Law Council
OF AUSTRALIA

Business Law Section

31 March 2025

Mr Henry Carr
Fair Entitlement Guarantee
Recovery and Litigation
Department of Employment and Workplace Relations
GPO Box 9828
CANBERRA ACT 2601

By email: FEGPolicy@dewr.gov.au

Dear Mr Carr,

Addressing corporate misuse of the Fair Entitlements Guarantee—Discussion Paper

This submission concerning the Discussion Paper[1] is made by the Insolvency and Restructuring Committee of the Business Law Section of the Law Council of Australia (the **IRC**).

The IRC is made up of experienced senior legal practitioners working in the insolvency and restructuring field.

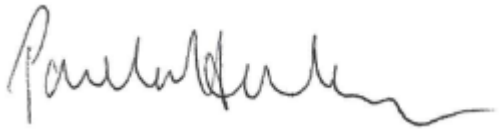
This response answers the questions raised in the Discussion Paper and proffers suggestions for law reform.

As a broad observation, the IRC considers that any changes to Australia's insolvency laws, including any which might result from the Discussion Paper, should be considered holistically with the recommended independent, comprehensive review of Australia's insolvency law proposed by the Parliamentary Joint Committee on Corporations and Financial Services in its *Corporate Insolvency in Australia* report dated July 2023[2] (**Comprehensive Review**). While there is room for obvious and simple reforms in some areas, such as those identified in the Comprehensive Review, the risks of piecemeal review of Australia's insolvency laws, which involve difficult questions of policy, such as those canvassed in the Discussion Paper, in our submission, outweigh any benefit in addressing FEG reform as a standalone priority.

[1] Department of Employment and Workplace Relations, Addressing corporate misuse of the Fair Entitlements Guarantee (Discussion Paper, February 2025) ('Discussion Paper').
[2] Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Insolvency in Australia,* Report (2023), Rec 1.

The IRC would be pleased to discuss any aspect of this submission. Please contact the chair of the IRC, Natasha Toholka [redacted] if you would like to do so.

Yours faithfully



Professor Pamela Hanrahan
Chair
Business Law Section, Law Council of Australia

Questions

NB: All legislative references are to the *Corporations Act 2001* (Cth) unless stated otherwise.

Question	Feedback
1. 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?	**Option 1:** The first proposal is to vary the evidentiary requirements to provide for a rebuttable presumption that: (a) the contributing entity has benefited, directly or indirectly, from work done by the employees [with unpaid entitlements owed by the insolvent company] (section 588ZA(1)(d)); and (b) that benefit exceeds the benefit that would be reasonable in the circumstances if the insolvent company and the contributing entity were dealing at arm's length (section 588ZA(1)(e)). The term "benefit" is relevantly defined as any benefit, whether by way of payment of cash or otherwise (section 9). The *Corporations Amendment (Strengthening Protections for Employee Entitlements) Bill* 2018 Explanatory Memorandum (**EM**) (at [3.37]) asserts that, in relation to section 588ZA(1)(e), the Court "could consider which entities in the contribution group the employees did work for, and which entities made payments for that labour". The EM further states (at [3.38–39]) that, to be satisfied of this requirement, the Court would determine the difference between a market rate for the services provided by the employees, and the actual amount paid or value of the consideration provided for those services. The following factors could be considered by the Court in making a determination of the excess benefit: (a) the price other entities in the contributing group, or a similar industry, pay for the work done by the employees; (b) what the labour cost incurred by the insolvent company for the employees that provided those services would have been if all obligations related to the employees were met; (c) any other dealings or offset type arrangements between the entities. The fact that, since the enactment of section 588ZA in April 2019, there has been no reported case law suggests that the current approach is not functioning as intended. Notably, many companies within insolvent corporate groups have inadequate records including records that are inconsistent with employee

