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Submission to the Senate Education and Employment Standing Committee on the Fair Work Amendment (Protecting Australian Workers) Bill 2016

4 April 2016

Australian
Chamber of Commerce
and Industry

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1 Introduction

The Australian Chamber welcomes the opportunity to provide a submission on the *Fair Work Amendment (Protecting Australian Workers) Bill 2016* (Cth) (the Bill). The Bill is currently before the Senate having been introduced as a private members Bill on 15 March 2016.

On 17 March 2016, the Senate referred an inquiry into the Bill to the Education and Employment Legislation Committee for inquiry and report by 10 May 2016 with submissions sought by 4 April 2016.

The Australian Chamber does not support the passage of the Bill which proposes to make several fundamental changes to the *Fair Work Act* 2009 (Cth) (FW Act). The Australian Chamber maintains its position that there is a need to restore balance to the FW Act. However, proposing changes that further tilt the balance against employers is the wrong approach. That is, unfortunately, the approach adopted in the Bill. The Australian Chamber has many proposals to restore this balance. But they are far from manifested in the Bill.

The changes proposed to the FW Act should also be considered in the context of the existing framework of workplace, migration, criminal and corporations laws and take into account the role of those laws in targeting the type of conduct towards which the Bill is directed. Many of the proposals in the Bill cross over into these other areas of the law and their untested and uncertain implications warrant close scrutiny.

The Australian Chamber submits that the Bill focuses priorities on areas where there is a lesser need for reform relative to, for example, priorities isolated by the Royal Commission into Trade Union Governance and Corruption in its final report.[1]The evidence from the Royal Commission is that the behaviour its law reform proposals target is “deep-seated” and “widespread” in the trade union movement. Laws which target this behaviour, labelled as aberrant by the Royal Commission, should be a major priority. In this context the Australian Chamber fully supports the bills to restore the Australian Building and Construction Commission as a good starting point to addressing the findings of the Heydon Royal Commission. Those bills should be given priority by all political parties and are far more cogent as instruments of reform than the proposals in the Bill.

The submission analyses each substantive provision of the Bill in reaching its conclusion that the proposed provisions are neither necessary nor proportionate to the problem they seek to remedy.

[1] https://www.tradeunionroyalcommission.gov.au/reports/Pages/Final-Report.aspx

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2 Does and should the FW Act apply to unlawful non-citizens and migrant workers working in breach of visa conditions?

Proposed section 15A at item 3 of the Bill seeks to clarify that the FW Act applies to all workers irrespective of their immigration status. If a change to the law to obtain clarity were to be necessary (and below it is argued that no change is required), then any such clarification should occur within the terms of the *Migration Act* 1958 (Cth) (Migration Act). That change would better ensure that no inadvertent conflict of laws arises between the proposed provision and the somewhat complex provisions of the Migration Act. This is not a matter that the Australian Chamber has investigated as it does not believe the provision to be necessary in any event.

The Australian Chamber's policy position with regard to migrant workers is that a balanced and responsive migration programme, including programmes for temporary migrant workers, operating with integrity, is a strong contributor to economic wellbeing and creates jobs for Australians.

Appropriate penalties should apply to employers who deliberately underpay migrant workers as that practice has the potential to undermine the integrity of the system. Yet there are only a very small number of employers who underpay migrant workers and there are substantial penalties under the Migration Act and the FW Act where breaches of those statutes occur. In addition the Fair Work Ombudsman (FWO) takes a proactive role in this area and robustly enforces the law and there is no evidence of regulatory failure. The Fair Work Ombudsman is also effective in providing information for migrants who are working.[2]

Proposed section 15A is based on the assumption that there is confusion about whether the FW Act applies to migrant workers working in breach of their visa conditions. However, the FWO has made it clear that those who are working in breach of their visa conditions are entitled to the protections and entitlements "contained in the Fair Work framework."[3] It is worthwhile in the context of the proposed provision to set out the arguments of the FWO to counter the proposition that the FW Act does not apply in the circumstances just outlined:

> *For example, in two of* [the FWO's] *proceedings against 7−Eleven franchisees, Fair Work Ombudsman v Bosen Pty Ltd & Anor (unreported, Magistrates' Court of Victoria Industrial Division, 21 April 2011) and Fair Work Ombudsman v Haider Enterprises Pty Ltd (in liq) & Anor (Federal Circuit Court, 30 July 2015, not yet published), the Courts ordered back−payments to be made to workers on student visas who had worked hours in excess of those permitted by their visas.*

[2] https://www.fairwork.gov.au/find-help-for/visa-holders-and-migrants#working-in-australia .

