



Senate Inquiry into the performance of the Australian Securities and Investments Commission

Submission by the Australian Manufacturing Workers' Union

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A. Purpose and Introduction

The Australian Manufacturing Workers' Union (AMWU) makes the following submission to the Senate inquiry into the performance of the Australian Securities and Investments Commission (ASIC).

5 The AMWU represents approximately 100 000 members nationwide, working across major sectors of the Australian economy. AMWU members are primarily based in the manufacturing industry: in metal, printing and graphic arts, food manufacturing, and vehicle building, repair and service. In addition, the AMWU also has significant membership in the mining, building and construction, aircraft and airline operations, laboratory technical, supervisory and public sector industries. Our members work in semi-skilled, trade, technical, and professional occupations within these industries and source their workplace
10 entitlements and responsibilities from a variety of industrial instruments including awards, over award certified agreements, and common law arrangements.

This submission concerns itself with ASIC's continued failure to adequately police safeguards for worker entitlements during liquidation, especially in the context of phoenix activity. Whilst this is not an issue that rests wholly upon enforcement by ASIC, their acquiescence (ranging from refusal to inability) to
15 continued misfeasance by rogue directors is nonetheless an important reason why arguably dishonest directors have acted with such blatant social, ethical, and legal irresponsibility. In summary, this inquiry should shift the focus from impunity to accountability in director malfeasance.

In keeping with our overall interest in holding directors to account, the AMWU submits that ASIC's role as the corporate enforcement and regulatory body be expanded and its powers be used more frequently
20 and successfully. Each of the following recommendations goes towards this aim:

- 1) increasing resources and funding to ASIC so that it can properly investigate corporate misbehaviour;
- 2) a comprehensive review and amendment of s 596AB of the *Corporations Act* to provide stronger
25 safeguards for employee entitlements and allow for more successful actions by ASIC and liquidators;
- 3) introducing a reverse onus procedure by which a director, where there has been an adverse liquidators' report lodged against them, will be required to ensure that they have acted honestly and responsibly in relation to company affairs.
- 4) increasing ASIC's legislative powers to hold directors and officers personally responsible for
30 unpaid employee entitlements, with a particular focus on phoenix activity;

This submission is split into four parts. Firstly, the issue of phoenix activity will be briefly explored. Second, relevant case studies affecting AMWU members will be presented. Third, recommendations for



action will be explained. Fourth, and finally, some general concluding remarks will be made for the inquiry.



B. The issue of Phoenix Activity

This submission adopts the definition of phoenix activity given by the Fair Work Ombudsman. Under their definition, phoenix activity encompasses: “the deliberate and systematic liquidation of a corporate trading entity which occurs with the fraudulent or illegal intention to: avoid tax and other liabilities, such as employee entitlements; continue the operation and profit taking of the business through another trading entity.”¹ This issue clearly pertains to our members: when company directors dishonestly use their position to avoid their debts only to re-emerge through another corporate entity, they leave employees to bear a dual loss of their jobs as well as the amounts owing to them.

In a 2012 report commissioned by the Fair Work Ombudsman, PricewaterhouseCoopers estimated the annual cost of phoenix activity to employees to be between \$191 million to \$655 million.² Overall, the total impact (the sum of the cost to employees, business, and government revenue) of phoenix activity was estimated to be between \$1.78 billion to \$3.19 billion per annum.³

Many authors have acknowledged the difficulties faced by employees in the context of corporate insolvency.⁴ This vulnerable group of creditors stand to lose entitlements such as unpaid wages, long service leave, annual leave, and unpaid superannuation – money heavily relied upon for basic needs and adequate financial security. Additionally, their inability to diversify their risk,⁵ lack of access to the company’s financial position,⁶ and inability to constrain post-contractual behaviour or to bargain for *ex post* readjustment of their terms of employment⁷ aggravate the difficulties for employees who are unable to protect themselves.

There have been various legislative reforms that have attempted to curb the growth of phoenix activity and/or protect employee entitlements. These include: *Corporations Law Amendment (Employee*

¹PricewaterhouseCoopers, *Phoenix activity report: sizing the problem and matching solutions* (16 October 2013) Fair Work Ombudsman < <http://www.fairwork.gov.au/Publications/Research/Phoenix-activity-report-sizing-the-problem-and-matching-solutions.pdf>> at p ii.

