

Addressing Corporate Misuse of the Fair Entitlements Guarantee

Submission of the United Workers Union

31 March 2025

Contents

Acknowledgement to Country	3
About the United Workers' Union	3
Introduction	3
Responses to issues and questions in the Discussion Paper	4
Contribution orders	4
Joint and several liability across corporate groups	6
Reform to deeds of company arrangement (DOCA) to provide for employee entitlements of related entities in liquidation	8
Proposal to replicate aspects of New Zealand legislation to recover employee entitlements	9
Civil penalties and compensation	11
Creditor-defeating dispositions	13
Superannuation Guarantee Charges (SCG).....	13
Right to request information for priority unsecured creditors	14
Disqualification of directors	15
Personal liability on directors.....	16
Other matters	18
Conclusion	21

Acknowledgement to Country

The United Workers' Union is a national trade union. We acknowledge and respect the continuing spirit, culture and contribution of Traditional Custodians on the lands where we work, and pay respects to Elders – past, present and emerging. We extend our respects to Traditional Custodians of all the places that United Workers' Union members live and work around the country.

About the United Workers' Union

United Workers Union ('UWU') is a powerful new union with 150,000 workers across the country from more than 45 industries and all walks of life, standing together to make a difference. Our work reaches millions of people every single day of their lives. We feed you, educate you, provide care for you, keep your communities safe and get you the goods you need. Without us, everything stops. We are proud of the work we do– our early childhood educators are shaping the future of the nation one child at a time; supermarket logistics members pack food for your local supermarket and farms workers put food on Australian dinner tables; hospitality members serve you a drink on your night off; aged care members provide quality care for our elderly and cleaning and security members ensure the spaces you work, travel and educate yourself in are safe and clean.

Introduction

United Workers Union (UWU) welcomes the opportunity to submit a response to the Department of Employment and Workplace Relations' (DEWR) discussion paper on the corporate misuse of the Fair Entitlements Guarantee (FEG). UWU is broadly supportive of the reforms put forward in DEWR's discussion paper, as UWU members may find over the course of their working lives that they require the assistance of the FEG scheme. Members of our union work in hospitality, contract cleaning, early childhood education and care (ECEC), and across other industries where corporate misuse of FEG occurs. Many members have lived experience of having to rely on FEG when companies transfer their assets, phoenix their business, or otherwise avoid paying employee entitlements during liquidation.

The FEG is an important safety net for Australian workers, but the corporate misuse of the scheme means some workers may never see the full payment of their employee entitlements (e.g. superannuation), nor receive any compensation. Consultation on changes to the FEG in 2018 found "that corporate misuse of the FEG scheme is not isolated, with the relevant sharp corporate practices occurring across most industries."¹ The cost of these "sharp corporate practices" is estimated to be \$90 million of FEG advances, or 43% of total FEG advances paid

in 2023-24.² UWU members have suffered due to the corporate misuse of FEG, both because of unpaid entitlements, but also due to the long process employees must undertake to recoup those entitlements and compensation. There are long-term effects of losing work, and members have experienced hardship when wages, superannuation and other entitlements go unpaid while employers engage in employee-entitlement defeating transactions.

UWU is in broad agreement with the proposed reforms put forward in DEWR's discussion paper and has provided responses to questions from the Discussion Paper below.

UWU has also read the ACTU's submission and we support their recommendations.

Responses to issues and questions in the Discussion Paper

Are reforms to the existing contribution order regime desirable? If so, what changes should be made including views on the suggested options mentioned in Part 5 of this paper?

Should other potential reform options be considered further? What are the benefits and drawbacks of these options?

Contribution orders

UWU supports reform of the existing contribution order regime.

Under s 588ZB of the *Corporations Act 2001* (Corporations Act), an application for a contribution order may only be made by:

- (a) The liquidator of the insolvent company referred to in paragraph 588ZA(1)(a) (the insolvent company); or*
- (b) The Commissioner of Taxation; or*
- (c) The Fair Work Ombudsman; or*
- (d) The Secretary of the Department administered by the Minister who administers the Fair Entitlements Guarantee Act 212³*

UWU recommends that employees and unions are listed in s 588ZB as parties with standing to apply for contribution orders. This would provide employees and their unions with additional avenues through which to recover entitlements, rather than having to rely on one of the currently listed parties to commence action on their behalf. The amendment could be modelled

on s 596AF(1), which gives standing to employees and industrial organisations to commence proceedings for compensation in relation to agreements or transactions that avoid employee entitlements.