[3] Fair Work Ombudsman, http://www.pc.gov.au/__data/assets/pdf_file/0009/193833/subdr0368-workplace-relations.pdf.

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> *Similarly, in Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd & Anor [2012] FMCA258, the Federal Magistrates Court ordered back−payments to be made to a worker for work performed outside of their sub−class 457 visa, and in Fair Work Ombudsman v Shafi Investments Pty Ltd & Ors [2012] FMCA 1150, the Court ordered back−payments to be made to a worker on a 801 spousal visa who worked in excess of the hours permitted by his visa.*
>
> *The FWO is only too aware that concerns about a worker's ongoing visa status can operate as a barrier to people approaching us for help. That is why it is critical that the Government makes clear to workers, employers and their advisers that the FWO can and does enforce Fair Work laws with respect to all workers, including migrant workers, irrespective of their visa conditions.*[4]

As is articulated in the last paragraph of the quoted extract, the issue is one of communication not further regulation.

To reinforce the proposition that the provision is not required, the Australian Chamber notes that both the Productivity Commission and Explanatory Memorandum (EM) at paragraph 9 rely on a decision of Commissioner Bissett of the Fair Work Commission in *Smallwood v Ergo Asia Pty Ltd*[5] to found the incorrect position on which the proposed provision is based. The case appears to be cited as authority for the proposition that an employment contract that was entered into contrary to the Migration Act was invalid and unenforceable and impliedly therefore the FW Act does not apply to migrants breaching the Migration Act. Obviously from the extract quoted above, the FWO does not agree with that proposition and the FW Act does and should apply to migrants breaching the Migration Act. In addition to the FWO's arguments, the Australian Chamber notes that the FWC is not a court of record, as opposed to the courts where the cases cited by the FWO in the extract above were decided. Further, *Smallwood* was a decision of a single Commissioner that was based on highly specific facts that do not support a more generally applicable ratio decendi. Reliance should not therefore be placed on *Smallwood* to introduce new law.

Accordingly, the Australian Chamber does not support the proposed provision. The law does not need to be clarified and the FWO continues to properly and successfully enforce the current law. This aspect of the Bill is unwarranted.

The Australian Chamber opposes the practices of underpayment or non-payment of wages in defiance of legal obligations and deliberate breaches of the migration laws. Aside from the negative social impacts upon individuals, evidence of non-compliance by others shakes confidence in the system and sets up unfair competition between businesses based on illegal activities. Employers do not support other employers underpaying workers. However, there are detailed and in many

[4] Fair Work Ombudsman, Op. Cit, p. 3.
[5] [2014] FWC 96.

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respects, complex laws in place to address improper or unlawful practices. The Australian Chamber supports more compliance and enforcement, not more regulation. Support is given for the work of the FWO particularly for more resources to be provided for targeted, risk-based enforcement campaigns. There are sufficient rules. What is needed is their greater enforcement.

3 The Fair Work Information Statement

The Australian Chamber opposes proposed changes to the requirements to provide the Fair Work Information statement that would place a further administrative burden on employers without evidence of any corresponding net benefit. Currently, section 124 of the FW Act requires the FWO to prepare a Fair Work Information Statement and publish it in the Gazette. Subsection 124(2) prescribes the information that must be contained within the Fair Work Information Statement, which includes information on:

- the National Employment Standards (NES);
- right to request flexible working arrangements;
- modern awards;
- making agreements under the FW Act;
- individual flexibility arrangements;
- freedom of association and workplace rights (general protections);
- termination of employment;
- right of entry;
- the role of the FWO and Fair Work Commission.

There is no evidence that the existing regulatory impost created by section 124 is delivering any net benefit to the economy or any real benefit to employees. Rather, the requirement shifts the Government's educative and compliance functions to employers and imposes an unnecessary administrative burden on employers. This situation represents a poor policy outcome. A failure to provide the Fair Work Information Statement amounts to a contravention of the NES and, as such, an employer may face liability of up to $54,000 per contravention. This pecuniary penalty is, in the Australian Chamber's view, disproportionate to the nature of the contravention.