Question	Feedback
	arrangements: for example, multiple contracts with multiple different entities. This circumstance, in itself, has given rise to the concept of the "true employer" (see *Gothard (receiver and manager of AFG Pty Ltd (in Liq) v Davey* (2018) ACSR 56 at [52]). Either by design, or by disorganisation, it may be very difficult to discern which entity or entities employ particular persons. It is for this reason that there may be some merit in the proposal. However, avoiding the need to properly consider the identity of the employing entity, and the potential contribution, may inadvertently lead to unintended consequences. It may have an effect on the willingness of the directors to allow a subsidiary within a larger group that is struggling to "trade through" its difficulties, and lead to more premature liquidations. Some of these factors are addressed in the "just and equitable" considerations in Option 2 below. There are potential issues that arise if a rebuttable presumption as to (a) the existence of the benefit; and (b) the reasonableness of the benefit is introduced. Firstly, section 588ZA(2)(a), the subclause that relates to the calculation of the contribution order by the Court, cross-refers to section 588ZA(1)(e), about the excess of the benefit the insolvent company received. It is difficult to conceive how some form of calculation of the contribution can be avoided in this context, where the outcome is an order to pay a certain amount by the contributing entity to the insolvent entity. Secondly, the notion of benefit, direct or indirect, is inherently uncertain—and untested. It would be difficult to import a presumption on a nebulous and uncertain concept. Rather, it is preferable to consider what form the benefit may take, and apply the existing criteria proposed in the EM. Thirdly, in some cases, the employees may be employed by one company and only work for that company, for example, where various companies operate different segments of a product lifecycle. Aside from the just and equitable criteria (considered in Option 2 below), it is difficult to see how the presumption is the appropriate starting point in all cases. Some group companies are particularly complex and may include various levels of subsidiaries. To include a presumption that effectively pierces the corporate veil as a default position could erode public confidence in the corporate veil in Australia, and put unnecessary pressure on the solvent companies within a corporate group. On balance, we oppose incorporating a rebuttable presumption regarding benefit for the purposes of section 588ZA. We consider, though, that there is merit in removing the requirements set out in sub-sections (d) and (e), and instead including only the just and equitable criteria (described in Options 2 and 3 below).

	Option 2 The second option proposed is to vary the requirement that a Court must be satisfied that it is just and equitable to make a contribution order (section 588ZA(1)(f)). Section 588ZA(4) specifies matters to which the Court *may* have regard in determining whether it is just and equitable to make an employee entitlements contribution order, including: (a) the size of the excess over the reasonable benefit referred to in section 588ZA(1)(e); (b) the nature of the relationship between the contributing entity and the company; (c) any efforts made by the contributing entity, or officers of the contributing entity, and officers of the company to pay or to provide for the payment of the unpaid entitlements amount; (d) whether the order is likely to result in the contributing entity becoming insolvent, if it is presently solvent; (e) the extent to which the order is likely to result in the contributing entity becoming unable to pay the entitlements of its employees or make distributions to creditors; and (f) any other matters that the Court considers appropriate. The EM (at [3.42]) further provides that the matters the Court could consider under paragraph 588ZA(4)(f) could include: (a) the control and management relationship between the members of the contribution order group, and whether the insolvent entity had common officers with some or all of the other members of the contribution order group; and (b) efforts made by other members of the same contribution order group to avoid or prevent the making of a contribution order, such as by transferring assets from entities which received an excess benefit from the employee labour so that a contribution order would make the entity insolvent (note that paragraph 588ZA(4)(c) provides that the Court may have regard to whether making a contribution order is likely to result in the contributing entity becoming insolvent). We address each of the existing potentially relevant factors: Firstly, the criterion in section 588ZA(4)(a) is arguably irrelevant to the Court's consideration regarding whether a contribution order is just and equitable. We recommend this aspect of the just and equitable criteria be deleted. Secondly, the nature of the relationship between the contributing entity and the company in section 588ZA(4)(b) is a criterion that is unclear. A better option may be to include a variation of the more