Another option put forward in the Discussion Paper is varying the evidentiary requirements to provide for a rebuttable presumption that the matters at subsections 588ZA(1)(d) and (e) are deemed to be satisfied unless proven otherwise. Under s 588ZA the Court is able to make an employee entitlements contribution order requiring that an entity within a contribution order group be required to pay, or partially pay, the employment entitlement liabilities of an insolvent company within the same contribution order group. Subsection 588ZA(1)(d) and (e) refer to tests that must be satisfied, in relation to the contributing entity having benefited from work (directly or indirectly) performed by workers of the insolvent entity (d), and that the benefit the contributing entity received exceeds the benefit than if the insolvent and contributing entities were dealing at arm's length (e).⁴

Reforms to these requirements would be welcome. The liquidated entity would be best placed to rebut that presumption, as opposed to other parties, including the Fair Work Ombudsman (FWO) or the Australian Taxation Office (ATO), as they are unlikely to be aware of the internal workings of the company in the way that the company would. It is therefore a sensible proposal and would lower the evidentiary burden on applicants such as the FWO, and if amended, employees. This is particularly relevant where 'sharp corporate practices' or deliberately complex corporate structures may have been utilised, to intentionally make opaque the transactions, dealings and arrangements undertaken by the liquidated entity. In addition, the reforms at 588ZA(1)(d) and (e) may encourage the use of the contribution order provisions, noting that to date no court has made contribution orders, nor have there been any applications made by a party with standing to do so.⁵

The 'just and equitable' requirement under s 588ZA(1)(f) is another avenue of reform, proposed by the Discussion Paper.⁶ There is no specific reform detailed in the Paper, however reform could better facilitate the intention of the 2019 amendments to "strengthen... enforcement and recovery options [and] to deter behaviours that prevent, avoid or significantly reduce the recovery of employment entitlements in insolvency."⁷

Section 588ZA(4) requires a court to undertake a balance of competing interests, between the employee and the competing entity.⁸ In comparison, courts in New Zealand have broad discretion based on "just and equitable grounds" to attribute liability to a related entity of a liquidated employer, with consideration given to factors such as the extent of control between

the entities.⁹ It is important to note that there does not appear to have been a successful decision in New Zealand utilising s 271(1)(a) and s 272(1). While we have concerns about the New Zealand model more broadly (detailed below), on the face of it, these provisions do appear to be simpler, and easier to satisfy, than the current provisions in s 588ZA(4). As such, there could be value in adopting this simpler approach in lieu of the prescriptive tests in s 588ZA(4). Protection for employees should be augmented by the addition of a requirement in s 588ZA(4) requiring the court to consider whether not making an employee entitlements contribution would result in unfairness to the affected employee creditors. This would acknowledge the particular vulnerability of employees in comparison with other creditors.

Joint and several liability across corporate groups

The Discussion Paper puts forward the *Payroll Tax Act 2007 (Vic)* and the *Workplace Injury Rehabilitation and Compensation Act 2013 (Vic)* as potential templates for joining employers as a group.¹⁰ Section 71 of the *Payroll Tax 2007 (Vic)* outlines groups arising from the use of common employees. Subsection (3) states:

If one or more employees of an employer perform duties for or in connection with one or more businesses carried on by one or more other persons, being duties performed in connection with, or in fulfilment of the employer's obligation under, an agreement, arrangement or undertaking for the provision of services to any one or more of those other persons in connection with that business or those businesses, the employer and each of those other persons constitute a group.

The Act continues:

(4) Subsection (3) applies to an agreement, arrangement or undertaking –

- (a) whether the agreement, arrangement or undertaking is formal or informal, express or implied; and*
- (b) whether or not the agreement, arrangement or undertaking provides for duties to be performed by the employees or specifies the duties to be performed by them.*

Under s 72 if a person or set of persons has a controlling interest in each of 2 businesses, the persons who carry on those businesses constitute a group.

In the *Workplace Injury Rehabilitation and Compensation Act 2013 (Vic)*, s 432 states:

- (1) A person who, during a period, is or was a member of a group within the meaning of section 431 is jointly and severally liable with the other persons who are or were members of the group during that period to pay premium and penalties payable by members of that group in respect of that period.*
- (2) For the avoidance of doubt, subsection (1) applies whether or not the person was an employer during the relevant period.*

The intent behind such clauses is to ensure that companies are not able to avoid their obligations through complex structures. Given how serious the financial impact on employees can be from lost or delayed wages and entitlements, we are of the view that it is appropriate for similar provisions to be introduced for employee entitlements. UWU would support joint and several liability clauses similar to the examples above, noting that the legislation should be effective in defining a corporate 'group' and establishing joint and several liability on the group.

Case study – Genius

Genius Childcare operated approximately 39 centres nationwide with approximately 850 educators and staff employed across these services. Darren Misquitta is the sole director of the early childhood education and care provider and the centres are owned through two entities in a corporate group, Vertical 4 Pty Ltd and Abacus 49 Pty Ltd.

In 2023 one Genius company, Genius (Collins) Pty Ltd, was wound up in a court-ordered liquidation. The creditor was claiming \$9 million in unpaid rent and other charges. The creditor accused Darren Misquitta of failing to supply key financial records to the liquidator. A winding up order was made against another company, Misquitta Childcare Property Pty Ltd in January 2024. ASIC filed to deregister the parent company DK Andaras Pty Ltd on 25 June 2024 and was placed under external administration at the end of 2024. Horizontal 1 Pty Ltd, another Genius entity, was also placed under external administration at the end of 2024, owing \$9.6m. At the same time, towards the end of 2024, the corporate structure changed, and Abacus 49 Pty Ltd and Vertical 4 Pty Ltd had been renamed and were moved under a new parent company.