Item 4 of the Bill proposes a new subsection 124(2A) that would see the prescribed information contained within the Fair Work Information Statement extended further to include information about:

(a) the relationship between workplace laws and the *Migration Act 1958*; and
(b) opportunities for redress for temporary overseas workers affected by contraventions of workplace laws.

Proposed subsections 124(2B) and 124(2C) would require the FWO to cause the statement to be translated into languages prescribed by the regulations and published in the Gazette.

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Subsection 125(1) of the FW Act requires an employer to give each employee the Fair Work Information Statement before or as soon as practicable after the employee starts employment. The Bill proposes a new subsection 125(1A) which provides:

> *(1A) If an employer reasonably believes that an employee is not proficient in written English, and the Statement has been translated in accordance with subsection 124(2B) into a langue in which the employee is more proficient, the employer must for the purposes of subsection (1) give the employee the translation of the Statement in that language.*

The Australian Chamber submits that further complicating the requirements about the provision of the Fair Work Information Statement will only increase the regulatory burden on lawfully operating employers without delivering any corresponding net benefit.

Paragraph 13 of the EM suggests that this amendment "makes clear that everyone has rights under the FWA, irrespective of their migration status, which is anticipated to result in the increased reporting of exploitation and reduced prevalence".

If the motivation for this requirement is to prevent illegitimate operators from deliberately undercutting legitimate operators by employing unlawful non-citizens and underpaying them, the proposed requirement is unlikely to have this effect. An illegitimate operator engaging in such behaviour is unlikely to respond to this requirement by providing information to unlawful non-citizens and, even if they did, unlawful non-citizens are unlikely to report breaches to regulators out of fear that they will be discovered to be working unlawfully.

In its recent inquiry into the workplace relations framework, the Productivity Commission suggested that:

> *Increasing the amount and quality of information available to migrant workers on their workplace rights and entitlements should be part of a broader strategy to reduce the prevalence of exploitation. Not only are informed migrant workers less likely to accept substandard working conditions when these are offered, but they are also more likely to alert regulators once an employer begins to act exploitatively*.[6]

The Australian Chamber agrees; however the Productivity Commission appropriately focussed its attention toward enhancement of the information provided by the regulators (as opposed to employers), noting that:

> *The FWIS offers specific information on workers' rights and conditions, but it also has weaknesses in relation to migrant workers. While it enumerates the minimum workplace entitlements specified in the National Employment Standards, making it easier for those with limited English skills to use, it contains no information about minimum wage levels.*

[6] Productivity Commission 2015, *Workplace Relations Framework,* Final Report, Canberra, p. 601.

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> *Moreover, because it is only provided upon employment, it can easily be withheld by an employer seeking to keep its workers ignorant of their rights.*[7]

Consequently, the Productivity Commission has focussed on ways to improve information provided by the FWO and the Department of Immigration and Border Protection (DIBP). It has identified that both the FWO and DIBP already produce a number of resources outlining rights, obligations and information about workplace conditions tailored for migrant workers. By way of example, the FWO has information available on its website about employment conditions and rights, including online videos available in different languages. The Visa Grant Notice, provided by the DIBP and which notifies migrants that their visa has been approved:

- informs migrants of the existence of a national minimum wage and that pay and conditions are available in awards and enterprise agreements;
- provides information about the FWO, its website and contact details;
- links to information available on the FWO's website in different languages;
- provides details on 'what is not okay at work' such as being bullied or harassed; and
- encourages migrants to keep a diary of days and hours worked and copies of payslips.

The Productivity Commission has made a number of suggestions for improvement to the information provided by regulators including but not limited to making their websites more accessible for migrants,[8] using visuals instead of words to explain workplace rights and conditions[9] and better utilising technology (including development of a mobile phone app).[10] The Productivity Commission has also suggested a role for community organisations in linking migrants to information.[11] It is more likely that migrants (whether working in Australia lawfully or unlawfully) will seek to inform themselves through means other than the Fair Work Information Statement and, as such, approaches to connecting migrant workers to information should be explored as an alternative to expanding regulatory requirements in relation to the Fair Work Information Statement.