Question	Feedback
	specific wording from the EM (at [3.42(a)]), i.e. to consider the control and management relationship between the contribution order group and the insolvent entity. This approach would be similar to the New Zealand approach under sections 272(1)(a) and 272 of the *Companies Act* 1993 (NZ). Thirdly, the criterion in section 588ZA(4)(c), being efforts made to pay or to provide for the payment of the unpaid entitlements amount, should be removed. It is unclear whether this criterion makes it more or less likely that the Court would grant the orders—does it demonstrate that the directors were aware of an orchestrated scheme to avoid employee entitlements, or is it a sign of contrition? This may be addressed by incorporating the clearer wording from the EM (at [3.42(b)]), i.e. "evidence of any efforts made by other members of the same contribution order group to avoid or prevent the making of a contribution order". Fourthly, the categories in section 588ZA(4)(d) and (e) are important and should be retained. These address some of the issues raised in option 1 above, and also align with the New Zealand approach in section 272(1)(c). Fifthly, the final category of "some other matter" must also be retained in section 588ZA(4)(f) to confer an appropriate discretion on the Court. **Option 3** We note that sections 271 and 272 of the *Companies Act* 1993 (NZ) refer to broader pooling regimes. Australia already has a pooling regime in Part 5.6, Division 8 of the *Corporations Act* 2001 (Cth). While consideration may be given to the potential advantages and disadvantages of bringing the contribution power into alignment with the existing pooling regime, we note that there may be good reasons to seek a contribution order without undertaking a full pooling of the corporate group and do not advocate including the contribution order power specifically into the pooling regime. Without advocating for a change to adopt the New Zealand regime, we do see merit in simplifying the existing contribution order provisions. As noted above in relation to Options 1 and 2, the existing provisions are overly complex and require assessment of value and benefit that may be indeterminate or difficult and costly to determine due to inadequate record keeping and when considered in light of common commercial practices concerning businesses operating in corporate groups. There is merit in considering whether the contribution order power could be simplified to arise where: (1) There is an identified group (relying on the existing criteria to establish the group) where one or more of the companies is in liquidation; (2) Employees have provided work for two or more entities within the group for which their statutory priority entitlements are unlikely to be fully satisfied by the assets of their employing company; and

Question	Feedback
	(3) The Court determines that it is just and equitable to make a contribution order to cover the unpaid priority employee entitlements. The just and equitable criteria could be guided by factors set out in the legislation that the Court may take into account. This approach would give the Court sufficient remedial flexibility to identify misuse of corporate groups and of the FEG program without deeming all group entities to be liable for employee entitlements. **Option 4** Option 4 provides for the clarification that an entity which is subject to external administration can be a contributing entity. This amendment is an appropriate provision "for the avoidance of doubt". **Option 5** Option 5 provides for the clarification that Courts can make an order under section 588ZA(5) that has the effect that, for the purposes of an amount required to be paid under a contribution order, the amount is treated as if it were an employee entitlement owed by the contributing entity (including that it is a debt referred to in section 561 in the event that the contributing entity is wound up). We support this amendment, which would serve to avoid unnecessary ambiguity and contest between the priority employee entitlements and secured lenders with circulating security interests. An additional suggestion would be to also refer to the companion provision, section 433 of the Act, to avoid any further ambiguity. ***Other reform options*** **Option 6** We do not support the deemed joint and several liability of corporate group members for employee entitlements. This is clearly inconsistent with the established foundations of corporate law and insolvency law that each company is a separate legal entity and shareholders have limited liability. While the Discussion Paper points to certain payroll tax and workers compensation provisions in Victoria that provide for deemed joint and several liability, we note that the underlying policy of these regimes are separate and distinct from the policy supporting the payment of employees as creditors of the company. The mere fact that employees are priority creditors who are likely to have had little control over the company's insolvency

Question	Feedback
	or corporate rescue does not justify imposing their debts and claims for statutory entitlements on companies that may have had little or no connection to the work undertaken by the employees. **Option 7** This option would require that a DOCA provide priority unsecured creditors *across the corporate group* the same priority they would have had if their employer was in liquidation. In theory, this seems to be a fair and reasonable requirement. However, this will require careful consideration of the definition of the "corporate group". It also may only work if all entities across the corporate group are in some form of external administration. It is also important to consider the potentially negative effects of dampening the interest of potential proponents in funding a DOCA if this additional expense is incurred for no benefit. The payment of employee entitlements is not a higher order goal than the successful rescue and restructuring of a company or corporate group, particularly where that successful outcome may include the satisfaction of those debts and claims and ongoing employment.
2. Should other potential reform options be considered further? What are the benefits and drawbacks of these options?	We have no further options to suggest in relation to question 2.
3. Are the fault elements at section 596AC fit-for-purpose or should a rebuttable presumption that the fault elements have been met be adopted?	The Discussion Paper states that the "civil penalty provision at section 596AC (and related compensation provision at section 596ACA) have not yet been considered by a court" even though "in 2023–24, a potential employee entitlement defeating transaction/agreement was identified in 39% of large FEG cases".[3] The Discussion Paper does not provide any indication as to why in those cases these provisions—which presently incorporate an objective "reasonable person" test—could not have been tested when there appears to be a significant number of transactions or agreements that could potentially be the subject of a liquidator's claim for compensation under section 596ACA of the Act.