Union members had raised concerns about unpaid superannuation back to 2023 (although there are claims of wage underpayments going back to 2016), and in 2024 UWU filed in the Federal Circuit Court to claim compensation for unpaid superannuation, late wage payments and financial penalties for breaches of the Fair Work Act, seeking an estimated total of \$7 million in unpaid superannuation.

Over the last 12 months, more Genius centres around the country have closed, for failing to pay rent, for unsafe conditions in the services, and mass resignations of educators who have been left with no wages to pay rent, fuel or grocery expenses. Some educators are owed approximately a months' worth of wages, parents have been left without a centre to send their children, and more landlords are claiming they are owed months in unpaid rent.

As of 25 March 2024, 25 Genius centres are under the control of administrators and Darren Misquitta has reportedly left the country.

Genius has made unusual business deals with other ECEC providers in the past, taking 17 underperforming centres from G8 in 2024, and receiving \$26 million in the deal. Genius also owns a 35% stake in ASX-listed Mayfield Childcare, in a complex arrangement that saw services sold to Mayfield in exchange for the shares.

Case Study – Inspire

Inspire operated long day care centres and afterschool care across Australia. Two members worked at an Inspire service in Warriewood, Sydney. They began their employment in July 2019 and February 2022 respectively.

In 2021, concerns were raised by educators to management that their superannuation was not being paid. Inspire later sent information to employees of a payment plan to pay the owed superannuation to educators, however contributions for the period before the complaint was made were not paid. In January 2023, educators noticed that the employer on their payslips had changed. At the beginning of their employment, the employer on their payslip was Inspire Administration Pty Ltd (Inspire Admin). Later in their employment, a different entity appeared on their payslip; Inspire Early Education (Casa) Pty Ltd (Inspire EEC). Employees were not notified of the change, and so it initially went unnoticed.

Very soon after, in late January 2023, educators arrived at the centre to find that the centre had been locked, because the rent for the site was in arrears. One member was aware there had been issues with making rent payments back to 2020. Management did not give employees details of when the centre would reopen. Nor did management inform employees of when they would be paid for hours that had been worked up to the centre closure, for unpaid annual leave or possible redundancies. In February 2023 employees were notified that their employment was terminated. Educators did not receive their unpaid entitlements, and in May 2023 Inspire EEC was placed into liquidation. This is likely the company that held the centre lease and so had no assets (only liabilities) with which to pay employee entitlements. Inspire Admin remained extant but non-trading. UWU filed for unfair dismissal for two members, but

due to the liquidation, employees are unlikely to ever receive their full entitlements from their former employer.

One member at the time of the centre closure was heavily pregnant and therefore could not find alternative work prior to giving birth. She struggled to pay for food, rent and bills and her family experienced hardship due to the unpaid entitlements.

Reform to deeds of company arrangement (DOCA) to provide for employee entitlements of related entities in liquidation

UWU would broadly support changes to strengthen s 444DA, the section of the Corporations Act setting out deeds of company arrangement (DOCA), so that any DOCA entered into provides for the employee entitlements of the corporate group as a whole. Sections 444DA and 444DB were excluded from reforms in 2018 designed to address corporate misuse of FEG, with the view that DOCAs were used as a legitimate business practice and reforming s 444DA would curtail entities' ability to restructure.¹¹ However, the Discussion Paper outlined the corporate practice of using DOCAs when an employer enters voluntary administration to push the cost of employee entitlements onto FEG. This is effectively a restructure of assets to other entities within the group and allows the group to continue trading whilst employees are employed by an insolvent entity with no assets with which to repay entitlements.¹² This ultimately leads to employees relying on FEG for their entitlements, with the cost borne by taxpayers, rather than the corporate group. It is pertinent, given the evidence of the use of DOCAs to avoid paying employee entitlements, that reforms should be made to discourage the misuse of FEG and capture the 'sharp corporate practices' used by entities to avoid payment.

Changes to s 444DA would appropriately see the cost of employee entitlements paid through assets held by the corporate group.

Proposal to replicate aspects of New Zealand legislation to recover employee entitlements

Under New Zealand's *Companies Act 1993* (Companies Act), the court has broad discretion in s 272(1) to consider what is just and equitable to make a contribution order, alongside some specific matters in subsections (a), (b) and (c); including the extent to which the related company took part in the management of the company in liquidation, the conduct of the related company towards creditors, and the how involved the related company was in the

circumstances of the liquidation of the company or to what extent the actions of the related company led to the liquidation of the company. This is a different approach to Australia, and the context between the two countries is quite different (as detailed below). There could be merit in replicating a list of non-exhaustive factors, including those in the Companies Act, to give the court a wider discretion (as discussed earlier).