²ibid, p iii.

³ ibid.

⁴ Anderson H ‘Directors’ Liability for Unpaid Employee Entitlements: Suggestions for Reform Based on their Liabilities for Unremitted Taxes’ Sydney Law Review Vol 30:470; Ronald B Davis, ‘The Bonding Effects of Directors’ Statutory Wage Liability: An Interactive Corporate Governance Explanation’ (2002) 24 *Law and Policy* 403; D Bruce Gleig, ‘Unpaid Wages in Bankruptcy’ (1987) 21 *University of British Columbia Law Review* 61; Arturo S Bronstein, ‘The Protection of Workers’ Claims in the Event of the Insolvency of Their Employer: From Civil Law to Social Security’ (1987) 126 *International Labour Review* 715; Robert Howse & Michael Trebilcock, ‘Protecting the Employment Bargain’ (1993) 43 *University of Toronto Law Journal* 751; and Paula Darvas, ‘Employees’ Rights and Entitlements and Insolvency: Regulatory Rationale, Legal Issues and Proposed Solutions’ (1999) 17 *Company and Securities Law Journal* 103.

⁵ Paul Halpern, Michael Trebilcock & Stuart Turnbull, ‘An Economic Analysis of Limited Liability in Corporation Law’ (1980) 30 *University of Toronto Law Journal* 117 at 149.

⁶ Ronald B Davis, ‘The Bonding Effects of Directors’ Statutory Wage Liability: An Interactive Corporate Governance Explanation’ (2002) 24 *Law and Policy* 403 at 412

⁷ Anderson H ‘Directors’ Liability for Unpaid Employee Entitlements: Suggestions for Reform Based on their Liabilities for Unremitted Taxes’ Sydney Law Review Vol 30:470 p478



Entitlements) Act 2000 (Cth); *Corporations Amendment (Phoenixing and Other Measures) Act 2012* (Cth); and the *Corporations Amendment (Similar Names) Bill 2012* (Cth). The AMWU particularly notes the lack of use and extensive criticism of s 596AB of the *Corporations Act*.⁸ Put bluntly, s 596AB is not an avenue for employees to recover amounts owing to them; the requirement for a subjective intention to deprive employees of their entitlements means that it is, practically, extremely difficult to prove.

Employees also enjoy some priority under s 556 and 558 of the *Corporations Act*. These sections prioritise the payment of wages and superannuation contributions, leave entitlements and redundancy payments. However employees still rank behind a number of categories of administration expenses during the winding up of a company⁹ and each must be paid in full before later categories receive anything. Joellen Riley summed up the ‘priority’ of employees best when she commented, “the first bite at nothing is still nothing”.¹⁰

It is clearly evident that the issue of phoenix activity is an issue which greatly affects employees. Their vulnerability is then exacerbated by ineffective methods of protecting entitlements against dishonest directors. It is therefore equally evident that ASIC’s role, to police and give effect to the law, is an extremely important one in holding these directors to account. However, as will be explored in the next section, rarely (if ever) does ASIC involve itself such matters.

⁸ Anderson H ‘The Proposed Deterrence of Phoenix Activity: An Opportunity Lost?’ *Sydney Law Review* Vol34:411 at 432.

⁹ *Corporations Act* s 433(3)(c).

¹⁰ Joellen Riley, ‘Bargaining for Security: Lessons for Employees from the World of Corporate Finance’ (2002) 44 *Journal of Industrial Relations* 491.