[3] Discussion Paper (n 1) 14.

Question	Feedback
	The IRC does not support the notion of introducing a rebuttable presumption that the "fault" elements in sections 596AC(1)(b) and (3)(c) are satisfied. For a civil penalty provision that may impose personal liability on a company officer who has sought to implement a restructuring plan or transaction (in the interests of the company and creditors as a whole), it is not appropriate or desirable to impose a burden on that officer to rebut a presumption that they, or a reasonable person in their position, knew that the transaction was likely to avoid or prevent the recovery of employee entitlements (or significantly reduce their recovery). Particular agreements or transactions may be structured and negotiated for a variety of rational, commercial reasons, in the interests of a broad range of stakeholders. Such a presumption would be inconsistent with the long-standing privilege against self-incrimination that applies to civil penalties. To require company officers to disprove "fault" in this way and to have the elements assumed against them if they do not disprove them or appear at the hearing would be unduly harsh and oppressive. In any event, it is difficult properly to consider the proposal for a rebuttable presumption of fault in the absence of a detailed explanation of why the existing provision has not yet been considered by a Court or why the existing provisions are said to be deficient. Sections 596AC and 596ACA, as they presently stand, expressly carve out—i.e. do not apply to—among others, a Pt 5.3A deed of company arrangement.[4] Section 596AC in its current form appears to sit in conflict with the policy behind the company director insolvent trading safe harbour (section 588GA of the Act) and the policy underlying it, namely to incentivise restructurings that avoid unnecessary or premature appointments of Pt 5.3A administrators. This argument was endorsed at length in the Final Report of the Statutory Review of the Insolvent Trading Safe Harbour (**Safe Harbour Review Report**).[5] Indeed, Recommendation 2 of the Safe Harbour Review Report was: "*that the safe harbour protections extend to the obligations of directors under section 596AC, and that section 588GA be amended to refer to subsections 596AC(1) and (3)*".[6] This recommendation was "noted" in the Commonwealth Government's Response to the Safe Harbour Review but has not been implemented.[7]

[4] See *Corporations Act 2001* (Cth) s 596AC(7).
[5] Genevieve Sexton, Leanne Chesser and Stephen Parbery, Commonwealth, 'Review of the Insolvent Trading Safe Harbour' (Final Report, 23 November 202173-4[14.6] <https://treasury.gov.au/publication/p2022-p258663-final-report> ('**Safe Harbour Review Report**').
[6] Ibid 89[16].
[7] See Recommendation 2 in the Commonwealth, 'Government Response to the Review of the Insolvent Trading Safe Harbour' (24 March 2022) 3.<https://treasury.gov.au/publication/p2022-p258663-govt-response>.

	As the Safe Harbour Review Report stated:[8] "At the time directors are seeking to rely on the safe harbour provisions while pursuing a course of action that will lead to a better outcome for the company, sections 596AB and 596AC appear to require that a separate analysis be undertaken to determine whether any agreement or transaction entered into during that period (or at any other time) has the effect of significantly reducing the amount of any entitlements to employees of the company that can be recovered … However, in some circumstances, it may be that while a restructuring plan satisfies the requirement that it be better for the company as a whole (and even creditors as a whole), it may not be better for employees as a whole (or may not be better for a sub-set of employees). The introduction of sections 596AB and 596AC require directors to have particular regard to the difference in position of employees under any plan, and, if there is a difference, then the relevant transactions will need to be entirely effectuated through a formal insolvency process rather than informally … [T]here are conflicting signals sent to directors via the introduction of these new provisions … in the Explanatory Memorandum to the Corporations Amendment (Strengthening Protections for Employee Entitlements) Bill 2018 (Cth), the following explanation was provided as a reason for excluding DOCAs from the ambit of the new provisions: *The purpose of excluding compromises and DOCAs from the operation of the offence provisions is to avoid undermining these mechanisms as legitimate options to rescue, reorganise or restructure financial distressed businesses.* In addition, the safe harbour Explanatory Memorandum also highlighted that the reason for introducing the safe harbour provisions was to recognise that the insolvent trading provisions can 'result in the unnecessary liquidation of companies that could otherwise be successfully restructured and continue to operate'. It is not clear to us why the safe harbour protections do not also operate as a carve-out to the obligations in section 596AC of the Act and are not considered a 'legitimate option to rescue, reorganise or restructure a financially distressed business'. We recommend that, just as cross references to the creditor defeating dispositions were included in the safe harbour provisions, so should section 596AC of the Act". Introducing changes to s 596AC that would presume informal restructurings contravene section 596AC (unless proven otherwise) would exacerbate the existing fundamental tensions between section 596AC and the section 588GA safe harbour. It should also be borne in mind that our legislative regime reflects an underlying policy to facilitate corporate debt restructuring and corporate rescue, and these efforts can provide a significant benefit to employees in retaining their employment and satisfying their entitlements following the restructuring. It is important that efforts to address the small proportion of misconduct cases do not have unintended consequences of discouraging good faith restructuring efforts.