However, there is no equivalent FEG safety net for employees in New Zealand. Employee claims are not paid out first in the instance of liquidation, rather they are paid out according to Schedule 7 of the Companies Act; after all costs related to the administration of the liquidation, and costs of any creditor who applied to liquidate the company or spent funds protecting the assets of the company. Unpaid wages and entitlements are restricted to work performed for the insolvent employer in the four months prior to commencement of insolvency – and this is capped at NZD\$31,820.¹³ Employees owed more than the capped amount can claim as an unsecured creditor for the remaining amount. Unsecured creditors fall below other priority creditors, and after any unpaid taxes owed to the Crown are recovered. Employees making a claim as an unsecured creditor are practicably less likely to receive the full amount owed after other creditors are repaid.¹⁴ Additionally, Keeper’s analysis of the Companies Act highlights the difficulty in pursuing civil penalties against directors due to the “high evidential difficulties”, but that this also has had the effect that it is “not government agency but rather private sector insolvency practitioners who are largely responsible for enforcement actions against directors and other former controllers of a failed company.”¹⁵ When it is predominantly private sector liquidators pursuing directors for civil penalties, regulation effectively relies on the independence of the appointed liquidators, with adequate resources to pursue civil action. Employees in New Zealand must also wait for the court to recover unpaid wages, with no guarantee of receiving the full amount owed, and will potentially wait for months for a decision.

UWU is of the view that there is more merit in preventing corporate misuse of FEG through other reforms outlined in the Discussion Paper, as it is unclear if the New Zealand approach overall provides stronger provisions to recover employee entitlements or discourages ‘sharp corporate practices’.

Are the fault elements at section 596AC fit-for-purpose or should a rebuttable presumption that the fault elements have been met be adopted?

Are the compensation provisions adequate to ensure that employees are appropriately compensated for loss or damage suffered?

Are any other changes to Part 5.8A desirable?

Civil penalties and compensation

The Discussion Paper highlights that in 2023-24, 39% of large FEG cases were identified as having potentially used an employee entitlement defeating transaction or agreement.¹⁶ Over \$52 million was advanced in total in relation to these cases. The Discussion Paper also notes the civil penalty provision at s 596AC, and related s 596ACA have not yet been brought before a court.

Section 596AC(1)(b) is a civil penalty provision outlining that a person, or reasonable person in the same position would know, that the relevant agreement or transaction is likely to avoid or prevent recovery of employee entitlements, or significantly reduce the amount of employee's entitlements that can be recovered. Section 596AC(3)(c) outlines the contraventions if an officer of a company causes the company to enter a relevant transaction or agreement, and a reasonable person would know the agreement or transaction is likely to avoid or prevent, or significantly reduce, the amount of employees' entitlements that can be recovered.

That sharp corporate practices may have been adopted in almost half of large FEG cases to avoid paying employee entitlements emphasises the need for reform. UWU would strongly support changes to make it a rebuttable presumption that the fault elements have been met in s 598AC(1)(b) and (3)(c). This would lower the evidentiary burden on applicants and employees who are seeking civil penalties against their employer for engaging in employee defeating dispositions, therefore making the provisions more accessible to employees. Not only is it important for employees and their representatives be able to seek civil penalties and compensation, but it also highlights that the inability to lift the corporate veil can impede employees' access to clear information on the employer's structure and related entities, even in cases where employee entitlement defeating arrangements or transactions have taken place.

Additionally, UWU would support recognising amounts recovered as compensation as a debt due to the employee. Without FEG, employees would, in many cases, never see the money that is owed to them in unpaid wages and entitlements. It is fair and reasonable that employers who have engaged in practices that avoid these payments are liable for compensation, and that it be treated as a debt such that employees may receive that compensation. What is evident, however, is that reform is needed to encourage the use of these civil penalty provisions, and the reforms proposed are reasonable in lowering the evidentiary burden on applicants, and therefore a step in the right direction.

Case Study - Phillips Cleaning Service

In 2015 UWU predecessor union United Voice took Angelo Di Dio and Phillips Cleaning Service to court for breaches of the Fair Work Act. The company had a contract to clean 10 public schools in the ACT.

United Voice was claiming wage underpayments, with some staff owed up to \$25,000 in unpaid entitlements. This included unpaid annual leave loading, permanent part-time cleaners were without work and without pay over school holiday periods, and there was no off-site induction upon commencement of employment. Most of the workers were S'gaw Karen refugees from Thailand and Myanmar, and were pressured to sign contracts they didn't understand. Workers were paid from different business entities, and they worked in unsafe conditions.

The legal process took two years, and in 2017 Justice Jagot found the company director had refused to accept responsibility, and "the respondents may be inferred to have deliberately taken steps to place their assets beyond the reach of applicants who have been systematically underpaid as a result of Mr Di Dio's view... that he 'felt entitled to run PCS as he thought fit irrespective of any legal obligations of PCS to its employees'". Justice Jagot ordered \$130,000 be paid in penalties against Mr Di Dio and the cleaning company to United Voice.

