



1.0 INTRODUCTION

Owners of insolvent or potentially insolvent businesses regularly express concern about the effect liquidation or bankruptcy will have upon their employees, especially if insufficient assets are available to pay entitlements. As a result, they often delay taking the necessary action to close a loss making business in the expectation they may be able to either improve their position or trade out of their difficulties. Invariably, this only increases the shortfall to creditors and in the case of company directors, exposes them to potential liability for insolvent trading.

2.0 FAIR ENTITLEMENTS SCHEME

Time to call in the cavalry! The Federal Government provides a limited safety net for employee entitlements via the Fair Entitlements Guarantee ("FEG"), which is a legislative scheme administered by the Department of Employment ("the DOE") under the Fair Entitlements Guarantee Act 2012 ("the FEG Act"). The catch is that the employing entity must either be a company in liquidation or a person who is bankrupt. This article will concentrate on the corporate aspects, as that is where most claims arise. The FEG scheme thus forms part of the insolvency regime in respect of which Insolvency Practitioners play a key role. Typically, the DOE will advance funds in respect of certain entitlements to a Liquidator, which are in turn paid to employees, net of tax. The DOE then makes a claim in the liquidation equal to the amount advanced.

3.0 WHO IS ELIGIBLE?

3.1 Eligibility

FEG may apply to a person if their employer enters liquidation or bankruptcy on or after 5 December 2012.

Prior to that date, the General Employee Entitlements and Redundancy Scheme ("GEERS") applied. FEG does not apply to companies that have a Controller or Receiver and Manager appointed (although such a company could also be in liquidation at the same time and therefore qualify) or those currently in Voluntary Administration, (although if it is subsequently placed into liquidation, it then qualifies). Subject to some exclusions, employees will be eligible if they meet the following conditions:

- i. Employment with the relevant employer has ended and the employer has entered liquidation or bankruptcy on or after 5 December 2012.
- ii. the end of employment;
 - was due to the insolvency of the employer,
 - occurred less than 6 months before the appointment of an insolvency practitioner to the employer,
 - occurred on or after the appointment of an insolvency practitioner to the employer.
- iii. They are owed eligible employment entitlements and have taken reasonable steps to prove those debts in the winding up or bankruptcy.

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- iv. They are an Australian citizen or, under the Migration Act 1958, the holder of a permanent visa or special category visa.
- v. They have made an effective claim that is eligible for an advance.

3.2 Exclusions

- i. Contractors and sub-contractors, although contract outworkers in the textile, clothing and footwear industry may be covered under a special scheme for that industry.
- ii. Employees who are excluded employees within the meaning of section 556 of the Corporations Act, (**"the Act"**), ie an employee who has been a director or who is a spouse or relative of a person who has been a director at any time in the period of 12 months prior to the date of insolvency, cannot be paid unpaid wages exceeding \$2,000 or annual leave, long service leave or retrenchment payments exceeding \$1,500.
- iii. Employees who are relatives (as defined under the Act) of a bankrupt or a spouse or de-facto partner of a bankrupt at any time within the 12 months ending on the date of the bankruptcy.
- iv. Employees who were initially engaged as a contractor within 6 months ending at the earlier of either the termination of employment or the appointment of an insolvency practitioner.

4.0 ELIGIBLE ENTITLEMENTS

4.1 Entitlements

FEG covers the following employee entitlements:

- i. wages – up to 13 weeks of unpaid wages ending at the earlier of the following times:
 - the time that employment ended,
 - the first time an insolvency practitioner had power (however expressed) to control or manage the former employer.
- ii. annual leave.
- iii. long service leave.
- iv. payment in lieu of notice – maximum of 5 weeks.
- v. redundancy pay– maximum of 4 weeks per full year of service and pro-rata for less than a full year of service, if the governing instrument provides such an entitlement.

The amount of assistance for which an employee may be eligible is based upon the terms and conditions of

the "governing instrument", which means a written law, an award determination or order recorded in writing, a written instrument or an agreement (eg industrial award, collective agreement, contract of employment). The FEG Act interacts with the Fair Work Act (**"the FWA"**) in some areas, including the National Employment Standards, where contracts may be silent on the issue of redundancy. In this regard, the FWA specifies which employees are not entitled to redundancy, in particular the small business exemption which applies to businesses which employ less than 15 employees. However, in calculating the number of employees, the grouping provisions of the FWA apply, and the employees of a related entity may be taken into account.

For the purpose of calculating the amount of any advance, employment entitlements are capped by the FEG maximum weekly wage which is currently \$2,451.00, subject to indexation. If an employee earned more than the FEG maximum weekly wage, DOE will calculate the entitlements based on the FEG maximum weekly wage at the time when employment ended.

