entitlements. As Valentina had already returned to her home country of Fiji before she could seek advice, ultimately, she opted to not pursue the matter further given the impracticality of her being overseas, and her concerns over the time and labour that court proceedings would require.

* name changed for confidentiality

Employees who are ineligible for FEG, including migrant workers on temporary visas, rely heavily on this provision to recover their entitlements where their employer has been put into external administration or liquidation. Temporary migrant workers face additional cultural and societal barriers when attempting to seek redress for unpaid wages and entitlements and often report to ERLS that they find the court process confusing and unfamiliar.

Case Study

Ammon* started remotely working from his home country of Turkey for a Sydney-based IT company during the COVID-19 pandemic. Ammon's employer promised to relocate him and his entire family to Sydney once the pandemic eased. Because Ammon was working for a national system employer, he was entitled to the benefits set out in the *Fair Work Act 2009* (Cth) and his applicable modern award. Ammon was underpaid just over $50,000 throughout his employment, and when he raised concerns around his unpaid wages with his employer, they stopped communicating with him entirely. Ammon was never relocated to Sydney. RLC represented Ammon in a small claim at the Federal Circuit and Family Court of Australia, and obtained a default judgment in Ammon's favour for the entire debt, however Ammon's former employer was unresponsive and did not pay the judgment debt. RLC obtained a garnishee, but shortly thereafter, learned the employer had gone into liquidation. As Ammon is not an Australian citizen, he is not entitled to FEG, despite being owed more than $50,000 under Australian industrial laws.

[12] Department of Employment and Workplace Relations, '*Frequently asked questions – Fair Entitlements Guarantee*' (Web Page) <https://www.dewr.gov.au/fair-entitlements-guarantee/frequently-asked-questions#07>, accessed 26 March 2025.

* name changed for confidentiality

Temporary migrant workers are also at greater risk of being employed and exploited by employers engaging in unscrupulous practices designed to avoid employment obligations, including illegal phoenixing activities, which in turn results in a misuse of FEG.[13] Given the higher proportion of migrant workers in this situation, expanding FEG's eligibility criteria to include temporary migrant workers would allow them to recover their entitlements in situations where their employer goes into liquidation and would further ensure greater scrutiny of phoenixing activities and the identification of repeat offenders.[14]

Case Study

We assisted a group of waitstaff and kitchen hands for a restaurant that went into administration, and later, liquidation, in 2024. The majority of these employees were on temporary visas, which made the Fair Entitlements Guarantee inaccessible. Accordingly, their only form of recourse of recovering their entitlements, which included redundancy pay, annual leave and unpaid shifts, was to go through the liquidation process or use the accessorial liability provisions in section 550 of the Fair Work Act to commence proceedings in the FCFCOA against those involved in contraventions.

Given our clients' limited English-speaking proficiency and their need for interpreters, commencing court proceedings is a difficult option, and the usual outcome of liquidation is that these employees are unlikely to recover the full amount owed to them.

We note the reform suggested in the Discussion Paper which would amend the Corporations Act to allow for the disqualification of company directors and officers in circumstances where:

- the individual has been an officer of a company whose employees were paid a FEG advance;
- on each occasion:

[13] *Discussion Paper* (n 1) 8.
[14] Coates, B., Wiltshire, T., and Reysenbach, T. (2023). Short-changed: How to stop the exploitation of migrant workers in Australia. Grattan Institute, 77.

  - the Commonwealth has received a minimal or no return on a FEG advance (whether or not the corporation is still being wound up or has been wound up); and
  - the court is satisfied or ASIC has reason to believe that the Commonwealth is unlikely to receive more than a minimal return on the advance; and
- the disqualification is justified.[15]

ERLS supports these reforms if enacted alongside FEG being expanded to include temporary migrant workers, who are more likely to be subject to behaviour warranting disqualification under this proposal.

Recommendations

- That the *Fair Entitlements Guarantee Act 2012* (Cth) be amended so that all workers, regardless of visa status, are able to access the Fair Entitlements Guarantee in the case of an employer's insolvency.
- That the *Corporations Act 2001* (Cth) be amended to allow for the disqualification of company directors and officers in circumstances where a director or officer was an officer of a company whose employees were paid a FEG advance, which has been minimally returned or not returned at all, and the court or ASIC are satisfied that no more than a minimal return on the advance is likely to be received.

Summary of Recommendations

1. That an accessible model for joint and several liability for employment entitlements across related bodies corporate and other group entities be implemented in situations where one group entity is placed in liquidation, with an ability for affected employees to recover their unpaid wages and entitlements through the model.
2. That the *Fair Entitlements Guarantee Act 2012* (Cth) be amended so as to include superannuation contributions as an 'employee entitlement' that can be paid as an advance to an eligible employee.
3. That the Superannuation Guarantee Charge be added to the list of employee entitlements that can be recovered through a contribution order under Part 5.8A of the *Corporations Act 2001* (Cth), where affected employees are able to access these pathways to recover their entitlements.

[15] *Discussion Paper* (n 1) 18.

4. That the *Fair Entitlements Guarantee Act 2012* (Cth) be amended so that all workers, regardless of visa status, are able to access the Fair Entitlements Guarantee in the case of an employer's insolvency.
5. That the *Corporations Act 2001* (Cth) be amended to allow for the disqualification of company directors and officers in circumstances where a director or officer was an officer of a company whose employees were paid a FEG advance, which has been minimally returned or not returned at all, and the court or ASIC are satisfied that no more than a minimal return on the advance is likely to be received.

Please let us know if you have any questions about this submission. You can reach the Employment Rights Legal Service at coordinator@erls.org.au.

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