Question	Feedback
4. Are the compensation provisions adequate to ensure that employees are appropriately compensated for loss or damage suffered?	The Discussion Paper does not explain in more detail the deficiencies in the compensation provisions that are said to warrant the consideration of legislative amendment. Presently, a liquidator may recover compensation under section 596ACA(3) "as a debt due to the company" which seems more appropriate for a liquidator's recovery action than compensation being treated "as a debt to the employee". Compensation recovered by a liquidator ordinarily should be recovered as a debt due to the company and the recovery augments the pool to be distributed to unsecured creditors in accordance with the Act (including in observance of the section 556 priority waterfall with liquidator's expenses and remuneration payable ahead of employee entitlements but also with employee entitlements having a priority over general unsecured creditors—this seem to be an appropriate policy setting). Indeed, section 596ACA(3) of the Act currently aligns with section 588M(2), the compensation provision for insolvent trading and creditor-defeating dispositions. Section 588M(2) of the Act provides that "the company's liquidator may recover from the director, as a debt due to the company, an amount equal to the amount of the loss or damage" sustained by one or more creditors. If a person contravenes section 596AC of the Act by incurring a debt within the meaning of section 588G of the Act or by a voidable creditor-defeating disposition under section 588FE(6), the incurring of the debt/the disposition and the contravention of section 596AC are "linked" for the purposes of section 596AD of the Act which avoids double recovery under both sections 596ACA and 588M.
5. Are any other changes to Part 5.8A desirable?	For the reasons explained above, the IRC supports the implementation of Recommendation 2 of the Safe Harbour Review Report, namely "*that the safe harbour protections extend to the obligations of directors under section 596AC, and that section 588GA be amended to refer to subsections 596AC(1) and (3)*".[9]
6. Are reforms to the creditor-defeating disposition provisions desirable, including the options described above?	The IRC notes that the first option proposed in the Discussion Paper for reform to the creditor-defeating disposition provisions, i.e. extending the period set out in section 588FE(6B) from 12 months to 24 months is attractive in aligning the creditor-defeating provisions with the 24 month period for uncommercial transactions under s 588FE(3).[10] That is, consistency is to be encouraged where these transactions are arguably of 'like' seriousness.

[8] Safe Harbour Review Report (n 4) 74[14.6].
[9] Ibid 89 [16].
[10] See Discussion Paper (n 1) 15.

Question	Feedback
	The second option proposed, in terms of clarifying that the 'market value' limb is only relevant if the property has a market value,[11] is supported as it aligns the concept articulated in section 588FDB with that in section 420A (Controller's duty of care in exercising power of sale)—that is inserting words to the effect 'if the property has a market value' in s 588FDB is supported. For completeness, we note the statutory definition of creditor-defeating dispositions contained in footnote 11 at page 15 of the Discussion Paper is not strictly correct—there is no 'or' between section 588FDB(1)(a)(i) and (ii). It is implied but the word is absent from the statutory provision. Turning to other potential reforms, the IRC notes: (a) there is room to consolidate offence and penalty provisions in the Act generally. For example, Symes and Harris question whether the creditor-defeating provisions are useful, observing that: "[c]ircumstances where assets are transferred out of insolvent (or nearly insolvent) companies for less than market value [can] already be addressed by uncommercial transactions or transactions to defeat creditors".[12] (b) in support of this argument, Symes and Harris referred to the case of *Franklin v Tecnologie Fluenti Pty Ltd* [2022] VSC 228 and stated that the "types of matters that the court […] consider[s] in an uncommercial transaction or unreasonable director-related transaction case" are the same as those the court considers when classifying a transaction as a CDD. Further, merely adding to legislative provisions available to ASIC and liquidators (and DEWR) without enforcement, renders the creditor-defeating disposition regime ineffective. The reasons why enforcement does not occur are not, in the IRC's opinion, to do with poor drafting of the provisions but are instead attributable to liquidators' lack of funds to pursue such transactions and ASIC's apparent inaction in respect of its administrative powers to make orders under section 588FGAA. As Helen Anderson et al note, the problem of illegal phoenixing exists because: "it is easy, cheap, profitable, relatively invisible and rarely followed up by regulators".[13]