However, more fundamental reform of the workplace relations system is needed to better cater for both employers and employees, especially small businesses. The workplace relations framework in its current form is not adequately designed for those it seeks to regulate. It is highly complex and the consequences of non-compliance are significant. Many business owners do not have sophisticated technical or language skills. Currently workplace regulation is not efficient, is overly complex and creates a disincentive to employ.

For example, small business owners struggle to navigate the complex dual-layered safety net of NES and modern awards. In a study commissioned by the FWC to elicit insights from small

[7] Productivity Commission 2015, *Workplace Relations Framework,* Final Report, Canberra, p. 924.
[8] ibid.
[9] ibid.
[10] ibid.
[11] id p. 925.

businesses with between 1 and 19 employees that are end-users of the awards (FWC Small Business Study), the following findings emerged:

- the 'layout of modern awards elicited negative sentiment and was considered daunting';[12]
- the awards 'were seen as difficult to use, but in-line with their low expectations of a government, regulatory/policy document, i.e. complex and challenging';[13]
- the awards were considered to be 'convoluted', 'complex', 'ambiguous', 'of questionable relevance' and written for the benefit of 'bureaucrats and lawyers';[14]
- there is little confidence in the modern awards and the 'lack of certainty was disempowering for small business owners in the study' leading to 'active avoidance'.[15]

The FWC Small Business Study found that the current modern award information architecture causes low expectations: poor experiences were acting as barriers to using the modern awards for the participants. At the same time, participants were acutely aware of needing to adhere to and follow the modern awards. To manage this apprehension, most participants reported simply paying a little above modern award pay rates as a form of insurance, so they did not get caught out. They also reported providing basic holiday and leave entitlements but relied on reaching some understanding with employees about many of the other provisions around breaks and penalties. Some participants were changing their employment practices in order to avoid dealing with the modern awards, i.e. not hiring or moving toward contract labour.

In summary, the challenges faced by the smaller end of the business community suggest that regulatory documents will not have optimal impact unless presented in a manner that demonstrates an appreciation of the needs and capabilities of the end-user. Information that is too hard to deal with may result in 'best guess' solutions or avoidance of the document altogether.[16] Importantly, avoidance of the awards system is not driven by the desire of the small business participants to do the wrong thing by their employees but is more likely to emerge as a result of the complexity of the award system.

Small business employers expressed concern that mistakes in applying terms and conditions could be costly, damaging to their reputation and ethically concerning with participants openly expressing 'a desire to the right thing by their employees'.[17] Frustration emerged from the tension between this desire to do the right thing and the lack of confidence small businesses had in interpreting the complex awards with participants reporting hesitation in engaging with the modern awards. This

[12] A Qualitative Research Report on: citizen co-design with small business owners, prepared by Sweeney Research for the Fair Work Commission, August 2014, p. 5.
[13] ibid., p. 5.
[14] ibid., p. 6.
[15] ibid., p. 6.
[16] ibid., p. 7.
[17] ibid., p. 14.

problem 'either filled them with a sense of dread or resignation to the challenge (and tedium) ahead'.[18]

The FWO has also acknowledged that the award system is too complex, with the following statements emerging from an address in 2014:

> *We are very much aware that workplace laws can be complex for the uninitiated.*
>
> *We know they also exist amongst a whole pile of rules you have to follow about all sorts of things…*
>
> *For those who aren't industrial experts, the margin for error is high.*
>
> *…there are many people who are a long way from understanding the intricacies of things such as the interaction between the National Employment Standards and awards, or the difference between above award payments, enterprise agreements and an Individual Flexibility Arrangement.*
>
> *This is why we are publicly acknowledging that the system could be simpler.*
>
> *That we should take every opportunity to make the framework clearer.*
> *…*
> *If we can decrease complexity then this reduces the red tape you have to grapple with.*
>
> *There is a clear productivity benefit*.[19]

The complexity of the award system compounds the burden on employers to comply with multiple regulatory instruments in implementing the safety net and is at odds with the principle that regulation should be clearly accessible to those who must comply and in an appropriate form to facilitate compliance. Regulation should also be contained in as few sources as possible.