Before filing a defence in 2016, Mr Di Dio registered all charges in favour of two businesses, Accolade Advisory and Reliance Financial Services. On the day of the decision, Mr Di Dio transferred real estate he owned to his wife. The witness to the transfer was connected to Accolade Advisory and Reliance Financial Services. Ten days after the decision, the name of the cleaning company was changed to Lloyd's Cleaning ACT. Later that year, a caveat over real estate owned by Mr Di Dio and his wife was registered in favour of Accolade Advisory. These actions made the process of trying to recover unpaid entitlements on behalf of the employees complex and difficult.

Are reforms to the creditor-defeating disposition provisions desirable, including the options described above?

Creditor-defeating dispositions

Amendments to include illegal phoenixing activity, or creditor-defeating dispositions were included in the *Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020*. The amendments sought to clarify the transactions that entailed a creditor-defeating disposition in s 588FDB, and to make a creditor-defeating disposition voidable under s 588FE(6B).¹⁷

UWU broadly supports reforms to better capture creditor-defeating dispositions in the legislation, including the proposed reforms in the Discussion Paper that would see the disposition of property backdated to 24 months from 12 months, as well as varying the definition of creditor-defeating disposition to mean dispositions of company property for less than market value (if the property has market value), or otherwise the best price reasonably obtainable in the circumstances. The current definition is limited to less than the lesser of between market value of the property or asset and the best price reasonably attainable in the circumstances at the time,¹⁸ which becomes a prohibitive burden on applicants to satisfy.

Should the definition of employee entitlements at section 596AA be amended to include SCG? If not, why not?

Superannuation Guarantee Charges (SCG)

UWU would support changes to s 596AA, that would see superannuation guarantee charges (SCG) included in the list of employee entitlements and aligned with s 556(1), and ensuring SCG included in Part 5.8A and contribution order provisions (Part 5.7B). Currently, it is not included in the list of entitlements, which is as follows:

(2) The entitlements of an employee of a company that are protected under this Part are:

- (a) Wages payable by the company for services rendered to the company by the employee; and*
- (b) Superannuation contributions*
- (c) Amounts due in respect of injury compensation in relation to the employee; and*

- (d) *Amounts due under an industrial instrument in respect of the employee's leave of absence; and*
- (e) *Retrenchment payments of the employee*¹⁹

Including the SCG would assist in preventing instances where the charge is not paid for, in the event of the employer's insolvency. It is an approach that could improve creditor recovery for FEG under the Recovery Program.

This relates to another area in which UWU would propose reform, namely including superannuation in the FEG scheme. Further detail is provided below under 'Other matters'.

Should priority unsecured creditors have the right to request information from controllers? Should there be any exceptions? If so, what should they be?

Who should bear the cost of complying with a request for information?

Right to request information for priority unsecured creditors

Currently employees are not entitled to obtain information from a company's controller. UWU would support changes to the legislation that supports employees and their representatives requesting and receiving information from controllers. As priority unsecured creditors, employees should have the same or similar rights to access to information from controllers as creditors from an external administrator. The *Insolvency Practice Rules (Corporations) 2016* could offer a template. Employees as priority unsecured creditors could then be provided updates periodically on, for example, the reasons for the liquidation, the sale of assets, if any investigation is required and the results of the investigation, and the returns to creditors.²⁰ The *Insolvency Practice Schedule (Corporations)*, of which aspects could also be included in this reform, gives creditors access, by resolution, to information, or specific reports or a document.²¹ Information requests can be denied in certain circumstances (e.g. a breach of the liquidator's duties) under the *Insolvency Practice Schedule (Corporations)*.²² UWU supports the intent of the reform to "promote transparency and foster compliance".²³

The cost of complying with a request for information should be borne by the controller, paid from the sale of assets in the winding up of the company, as are other costs related to liquidation. Where this cost can't be borne by the controller, the Commonwealth should bear the cost. Ensuring costs are not borne by employees to recover their entitlements is fair "as

employees do not normally share in the profits of the enterprise, they should not share in its losses either.”²⁴

Should the director disqualification provisions at sections 206EAB and 206GAA of the Corporations Act be refined? If so, how?

Do existing arrangements that impose personal liability on directors provide adequate incentives for directors to ensure companies meet their employee entitlement obligations? If not, why not?

Disqualification of directors

The proposed reforms on director disqualification in the Discussion Paper are in relation to s 206EAB and 206GAA, to remove the requirement that the person was an officer of the relevant company when the person or entity contravened the Corporations Act or the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*. A court, or ASIC, could disqualify a person from being a director based on other instances of involvement in failed companies, where less than 10c on the dollar was recovered on FEG advances to employees, and of which there have been at least two instances in the last seven years. These reforms were part of the *Treasury Laws Amendment (Strengthening Protections for Employee Entitlements) Act 2019*.²⁵

UWU supports the proposed reform to the director disqualification provisions in the Corporations Act.