C. Recent Cases

Recent cases in which the AMWU have had members whose entitlements have been compromised by insolvency are outlined below. This is by no means an exhaustive list, but goes towards the contention that millions of dollars worth of employee entitlements have been left unpaid, potentially contrary to director's duties under statute and general law. In our contention, this type of behaviour continually goes unpunished by ASIC, despite their legislative objectives to: administer the law effectively and with minimal procedural requirements;¹¹ and to enforce and give effect to the law.¹²

Steel Tank and Pipe Group ("STP")

The "disgraceful"¹³ treatment of STP group employees when their company went into receivership was a major impetus to the reforms introduced by the *Corporations Law Amendment (Employee Entitlements) Act 2000* (Cth). Steel Tank and Pipe was founded in Newcastle in 1947 and expanded into seven companies throughout Australia. During early November 2000, branches were placed into receivership. It was only at this point that employees were notified by written correspondence from the receiver that, in addition to potentially losing their jobs, they were at risk of collectively losing \$3.3 million in long service, superannuation, holiday pay entitlements and even health fund deductions. This was because the STP directors, Brad and Stephen Weeks, had transferred employees, without their consent, to over 40 shelf companies that held no assets whatsoever. Because of this transfer, employees were left with next to nothing whilst creditors such as National Australia Bank (\$10 million), the owners' mother, Mrs Vi Weeks, (\$1 million), and a Malaysian company controlled by the Weeks brothers (\$1 million) were still secured upon the liquidation of STP's assets. Perhaps most outrageously, while these workers were fighting for their deserved entitlements, one of the former directors was preoccupied with building a luxurious mansion in the beach-side suburb of Mereweather. There was no ASIC response to the unscrupulous actions of the directors of STP.

Forgecast Australia Pty Ltd ("Forgecast")

Forgecast is another example where employee entitlements, following suspicious corporate activity, were left unpaid by the employer and unpunished by ASIC. Fifty-seven employees from Forgecast, a metal parts and fittings manufacturer based in Mitcham, Victoria, were told in November 2009 that they were to be terminated and the company did not have the money to pay the \$4.4 million worth of redundancy, superannuation, and other entitlements they were owed. Prior to this date, the sole director of Forgecast, Mr Ian Beynon, had accumulated a loan of almost \$4 million, secured by a charge, owed to another

¹¹ *Australian Securities and Investments Commission Act 2001* (Cth) s 1(2)(d).

¹² *Ibid*, s 1(2)(g).

¹³ Bryce Gaudry, *Steel Tank And Pipe Manufacturing Company Workers Entitlements* (18 October 2013) Parliament of New South Wales <<http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LA20001114034>>.



company (Ideal Pty Ltd) controlled by the same sole director: Mr Beynon. This was despite the initial share purchase deal between the two companies being worth \$300,000.¹⁴ The AMWU petitioned for ASIC to intervene, but no action was taken. Instead, the AMWU filed an application against Mr Beynon alleging that he was a person involved in the contravention of the civil remedy provisions under Part 4.2 of the *Fair Work Act 2009* (Cth). This application was rejected by the Federal Court on the basis that, upon the receiver being appointed, Mr Beynon ceased being the controlling mind and will of Forgecast, and nor was he linked with the receiver by a common intention or purpose.¹⁵ Because of these circumstances, the employees of Forgecast were short-changed by \$1.4 million in their deserved entitlements.

10 *Carlton Sheet Metal Pty Ltd*

Carlton Sheet Metal Pty Ltd was a Sydney based manufacturer of commercial sheet metal and air-conditioning systems with around 100 employees. Carlton Sheet Metal Pty Ltd was owned by Mr and Mrs Usalji and their two sons. In June 2009, the company went into liquidation owing an estimated \$300 000 worth of unpaid employee entitlements. Shortly after the liquidation, two new companies emerged: CSM Australia Pty Ltd, and Industrial Access & Hire Pty Ltd. Both of these companies were controlled by family members related to the former owners of Carlton Sheet Metal Pty Ltd. These two companies then continued to operate within the same premises with a fifth of the workforce – some of whom were also employed by Carlton Sheet Metal Pty Ltd. The Carlton group of companies then later expanded to Canberra and Perth where employee entitlements were similarly not met after insolvency. ASIC were contacted by the AMWU, but to our knowledge, no steps have been taken to hold the directors liable for these unpaid employee entitlements.

Huon Corporation (“Huon”)

Huon was an important manufacturer of car parts, supplying to Ford, Toyota, and Holden. Employee entitlements were compromised when, in 2006, the company went into administration and was unable to pay the redundancies for 120 sacked workers. John Shultz, the CEO of Huon, was alleged to have contravened the *Corporations Act* for insolvent trading under section 588G. It was alleged that Mr Shultz purchased Huon, transferred assets into a family trust, and then “ran the company into the ground”.¹⁶ Again, the AMWU petitioned for ASIC to investigate but no action was taken.