[11] See ibid.

[12] Christopher Symes and Jason Harris, '*When the new model meets the classic: Creditor-defeating dispositions*' (2022) 37 Australian Journal of Corporate Law 289, 296.

[13] Helen Anderson et al, Submission to the Australian Government Treasury *Combatting Illegal Phoenixing* (September 2017) 12 <Anderson,-Ramsay,-Hedges-and-Welsh,-Submission-to-Treasury-Cth,-Combatting-Illegal-Phoenixing,-9-October-2017.pdf>.,

Question	Feedback
	In terms of ASIC's powers, the IRC notes that some concern has been expressed about the constitutionality of ASIC's powers under these provisions and we refer to our submission to the PJC at [68][14]. However, the IRC cautions against piecemeal reform for the reasons previously articulated.
7. Should the definition of employee entitlements at section 596AA be amended to include SGC? If not, why not?	The answer to this question is substantially dependent upon policy considerations regarding the respective purpose and scope of the FEG scheme itself and Part 5.8A of the Act. Assuming that such a purpose and scope truly encompasses an intention for the protections of Part 5.8A to extend to the same priority creditors provided for in section 556(1) of the Act, there is (at least ostensibly) some attraction to bringing section 596AA into alignment with section 556(1). Having said this, such an amendment should not be made in a piecemeal manner but instead should form part of a broader set of measures which seek to enhance the efficiency and integrity of the FEG scheme but in a manner that does not conflate related but distinct issues such as illegal phoenixing activity and combating abuse of the FEG scheme.
8. Should priority unsecured creditors have the right to request information from controllers? Should there be any exceptions? If so, what should they be?	The IRC considers priority unsecured creditors' rights to request information from external administrators (i.e. not controllers) under *Schedule 2—Insolvency Practice Schedule (Corporations)* (**IPS**) are sufficient to protect these creditors' interests and that extending these rights to demand information from controllers directly (who are either privately appointed or Court appointed receivers) imposes an unnecessary burden on controllers (and their appointors who generally fund the controllership) and/or the assets the subject of the controllership. However, while not every priority unsecured creditor should have the right to request information from controllers, we can see the benefit in the Commonwealth having the power to make a request as a matter of public policy where the FEG scheme has been called upon (similar to the Commonwealth's rights under 70-55 of the IPS). A limitation period should be imposed to ensure that controllers do not receive requests later than, say, 6 months after their retirement. The Discussion Paper cites "controllers appointed by secured creditors who do not comply with their duty to pay employee entitlements out of the proceeds of circulating assets of the business (such as trade debtors) but instead pay those amounts to their appointing creditor" as an example of misuse of the FEG scheme. The

[14] See Law Council of Australia, Submission to the Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Insolvency in Australia* (1 December 2022) 28 [68] < 2022 12 01 - S - Corporate Insolvency in Australia.pdf>.