Additionally, in New Zealand the *Worker Protection (Migrant and Other Employees) Act 2023* came into force on 6 January 2024, where s 383(1) of the Companies Act was amended, relating to the court’s disqualification of directors:

(bc) a person has been convicted of an offence under section 351 of the Immigration Act 2009 (exploitation of unlawful employees and temporary workers) and the offence was enabled by, or otherwise related to, the use of a company; or

(bd) a person has been convicted of an offence under section 98D of the Crimes Act 1961 (trafficking in persons) and the offence was enabled by, or otherwise related to, the use of a company; or

UWU would support the inclusion of provisions in the Corporations Act that make explicit the disqualification of directors that illegally exploit migrant workers or engage in human trafficking, using s 383(1)(bc) and (bd) of the Companies Act as a possible model.

Personal liability on directors

The Discussion Paper also outlines and proposes reforms of director personal liability, using the model of the *Taxation Administration Act 1953*. Under Schedule 1, directors are personally liable for non-payment of SCG amounts owed to the Australian Taxation Office (ATO). Non-payment after 1 month and 28 days can lead to, amongst other options, the appointment of an administrator, or the company to be wound up. UWU would support changes to the provisions relating to personal liability of directors, and the model of the *Taxation Administration Act 1953* may be appropriate.

In UWU's experience, directors can try to deflect personal liability, and there are hurdles in pursuing accessorial liability under the provisions of section 550 of the *Fair Work Act 2009* (Fair Work Act). The Fair Work Act has been used to limited success in pursuing directors for accessorial liability, yet where this has failed, it has typically been from the difficulty in meeting the required element in subsection (2)(c) that a director has been "*knowingly concerned in or party to the contravention*". As such, the UWU would support other models which enable personal liability of directors for unmet employee entitlements to be more easily established.

Case Study – tele-sales company

Three UWU members were employed by a company doing tele-sales, aged between 55-75 years. The three workers had been there between 4.5-7 years, two were union delegates and the other was a union member. The member was being supported by the delegates in a possible bullying claim against management. The delegates were also involved in bargaining for a new enterprise agreement with their employer, who in late 2024 made clear he did not want to negotiate a new agreement or to have to pass on pay increases.

All three workers were terminated in January 2025. The termination email the workers received said there was "no more work" for them to do at Y Pty Ltd, and the entity would no longer be "conducting business" – i.e. a purported redundancy. The workers had been given no notice, and there was no consultation.

The three women had never heard of Y Pty Ltd; they knew their employer to be a company named X Pty Ltd (all company names have been changed, however Y Pty Ltd and X Pty Ltd

have very similar registered names). Company searches revealed that X Pty Ltd was a separate entity but controlled by the same director as Y Pty Ltd. The director was the sole shareholder of both companies. UWU filed unfair dismissal applications against X Pty Ltd, alleging that these were not genuine redundancies. The director made a jurisdictional objection, claiming the true employer was Y Pty Ltd. At the first directions hearing the director explained that Y Pty Ltd is “nonfinancial” and would shortly be placed into administration.

Unfair dismissal or underpayment claims against Y Pty Ltd were not viable; the company had no assets that could be sold to repay entitlements. Its sole purpose was to be used as a “paymaster” to pay employees, and in conjunction, shield X Pty Ltd from liability. Y Pty Ltd never had its own source of revenue, the director moved money from a third entity, W Pty Ltd, into Y Pty Ltd to pay employee wages and entitlements.

The director continues to operate X Pty Ltd, performing the same work as before for the same clients. They have since recruited new staff to perform the exact role that the women were terminated from.

One of the terminated employees had signed a contract on commencement with Y Pty Ltd as the employer name, which poses an evidentiary difficulty in the claim against X Pty Ltd. The employee never received a copy of the contract, had no recollection of the employer name on it, and there was no discussion of the contract at the time. In conjunction, her pay and super was processed through Y Pty Ltd, making it look as though Y Pty Ltd was the true employer. It appears from investigating members’ claims that the director has been operating this way for nearly 3 decades. The same scheme has been used in the past to avoid paying employees their entitlements and dodge unfair dismissal claims. New entities are registered well in advance, so it less obvious that it is a phoenix, or employee entitlement-defeating, arrangement.

The consequences on the three women members have been severe. One member has had to get early access to her superannuation to have enough money to survive. She doesn’t own a home and would have become homeless without the access to her super. Even if she recovered unpaid wages through FEG, she won’t be able to recover unpaid superannuation through the scheme. There will be no compensation for being unfairly dismissed unless UWU can overcome the jurisdictional objection. She has struggled to find work, which she believes is due to her age, yet does not have enough super to retire on.

