



## Fair Entitlements Guarantee and an Exclusion for Employee Directors

### 1 Introduction

This memorandum highlights a little known but significant disadvantage to employees who represent employee interests on an employer's board. This is caused by the *Fair Entitlements Guarantee* ("FEG") exclusion of all directors of an employer from the FEG scheme.

This memorandum explains how this treatment is inconsistent with the policy aim of FEG, discourages accepted good employee engagement practice and how the regulation-making power under the *Fair Entitlements Guarantee Act 2012* (Cth) (the "Act") might be utilised to keep such employee representatives within FEG.

#### 1.1 Employee directors

Companies that wish to promote employee engagement may have employees elected or selected to join a board to represent the interests of the workforce ("**employee directors**"). Employee directors typically rotate every two or three years and do not receive extra remuneration for their non-executive role.

Employee representation (also referred to as co-determination or worker participation) is a well-established international feature of corporate governance. It is not exclusive to employee-owned companies ("**EOCs**") but it is a significant element of EOCs' governance. In the UK over half of the of EOCs surveyed (e.g. worker co-operatives and companies controlled by an employee ownership trust ("**EOT**") have an employee director on the main board.

#### 1.2 FEG

The Act provides a safety net for employees who have lost their jobs due to the insolvency or bankruptcy of their employer (see **Appendix 1** for full eligibility criteria).

The Act allows the Commonwealth to pay advances to cover certain unpaid employment entitlements, including wages, annual leave, long service leave, payment in lieu of notice, and redundancy pay.

Directors can be personally liable for unpaid employee entitlements through a range of mechanisms (see '[Addressing corporate misuse of the Fair Entitlements Guarantee](#)', February 2025, The Department of Employment and Workplace Relations).

#### 1.3 General Exclusion of Directors from FEG

Section 11 of the Act excludes certain individuals from eligibility for an advance under the FEG scheme. Specifically, it excludes:

- (i) Directors of the company within 12 months of the insolvency event.
- (ii) Spouses or de facto partners of directors.
- (iii) Relatives of directors or their spouses/de facto partners.

This exclusion aligns with section 556 of the *Corporations Act 2001*, which prioritises the payment of debts in the winding up of a company and similarly excludes directors and their close associates from certain entitlements.

This exclusion does not distinguish between different categories of directors.

#### 1.4 Rationale for Exclusion of all Directors

The exclusion of directors and their close associates appears to be based on the principle that individuals with a "personal connection to the employer" should not benefit from the same

protections as ordinary employees (this is the heading to section 11 of the Act) or who are individuals in a position of control or significant influence.

However, it does not consider that employees may be appointed to a board to promote or represent the interests of employees, who do not have a personal connection with their employer and who are not individuals in a position of control or significant influence.

### **1.5 No Exclusion for Substantial Shareholders**

The Act does not exclude substantial shareholders who are employees from eligibility under the FEG scheme unless they fall into one of the categories mentioned above (i.e., they are also a director, a spouse or de facto partner of a director, or a relative of a director or their spouse/de facto partner). Therefore, simply being a shareholder and an employee, even if a substantial shareholder, with significant control or influence, does not automatically make an individual an excluded employee under section 11 of the Act.

## **2 Policy Considerations for Employee Directors Representing Employee Interests**

### **2.1 Inconsistencies in Existing Regulations**

#### **(a) Non-Disadvantage Principle**

Employees who represent employee interests on an employer's board should not be disadvantaged under the FEG scheme. They are especially disadvantaged in comparison to a significant or controlling shareholder who is an employee (but not a director or otherwise excluded) and yet who can exert influence over a board and retain FEG entitlements.

Employee directors accept they have potential personal liabilities as directors of a trading company, in various circumstances, but it is the FEG exclusion that is problematic. This FEG exclusion will become even more problematic if the scope to penalise directors for corporate misuse is widened.

Excluding employee directors is inconsistent with the policy objective of the legislation, which aims to protect the entitlements of employees who have lost their jobs due to the insolvency of their employer.

#### **(b) Consistency with Legislative Policy**

The policy of the FEG legislation is to provide a safety net for employees who are left without their entitlements due to the insolvency of their employer.

Employees who serve on the board to represent the interests of their fellow employees are performing a valuable role and reduce the likelihood of corporate misuse. They should not be penalised for their involvement in governance and risk personal liability at the same time as being excluded from FEG.

Excluding such employees from the FEG scheme is contrary to the aim of the legislation, which seeks to protect the rights and entitlements of all employees.

#### **(c) Discouraging or Undermining International Good Practice**

An Australian employer that follows international good practice and appoints an employee director may inadvertently undermine that employee engagement by failing to warn about the FEG exclusion. This is because it is not a well-known problem and is an unexpected outcome of the Act. There is no official guidance highlighting this problem and explaining the risks should an employer adopt this established employee engagement practice. An informed employer will be discouraged from adopting what is international good practice.

### **2.2 Regulation-Making Power for Exemptions**

#### **(a) Regulation-Making Power**

Section 55 of the Act grants the Governor-General the power to make regulations prescribing matters required or permitted by the Act or necessary or convenient for carrying out or giving

effect to the Act. This includes the ability to provide exemptions for certain categories of employees or entitlements.

**(b) Potential Exemptions**

The regulation-making power could be used to provide exemptions for employee directors. The regulation could bring within FEG employee directors who either represent the:

- (i) interests of employees generally; or
- (ii) interests of employees arising under appropriate employee share schemes such as an EOT or a legal model such as a worker co-operative.

**(c) Justification for Exemptions of Employee Directors**

Providing exemptions for a wide category of employee directors would ensure that individuals who are actively involved in representing employee interests or participating in employee share schemes of any description are not unfairly excluded from the protections offered by the FEG scheme and can represent employee interests as members of their employer's board of directors knowing they are eligible under FEG.

This approach would align with the policy objectives of the legislation, international good practice and ensure that all employees, regardless of their involvement in governance or share schemes, are afforded the same level of protection.

Appendix 2 sets out a proposed regulation.

## **2.3 Conclusion**

The *Fair Entitlements Guarantee Act 2012* provides a crucial safety net for employees who have lost their jobs due to the insolvency of their employer.

While the Act excludes directors and their close associates from eligibility, it does not automatically exclude substantial shareholders unless they fall into specific categories.

Employees who represent employee interests on an employer's board should not be disadvantaged, as this is inconsistent with the policy objectives of the legislation and established good practice on employee engagement.

The regulation-making power under the Act can be utilised to keep within FEG an employee director representing employee interests, ensuring that the protections of the FEG scheme are applied equitably.

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## **Appendices**

### **Appendix 1**

#### *Eligibility Criteria*

Under Part 2 of the Act, a person is eligible for an advance if the following conditions are met:

- (i) The person's employment by a particular employer has ended.
- (ii) An insolvency event has occurred to the employer.
- (iii) The end of the employment was due to the insolvency of the employer or occurred within a specified period before or after the appointment of an insolvency practitioner.
- (iv) The person is owed one or more debts attributable to employment entitlements.
- (v) The person has taken reasonable steps to prove those debts in the winding up or bankruptcy of the employer.
- (vi) The person was an Australian citizen or permanent visa holder at the time the employment ended.
- (vii) An effective claim has been made to the Secretary.

### **Appendix 2**

#### *Proposed regulation*

Where section 556 of the Corporations Act 2001 applies to the winding up of the employer a person is not an excluded employee under that section in relation to the employer if they are:

- (a) a director solely because they were elected or selected as a director to represent the interests of all employees of the employer; and
- (b) had no executive function in the management and administration of the employer at any time during the period of 12 months ending on the relevant date.