The Productivity Commission has identified that small businesses value 'compliance requirements that are straightforward to find, understand and implement'.[20] In this regard, it is apparent that much of the regulatory framework has not been designed with these principles in mind which presents significant barriers for the 93% of Australian businesses employing between 1-19 employees. The Productivity Commission also considered the profile of the person behind a small business with statistical information indicating that the typical owner is 'likely to have completed

[18] Sweeney Research, op. cit., p. 16.
[19] Fair Work Ombudsman (Natalie James), Speech for the National Small Business Summit: FWO's Deal with Small Business, 8 August 2014, Melbourne.
[20] Productivity Commission 2013, *Regulator Engagement with Small Business*, Research Report, Canberra, p. 38.

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secondary school or a trade qualification but often have not undertaken formal management training and tend not to use a business plan'.[21]

Migrant small business owners were also identified as a significant group at 27 per cent.[22] More recent data indicates this figure is climbing. It is clear that the regulatory regime, including the complex tangle of employment regulation, is inappropriate for businesses with such characteristics. The Australian Chamber made comprehensive submissions to the Productivity Commission's inquiry into the workplace relations framework, exploring ways to simplify the system for its participants. The additional administrative burdens that would be imposed by the proposed amendments to section 124 FW Act would only compound this very real problem with the Australian workplace relations system. The direction proposed by the Bill flies in the face of the need for there to be put in place simplified arrangements that ease the regulatory burden. Rather the substance of the Bill would compound the complexity and add to the regulatory burden. On that basis the provision is not supported.

4 Expanding the general protections provisions

The Australian Chamber strongly opposes the further expansion of the already broad and overly complex general protections provisions. In particular, item 9 of the Bill proposes to expand the general protections regime by including a new provision at the end of section 340 which would provide:

> *(3) A person must not take adverse action against another person (the **second person**) because the second person raises, has raised, or proposes to raise an issue or concern about whether the second person or a third person has a workplace right.*

It is proposed that the subsection would be a civil remedy provision. This provision, if enacted, would provide an unwarranted and unnecessary expansion of this already confused and confusing area of the law.

The EM states at paragraph 20 that "[t]he new subsection 340(3) specifies that a person must not take adverse action against another person because the person questions whether a workplace right (defined in section 341) exists. The questions may be asked on the person's own behalf or on the behalf of another person." Paragraph 21 of the EM states that this will "ensure that adverse action cannot be taken if a worker asks whether someone is an employee not an independent contractor". However, the provision is much broader in application than suggested by the EM, extending the reach of the general protections to persons well beyond those with workplace rights. In particular it provides protections to those who raise an issue of concern about whether they have a workplace right or whether *another person* has a workplace right, regardless of the existence of

[21] Productivity Commission, op.cit., p. 31.
[22] ibid., p. 32.

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the workplace right. This has the potential to give rise to claims from persons not only outside the employment relationship but outside the workplace altogether.

The implications of this provision are far reaching and could have a number of negative, unintended consequences. For example, a person may raise an issue or concern about whether another person has a workplace right in a manner that causes reputational or other damage to an organisation or the individuals within it without having the facts at hand or in breach of confidentiality obligations (e.g. during the course of a workplace investigation). Notwithstanding the inappropriate conduct under investigation, it would appear that the person would have access to protections under the proposed subsection 340(3). Extending the protections beyond those with 'workplace rights' could give rise to frivolous, vexatious and potentially public and damaging accusations by persons within and outside of the workplace which could in turn give rise to claims if an employer attempted to take action to address such conduct.

Laws recognising and protecting the right to freedom of association, preventing discrimination, and preventing other unfair conduct have long been a feature of the framework; however there was no indication in Labor's *Forward with Fairness* policy documents released prior to the 2007 election that the regime of unlawful termination and freedom of association protections in the *Workplace Relations Act 1996* (Cth) would be replaced with the "general protections" against "adverse action" based on a broader range of protected "workplace rights" and discrimination grounds. There was no proper assessment of the provisions via a regulatory impact statement (RIS) prior to the regime's enactment as the FW Act was exempted from this requirement.