Paragon Printing Ltd (“Paragon”)

30 In early 2010, 140 workers from Paragon were facing the prospect of being made redundant without receiving entitlements totalling \$9 million. When the company went into administration, it was

¹⁴ *AMWU v Beynon* [2013] FCA 390 at [23]-[41].

¹⁵ *ibid*, at [83]-[85].

¹⁶ <http://www.adelaidenow.com.au/business/huon-liquidated-unions-want-asic-investigation/story-e6frede3-111112320672>



5 discovered that the \$10 million property upon which Paragon's premises were located was transferred to the superannuation fund of the majority shareholder of the controlling entity; this shareholder promptly left the country after Paragon was placed into administration. Alarming, employees had not been paid superannuation for up to four months prior to administration, and some employees not having been paid wages for three weeks. Fortunately, a buyer was eventually found and around 90 employees returned to work on the same entitlements. Despite an AMWU petition and the accountant's report identifying suspicious transactions prior to Paragon being placed in administration, ASIC took no action to investigate.

D. Recommendations

- 1) increasing resources and funding to ASIC so that it can properly investigate corporate misbehaviour

ASIC is under-resourced to handle the thousands of complaints submitted to it every year. Regardless of what legislative or regulatory reforms are undertaken, without additional funding, ASIC will not be able to protect the interests of even the most vulnerable of parties, such as employees. There needs to be a commitment to replace impunity with accountability, and increased resources and funding to ASIC must be the driving force behind this.

- 2) a comprehensive review and amendment of s 596AB of the *Corporations Act* to provide stronger safeguards for employee entitlements and allow for more successful actions by ASIC and liquidators

The intention behind s 596AB was to “deter the misuse of company structures ... to avoid the payment of amounts to employees that they are entitled to prove for on liquidation of their employer”.¹⁷ This intention has not materialised. Instead, the criticism that s 596AB will prove to be a “toothless tiger... so hard to prove that nobody will be effectively prosecuted”¹⁸ has been proven true. This recommendation would allow for ASIC to, more easily, bring proceedings against directors who have compromised employee entitlements through corporate restructures. This would have a threefold effect of protecting employee entitlements, holding dishonest directors to account, and deterring similar conduct.

- 3) introducing a reverse onus procedure by which a director, where there has been an adverse liquidators’ report lodged against them, will be required to ensure that they have acted honestly and responsibly in relation to company affairs

This recommendation is modelled upon Irish legislation under the *Companies Act 1990* (Ireland) s 149. In Ireland, where an adverse liquidators’ report has been lodged, directors must ensure that a large amount of equity capital is invested in the new company (at least £100 000 with a minimum of £20 000 paid up in cash)¹⁹ or are required to prove in court why they should not be required to do so. This reverse onus procedure would reduce the detection and compliance burden on ASIC.

- 4) increasing ASIC’s legislative powers to hold directors and officers personally responsible for unpaid employee entitlements, with a particular focus on phoenix activity

¹⁷ Explanatory memorandum, *Corporations Law Amendment (Employee Entitlements) Bill 2000* (Cth) 5 [18].

¹⁸ Submission by the Shop, Distributive and Allied Employees’ Association: Parliamentary Joint Statutory Committee on Corporations and Securities, Parliament of Australia, *Report on the Corporations Law Amendment (Employee Entitlements) Bill 2000* (2000) 11 [3.25].

¹⁹ *Companies Act 1990* (Ireland) s150 (3).



The AMWU submits that continued review of the anti-phoenix activity measures implemented be undertaken, especially in light of the first anniversary of the enactment of the *Corporations Amendment (Phoenixing and Other Measures) Act 2012* (Cth).²⁰

²⁰ The Act was proclaimed on 1 July 2012.



E. Conclusion

The AMWU submits that ASIC's failure to adequately hold directors to account has cost millions of dollars worth of unpaid entitlements for employees nationwide. The time is now for action to be taken, impunity to end, and for unscrupulous directors to be held accountable.