4.2 Excluded Entitlements

Excluded entitlements under FEG include superannuation, discretionary payments such as bonuses, expense reimbursements, travel & relocation expenses and amounts that are not payable on an ongoing basis.

5.0 TRANSFER OF EMPLOYMENT TO NEW EMPLOYER

Employees will not be eligible to claim under FEG for payment in lieu of notice and redundancy if the business of the former employer is transferred to a new employer and, within 14 days of the end of employment, the new employer makes an offer of employment:

- i. to do work that is the same, or substantially the same, as the work done for the former employer; and
- ii. on terms and conditions substantially similar to, and considered on an overall basis, no less favourable than those under which the employee was employed immediately before termination.

The more cynical readers may perceive this is an anti-phoenix measure to limit exploitation of the FEG scheme. It is noted that under section 596AB of the Act, it is an offence to enter into agreements or transactions to avoid employee entitlements.

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6.0 MAKING A CLAIM

A Liquidator or Trustee in Bankruptcy will generally advise employees of their right to make a FEG claim and will assist in the process by providing details of entitlements if the business records are available and contain sufficient information. Whilst the FEG Act contains a provision that advances may be denied if the Insolvency Practitioner expects to have sufficient funds to pay entitlements within 112 days of appointment, the practical reality is that given the time taken to realise assets to generate sufficient cash, together with the statutory timetable for payment of a distribution, it is often quicker for employees to receive their entitlements under FEG.

The current procedure requires employees to submit their claims to DOE, preferably via an online form. The claims are then assessed by DOE and sent to the Insolvency Practitioner for verification. It should be noted that FEG advances can be reduced by any amounts owing to the employer.

To make an effective claim, employees must lodge a FEG claim form and include all mandatory information and documentation. For more information about lodging a FEG claim form, kindly refer to the [How do I apply for FEG assistance](#) and [How do I certify documents](#) fact sheets available on the [FEG website \(www.employment.gov.au/FEG\)](http://www.employment.gov.au/FEG). A claim must also be made:

- i. no more than 12 months after the end of employment or the date of the insolvency event (whichever is later) and
- ii. before the discharge of the former employer's bankruptcy (if the employer was a bankrupt).

The DOE currently has an objective to process FEG claims within 16 weeks. Earlier this year, DOE conducted its annual stakeholder survey with Insolvency Practitioners with a view to improving its administration and processes.

7.0 BACK TO THE FUTURE

7.1 The FEG Recovery Program (FEGRP)

Back in 2007, the Department of Employment and Workplace Relations ("DEWR"), (as it was then known) commenced the Active Creditor Pilot Program ("ACPP"), in a bid to partially recoup the increasing costs of the GEERS scheme. The ACPP was intended to fund Liquidator's recovery actions against directors and others in situations where an insolvency event had resulted in

unpaid employee entitlements. A particular focus was the conduct of Controllers and Receivers & Managers who did not properly fulfil their statutory obligations under section 433 of the Act to pay employee entitlements from floating charge assets before paying the proceeds to their appointor, being the secured creditor. At the time, the annual cost of GEERS was approximately \$85 million p.a. The ACPP was terminated in 2009.

Fast forward to 2015 and the costs of FEG have averaged \$204.1 million p.a. in the four years to June 2014, whilst recoveries in the same period averaged \$23.6 million p.a. The estimated cost of GEERS and FEG for 2012-13 was \$304 million. The 2015-2016 Federal Budget included funding of \$11.5 million over two years from 1 July 2015 for the FEGRP to enable the DOE to more actively pursue its interests as a creditor for FEG advances. The FEGRP will provide funding to pursue actions such as unfair preferences or loans, uncommercial transactions and insolvent trading.

The introduction of the Personal Properties Security Act 2009 ("PPSA") on 31 January 2012 replaced the concept of the fixed and floating charge with a security interest over all the present and after acquired property of a company. However, section 433 of the Act and the PPSA still recognise that in some circumstances, employee entitlements have a priority over secured creditors in respect of funds realised from the assets subject to a circulating security interest, those assets for example being inventory, debtors and cash at bank. For many years, secured creditors have sought to create fixed charges over circulating assets, with varying degrees of success. To date, there has yet to be a definitive test case run in Australia on this issue. To pursue such a case would require a very brave Liquidator or lawyer with very deep, well-funded pockets and no conflicts of interest.

8.0 CONCLUSION

The FEG scheme can provide piece of mind and support to businesses and employees in situations where:

- i. There are insufficient assets available to meet employee entitlements.
- ii. Secured creditors claims take priority over employee entitlements.
- iii. There is likely to be a long timeframe to recover sufficient funds to pay entitlements and FEG will enable payment of most entitlements in a much shorter timeframe.



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Without obligation or cost, we are available for an initial consultation. Please contact:

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