A post-implementation review (PIR) of the FW Act was required to examine, inter alia, the problem that the regulation was intended to address.[23] It was said that the Government had considered that the pre-existing scheme lacked regulatory coherence, involved duplication and contained inconsistencies[24]. However the PIR Panel was moved to conclude:

> *While one would imagine that the consolidation of previously scattered protections into a single Part of the FW Act would make the protections easier for employers and employees to understand and apply, the Panel is aware that this has not been the immediate result. Moreover, there is uncertainty and confusion (primarily among employers and their representatives) about the implications of the provisions. The Panel consider that much of this is due to the lack of judicial consideration of matters that test the limits of the new protections. As more legal precedent develops, the Panel hopes employer uncertainty will subside.*[25]

The Australian Chamber remains unconvinced that waiting for legal precedent to develop is the best way to address uncertainty. The general protections provisions are encumbered with a number of problems. Whereas there was a longstanding protection for employees who had filed a

[23] McCallum, R., Moore, M. and Edwards, J., *Towards more productive and equitable workplaces – An evaluation of the Fair Work legislation* , June 2012, p.30.
[24] ibid., p.232.
[25] ibid, p 246

complaint or participated in proceedings involving alleged violation of laws or regulations or recourse to competent authorities[26], the FW Act offers protection to a person (employee or prospective employee) who makes **any** complaint or enquiry relating to his or her employment/prospective employment. It is now possible for employees or prospective employees to bring a complaint alleging that because of a complaint or inquiry they have made, their employer/prospective employer has:

- 'injured' them in their employment; or
- altered their position to their detriment; or
- discriminated against them; or
- refused to employ them; or
- discriminated against them in the terms of a job offer.

In these circumstances, it will be presumed that the employer/prospective employer has taken the alleged action because of the complaint or inquiry made unless the employer proves otherwise. Where the alleged action complained of does not involve a termination, it is open for the employee/prospective employee to apply for the FWC to deal with the dispute pursuant to s. 372 of the FW Act. The proposed subsection 340(3) would go even further and offer protection to a person (employee or prospective employee) who raises an issue or concern about whether someone else has a workplace right, regardless of whether that person wants that issue or concern raised, what the person's motivations are in raising the complaint or what impacts raising the issue or concern might have in the workplace.

The Australian Chamber is increasingly concerned that the provisions, with uncapped compensation, are resulting in 'go away money' becoming an entrenched part of the workplace relations system with employers influenced by the desire to avoid the cost, time, inconvenience or stress of further legal proceedings (particularly in the court system) in choosing to settle in order to minimise their exposure to and cost of a general protections claim. The rate of growth in general protections continues with annual general protections applications pursuant to ss365 and 372 of the FW Act increasingly from 1442 in 2009-2010 to 4,261 in 2014-2015.

Before implementation, the regime was not foreshadowed; nor was it publicly debated. It was not the subject of a RIS prior to enactment and the PIR Panel was constrained by that review's narrow terms of reference. What has been produced is neither streamlined nor simple with the very early requirement for judicial consideration by the High Court a significant rebuttal of this proposition. It was at least arguable that a 'clean up' of existing provisions would have been worthwhile but the expansion encapsulated in the FW Act was never justified.

The Australian Chamber had sought for the Productivity Commission to give consideration to recommendations that addressed:

- limiting the general protections framework to unlawful termination provisions only;

[26] *Workplace Relations Act 1996* (Cth) ss. 170CK(2)(e); s659(2)(e), *Industrial Relations Act 1988* (Cth) s170DF(1)(e).

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- removing the reverse onus of proof;
- reinstating the former, pre-FW Act 'Freedom of Association' protections; and
- imposing higher barriers to entry such as increased filing fees for applications and caps on compensation.