Other matters

UWU members include many temporary visa workers, who are also impacted by the corporate misuse of FEG. As employees of Australian businesses, migrant workers should be eligible for FEG. UWU would recommend implementing the Migrant Workers Taskforce recommendation in its 2019 report which calls for FEG to be extended to temporary visa workers. The report noted the vulnerability of temporary visa workers, and the added difficulties migrant workers face in seeking unpaid wages and entitlements when phoenixing or creditor-defeating dispositions occur.²⁶

UWU would recommend the inclusion of superannuation as an advanceable employee entitlement through FEG. Currently superannuation is not included in the entitlements paid through the scheme. As noted in UWU's case studies, unpaid superannuation is a common feature when an employee enters liquidation – in fact in the case of Genius and Gumnuts, it is a warning sign of employee entitlement-defeating transactions and agreements. The non-payment of superannuation through entities' misuse of FEG has long-lasting impacts on workers, particularly on those workers who are already disadvantaged at the end of their working lives. Women make up 92% of the total ECEC workforce,²⁷ and it is notable that in our attached case studies that those educators may never receive the superannuation owed for months, if not years, of their employment. From a gender equity perspective, it would assist women (let alone all workers) having superannuation included as an entitlement paid through FEG. As at 30 June 2024, women currently, on average, have a superannuation balance of \$300,300 aged between 60-64, compared to men at the same age with an average balance of \$401,600.²⁸ It is a much-cited statistic (but no less true) that older women (aged 55 and over) are the fastest growing population experiencing homelessness.²⁹ Including superannuation as an employee entitlement in FEG would assist workers who would rely on that income in retirement.

We support the ACTU's call for other gaps in FEG to be filled, including untaken sick leave, unpaid non-ongoing payments or commissions, accrued time (e.g. time off in lieu), long-standing wage underpayments and unremitted payroll deductions to 3rd parties. Unpaid overtime, unpaid parental leave pay, interest on unpaid entitlements and rostered days off beyond the 13-week recovery period should also be considered for inclusion.

Case study – Gumnuts

UWU has been attempting to recover unpaid superannuation for members working in an early learning long day care centre since 2019.

Members at the centre notified the union that they believed they weren't being paid superannuation from 2019, not long after a new company took over management of Gumnuts Childcare Centre.

A UWU organiser assisted 10 members at the centre, and over the course of 2019 and onwards:

- The organiser wrote a letter to the director of ECEC Management asking for all superannuation contributions to be paid.

- The organiser also made a complaint to the Australian Taxation Office (ATO) regarding the outstanding super.

- Lithgow Council owned the building in which the service was leased. The UWU organiser spoke to Lithgow Council about the unpaid super, and the issue was raised with the Lord Mayor and Deputy Mayor and raised at a council meeting in mid-2019. A member attended the meeting and spoke to the councilors, and the council agreed to look into the matter.

- A month later, the UWU organiser contacted some of the superannuation funds of the members, asking for assistance in recovering the unpaid super. The funds responded by asking the organiser to refer the matter to the ATO.

- The UWU organiser was advised by the ATO that their investigation had been completed, and had determined there was outstanding superannuation owed to members.

- By late August, the ATO advised UWU that the company managing the centre had started negotiating a payment plan.

- By September 2019 members had been notified by the ATO confirming the outcome of the investigation, but the ATO did not provide details of steps being taken to recover the superannuation.

- In December 2019 UWU was advised a payment plan was in place, however, members were still not provided details of the payment plan or been provided with details of the undertaking that the ATO stated they had received from the company to pay the superannuation.

The company was still not paying superannuation in December 2019, and the debt was continuing to grow.

Members were advised by the ATO that they would have to file a complaint every quarter if their employer did not make superannuation contributions. UWU commenced proceedings against the company in February 2020 in the Federal Circuit Court. The unpaid superannuation totalled \$82,516.82 and UWU sought pecuniary penalties for contraventions of the Fair Work Act.

The company was self-represented by the Director. He admitted during court proceedings that they were not paying superannuation because they could not afford to, despite continuing to operate.

The Federal Circuit Court on 7 June 2021 declared that the company had contravened numerous provisions of the Fair Work Act and the relevant modern award and enterprise agreement. The court ordered that the company must pay the outstanding superannuation for the period March 2018 to June 2021. On September 29 2021 the Federal Circuit Court also ordered that the company pay \$60,000 in pecuniary penalties to UWU for breaches of the Fair Work Act. In total, this amounted to \$142,516.17 to be paid to members and UWU.

After the company filed an appeal in December 2021 in relation to the Federal Circuit Court's decision on pecuniary penalties (and while the company was still trading), UWU filed an interlocutory application for Security for Costs, and a case management conference was scheduled for 4 February in the Federal Court of Australia. The day before the conference was scheduled the company was placed into liquidation. The liquidator did not attend the conference, and the matter was adjourned.

UWU filed a self-executing order to dismiss proceedings if the company didn't file an appeal book, which did not occur, and the appeal was dismissed. UWU then engaged a debt enforcement company, which also failed to recover the unpaid debt.