Question	Feedback
	IRC is aware of further informal suggestions from government that voluntary administrators too should exercise caution or obtain court approval before utilising circulating assets to continue to allow a company to trade during a voluntary administration. There is a difficult commercial question for any person appointed as a controller or administrator on whether to allow a company to continue to trade, presumably in order to maximise the prospect of improving value to creditors as a whole, or instead cease to trade, often resulting in loss of jobs and crystallisation of employee entitlements, such as redundancy obligations which may never have otherwise eventuated. Whilst ceasing to trade will always minimise the direct cost to the FEG scheme, that is not the only (or indeed the overarching) priority of an independent administrator appointed to act in the interests of all creditors. Indeed, the employee creditors who FEG may (contingently) represent might well prefer in a given circumstance to take a risk on continued trade on the prospect of keeping their jobs. That the Commonwealth has legislated a scheme to guarantee those employees' entitlements should not self-evidently change the balance of the relevant trading decision. There should not be a default position that continued trade requires directions or permission from the court. Independent registered liquidators are usually well-placed to make these commercial decisions when required. If a decision is complex or special, there are provision (as there always are) for those practitioners to seek the court's direction if they see fit.
9. Who should bear the cost of complying with a request for information?	If the Commonwealth were to be granted the power to require controllers to provide information as set out at question 8, then the IRC sees no reason why the costs of complying with such request should not be a 'controllership expense' payable from the assets the subject of the controller's appointment.
10. Should the director disqualification provisions at sections 206EAB and 206GAA of the Corporations Act be refined? If so, how?	If the director disqualification regime is to play a part in promoting the accountability of those directors with a track record of inappropriate reliance on FEG, *Court-ordered* disqualifications are unlikely to make much of an impact given their cost and infrequency. It is the role and performance of the *administrative* (ASIC-initiated) disqualification regime that warrants scrutiny with a view to amendments that will have a marked impact on director behaviour and accountability. Currently, section 206GAA provides a basis for ASIC to exercise the power of disqualification of a person from managing corporations in the event of two corporate failures in which the Commonwealth has received a "minimal return" on FEG advances. Section 206GAA exists alongside ASIC's long-standing power of disqualification in section 206F of the Act. Section 206F applies if a report has been lodged by a liquidator under section 533 of the Act in respect of two companies of which a person has been an officer in the preceding seven years. Given that a liquidator must lodge a report under section 533 of the Act if it appears that unsecured creditors will receive less than or equal to 50 cents in the dollar *even if there is no identified misconduct*, it is difficult to envisage a scenario where section 206GAA of the Act ("bolstered" or otherwise) would provide ASIC power to make an

<table>
<tr><th>Question</th><th>Feedback</th></tr>
<tr><td></td><td>
administrative banning that ASIC would not already have under section 206F of the Act. If there is a minimal return to the FEG of less than 10 cents in the dollar, then it stands to reason that a section 533 report would be lodged and an administrative banning would be open to ASIC under s 206F (ASIC must be satisfied that the disqualification is justified under both sections 206F and 206GAA of the Act).

Even if section 206GAA were “bolstered” by removing the existing requirement that the company or person contravened the Act while the person was an officer, section 206AA of the Act will remain a provision that provides ASIC with the power of disqualification. Available data suggests that it is unlikely that bolstering existing administrative banning provisions will result in any significant increase in disqualifications, let alone drive behavioural change. For the past 10 years, the annual number of administrative disqualifications of directors has been modest (an average of 46 per year for the last 10 years and an average of 52 per year for the last 13 years). The following figures, taken from ASIC Annual Reports, detail the trend of low numbers of administrative director disqualifications each year:
<table>
<tr><th>Year (ASIC Annual Report)</th><th>Number of people disqualified or removed from directing companies</th></tr>
<tr><td>2023–24</td><td>35</td></tr>
<tr><td>2022–23</td><td>32</td></tr>
<tr><td>2021–22</td><td>58</td></tr>
<tr><td>2020–21</td><td>49</td></tr>
<tr><td>2019–20</td><td>51</td></tr>
<tr><td>2018–19</td><td>59</td></tr>
<tr><td>2017–18</td><td>50</td></tr>
<tr><td>2016–17</td><td>51</td></tr>
<tr><td>2015–16</td><td>39</td></tr>
</table>
</td></tr>
</table>

Question	Feedback

2014–15	40
Average (10 yrs)	**46.4**
2013–14	62
2012–13	72
2011–12	84
Average (13 yrs)	**52.46**

The administrative disqualification regime is not serving as an effective deterrent nor is it providing the business community adequate protection from those persons who should not be involved in managing corporations without at least a modest period of disqualification (a "time out" as it were) following serial minimal returns to unsecured creditors in the liquidation of their companies.

For these reasons, consideration should be given to the introduction of *automatic* disqualification provisions that may be triggered *solely* by the delivery of a minimal return to priority creditors or the Commonwealth (i.e. 10 cents in the dollar or less) in two or more instances of corporate failure *regardless* of whether there has been a contravention of the Act or whether there is "reason to believe" that a contravention has occurred.