Citation: *United Workers Union v ECEC Management Pty Ltd* [2021] FCCA 1260

Conclusion

FEG is a vital safety net for Australian workers. And yet, ‘sharp corporate practices’ and the corporate misuse of FEG have impacted many UWU members across many industries, including contract cleaning, early childhood education and care, and sales. UWU would reiterate that as “as employees do not normally share in the profits of the enterprise, they should not share in its losses either.”³⁰ Equally, Australian taxpayers should not bear the cost of entities and their directors misusing FEG. Our submission has highlighted key reforms that would make a difference to employees’ attempts to recoup unpaid entitlements and compensation, whilst discouraging creditor- and employee-defeating transactions and arrangements.

UWU broadly supports the reforms proposed by the DEWR’s Discussion Paper, and supports the recommendations put forward in the ACTU’s submission.

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- ¹ Corporations Amendment (Strengthening Protections for Employee Entitlements) Bill 2018 Explanatory Memorandum. Pg. 6.
- ² Department of Employment and Workplace Relations. “Addressing corporate misuse of the Fair Entitlements Guarantee” Discussion Paper. Australian Government. Pg. 4.
- ³ *Corporations Act 2001*, s 588ZB
- ⁴ Corporations Amendment (Strengthening Protections for Employee Entitlements) Bill 2018 Explanatory Memorandum. Pg. 45.
- ⁵ Discussion Paper. Pg. 9
- ⁶ Department of Employment and Workplace Relations. “Addressing corporate misuse of the Fair Entitlements Guarantee” Discussion Paper. Australian Government. Pg. 11
- ⁷ Corporations Amendment (Strengthening Protections for Employee Entitlements) Bill 2018 Explanatory Memorandum. Pg. 3
- ⁸ *Corporations Act 2001*, s 588ZA(4)
- ⁹ *Companies Act 1993* (NZ), s 271 and s 272.
- ¹⁰ Discussion Paper, Pg. 12.
- ¹¹ Corporations Amendment (Strengthening Protections For Employee Entitlements) Bill 2018, Explanatory Memorandum, Para. 2.56-2.63.
- ¹² Discussion Paper, Pg. 12.
- ¹³ *Companies Act 1993* (NZ), clause 3(1) of Schedule 7.
- ¹⁴ Keeper, Trish (2019). “An Analysis of the Mechanisms in New Zealand Law to Protect Employee Entitlements in the Event of Employer Insolvency and their Effectiveness.” *Journal of the Australian Law Academics Association*, Vol. 12. Pg. 64
- ¹⁵ Keeper, Pg. 68.
- ¹⁶ Discussion Paper, Pg.14.
- ¹⁷ Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019, Explanatory Memorandum. Pg 15-19.
- ¹⁸ *Corporations Act 2001*, s 588 FDB (1)(a)
- ¹⁹ *Corporations Act 2001*, s 596AA(2)
- ²⁰ *Insolvency Practice Rules (Corporations) 2016* 80-15(4)
- ²¹ *Corporations Act 2001*, Schedule 2, Insolvency Practice Schedule (Corporations) Subdivision D, 70-40, 70-45
- ²² Ibid.
- ²³ Discussion Paper, pg. 17.
- ²⁴ International Labour Organisation (ILO) (2003). *General Survey of the Reports Concerning the Protection of Wages Convention (No. 95) and the Protection of Wages Recommendation (No. 85), 1949: Report of the Committee of Experts on the Application of Conventions and Recommendations (Articles 19, 22 and 35 of the Constitution)*. Report III (Part 1B), International Labour Conference, 91st sess [299].
- ²⁵ Corporations Amendment (Strengthening Protections for Employee Entitlements) Bill 2018 Explanatory Memorandum. Chapter 3. Pg. 51-62.
- ²⁶ Migrant Workers Centre (2025). “Migration Matters: Expanding the Fair Entitlements Guarantee”, Policy brief, February 2025. Recommendation 1, pg. 5. Found at: https://assets.nationbuilder.com/mwc/pages/6301/attachments/original/1739317176/2025_MWC_Migration_Matters-UnderstandingFEG_V2.pdf?1739317176
- ²⁷ 2021 National Early Childhood Education and Care Workforce Census. Found at: <https://www.education.gov.au/early-childhood/about/data-and-reports/national-workforce-census/2021>
- ²⁸ Analysis by Deloitte for Australian Super, found at: <https://www.australiansuper.com/campaigns/average-balance-planners>
- ²⁹ Australian Human Rights Commission (2019), “Risk of Homelessness in Older Women”, Background Paper. Found at: <https://humanrights.gov.au/our-work/age-discrimination/projects/risk-homelessness-older-women>
- ³⁰ International Labour Organisation (ILO) (2003). *General Survey of the Reports Concerning the Protection of Wages Convention (No. 95) and the Protection of Wages Recommendation (No. 85), 1949: Report of the Committee of Experts on the Application of Conventions and Recommendations (Articles 19, 22 and 35 of the Constitution)*. Report III (Part 1B), International Labour Conference, 91st sess [299].