The design and legislative drafting of an automatic disqualification regime could incorporate the following, sensible "safety valves":

- counting one group insolvency as one corporate failure (presently, section 206GAA(4) provides that, in determining whether disqualification is justified, ASIC must have regard to **whether the two corporations were related to one another**. Reference could also be had to section 453C of the Act and reg 5.3B.03 of the *Corporations Regulations 2001* (Cth) that limit access to the use of the Pt 5.3B 'small business' restructuring procedure by denying eligibility for the procedure to a company whose director has been a director of another company that used the Pt 5.3B procedure (or a simplified liquidation procedure) in the previous seven years. The "group failure" scenario is addressed ("carved out") by regulation 5.3B.03(4) which provides for an exception to the usual denial of eligibility in circumstances **where the two companies are related and the**

Question	Feedback
	other company had commenced the restructuring/simplified liquidation procedure no more than 20 business days prior); ○ providing persons with **a right to apply to ASIC or a court for relief** or to be absolved from an automatic disqualification. For example, directors who can demonstrate honesty and that reasonable steps or conduct were taken to address the worsening insolvency of their company could apply for such relief. If the policy goal is to deter inappropriate or excessive reliance on the FEG scheme, it is difficult to see how anything short of an *automatic* disqualification regime will significantly "shift the dial"—i.e. change behaviour and introduce better director accountability for minimal returns to priority creditors in liquidations. The IRC acknowledges that such a move is draconian and before taking any steps to institute such policy, further consideration would be required on the justification and consequences of an automatic disqualification regime. Any such move should be part of a holistic review of the policy and regulatory regime of insolvency and restructuring and the IRC may consult more broadly amongst its members before committing to a final position.
11. 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? Please note adjustments to the director penalty notice regime are outside of the scope of this consultation	Further to our response to question 10 above, the extent and nature of directors' personal liability for companies' debts is far too complex and lacks a holistic policy basis. That issue is not restricted to liability for employee entitlements but does involve it. Examples of the policy difficulties include at least the following matters: (a) In circumstances where superannuation is not (or cannot be) paid on time, there is a clear incentive to file SGC statements on time, in order to limit director liability to "non-lockdown" liability under the director penalty regime. However, the enforcement of the director penalty regime, including but not limited to penalties for SGC debt, lacks any apparent policy consistency. Sending a "non-lockdown" DPN naturally encourages a rational director to appoint an insolvency practitioner in order to avoid personal liability, whereas sending a "lockdown" DPN entrenches liability and therefore might naturally encourage a rational director to allow the company to continue to trade (even if insolvent) as the director's personal liability for the relevant debt is entrenched. There is no clarity around why lockdown or non-lockdown DPNs are sent, and indeed often mixed DPNs are sent which include both lockdown and non-lockdown debts. (b) In circumstances where a director allows a company to pay an SGC debt and that amount is later clawed back as a preference under section 588FF, or under section 588FGAA, the directors **become** personally liable under the statutory indemnity in section 588FGA, where they might not otherwise

Question	Feedback
	have been personally liable for that obligation. This is an example of where the personal liability regime as it stands might naturally encourage a rational director to cause a company **not to pay** its SGC obligations. (The same issue applies in respect of PAYG debts though those may be outside the scope of the question.) (c) Provisions requiring employee entitlements to be satisfied as a precursor to (for example) safe harbour eligibility appear to prioritise payment of certain types of debts over others, in circumstances where a company is (necessarily, in order for the provision to have relevance) insolvent. There are difficult policy questions about whether our regime should prioritise employee entitlements over other creditors in that regard, though historically our regime has always considered the high priority of employee entitlements to be a very important part of the restructuring regime. There are also complicated economic questions about whether employees' interests are best served by preventing safe harbour eligibility and encouraging the appointment of administrators, which may see unnecessary destruction of jobs and businesses where informal restructuring was a realistic option. Ultimately, it is hard to say there is a clear policy position or incentive for directors associated with their own personal liability in circumstances where a company is in financial trouble. The answer to the question in the Discussion Paper is that, as with other matters raised in this submission, the issues involved require broad, holistic consideration in line with the whole of the restructuring regime. Piecemeal legislation to increase personal risk to directors associated with some particular circumstances will likely serve simply to muddy the waters further.