While stopping short of the Australian Chamber's recommendations for reform of the provisions, the Productivity Commission did consider that substantial improvements are required:

- the ambiguous right to make a 'complaint or inquiry' needs to be better defined;
- active management by the Fair Work Commission and the Courts of discovery processes, consistent with similar limits to sweeping discovery action in the Federal Court, is essential when a reverse onus of proof is in operation;
- greater powers to award costs against applicants in certain circumstances are also required;
- the FWC should be required to report more details about general protections claims and the outcomes of such cases, and be adequately resourced to do so; and
- the Government should further review the operation of the general protections within 18 months of the recommended reforms taking effect if there is continuing growth in FWC case numbers.[27]

The general protections regime in the FW Act offers expanded workplace rights to a broader pool of potential claimants with attractive remedies and a favourable burden of proof for those inclined to agitate a claim. Any changes to the regime should be directed to tightening up the provisions rather than broadening their application. If the intention of the proposed amendment is to help guard against 'sham contracting' in the Australian Chamber's view the framework is sufficiently strong (as is explained further in the next part of this submission). The provision should be abandoned. Like most of the terms of the Bill, it takes the wrong reform direction.

5 Changing the defence to sham contracting

The Australian Chamber is opposed to sham contracting: that is the deliberate disguising of an employment relationship as a contractual relationship or, albeit rarely, vice versa. Sham contracting makes it more difficult for employers who comply with the law to compete. Legitimate employers are disadvantaged directly by having to compete against other firms whose costs are reduced via an unlawful means.

The Australian Chamber notes that there is neither widespread incidence of sham arrangements nor any evidence of a widespread pattern of dishonesty or exploitation. The Australian Chamber supports the current provisions of section 357, 358 and 359 of the FW Act as appropriate in countering the practice of sham contracting.

As the Productivity Commission[28] noted:

[27] Productivity Commission 2015, *Workplace Relations Framework,* Final Report, Canberra, p. 601.

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These provisions prohibit an employer from:

- *misrepresenting an employment relationship or a proposed employment arrangement as an independent contracting arrangement (s. 357);*
- *dismissing or threatening to dismiss an employee for the purpose of engaging them as an independent contractor (s. 358);*
- *making a knowingly false statement in order to persuade or influence an employee to become an independent contractor (s. 359).*[29]

The current law is supported. It has the effect of providing appropriate penalties where sham contracting has occurred. The offences in section 358 and 359 are strict liability. These sections are civil remedy provisions that permit a relevant court to make orders under s 545 FW Act, including injunctions, compensation and reinstatement orders, as well as pecuniary penalties under s 546. Section 539(2) of the FW Act prescribes that the maximum penalty that may be imposed by a court for a contravention of section 357 is 60 penalty units for an individual and 300 for a corporation.

The offence created by section 357 has a defence currently set out in subsection 357(2). If an employer is able to demonstrate that they did not know that the contract was for employment rather than for service and that they were not acting recklessly then a defence is made out. The onus is on the employer.

The test of being reckless in paragraph 357(2)(b) is consonant with the notion that the action taken was deliberate in accordance with the idea of sham contracting. For example, an advisor has been held not to have made out the defence where he was seized of the knowledge that the relevant contract was an employment contract and not a contract for services.[30] The FWO appears well aware of the specific and general deterrence that is able to be achieved by pursuing personal liability against those who are key gatekeepers in relation to employment standards. This aspect of the effective use of the current provisions of the FW Act, including the accessorial liability provision, appears to be a successful litigation strategy.

The Australian Chamber notes that the Productivity Commission[31] remarked on the FWO's strategy thus:

> *Where the regulator does investigate potential sham arrangements, the majority of cases do not result in court action. For example, in 2014-15, the FWO finalised 301 complaints relating to misclassification and sham contracting — 29 per cent of complaints were*

[28] Productivity Commission 2015 *Workplace Relations Framework* Final Report http://www.pc.gov.au/inquiries/completed/workplace-relations/report/workplace-relations-volume2.pdf
[29] Ibid. at p813
[30] *Fair Work Ombudsman v Centennial Financial Services Pty Ltd & Ors* [2010] FMCA 863 esp at paras 265 and 266
[31] Productivity Commission 2015, loc. cit.

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sustained (the contravention rate), the FWO issued 23 letters of caution, and commenced six sham contracting matters in court (FWO, pers. comm., 23 November 2015).[32]

In the Australian Chamber's view, where matters do proceed to litigation, the penalties imposed by the courts reflect the seriousness of the offence. For example, in *Fair Work Ombudsman v Metro Northern Enterprises Pty Ltd*[33] the Federal Circuit Court imposed a penalty of $161,700 (noting the maximum per contravention of 60 or 300 penalty units previously referred to). This level of fine, combined with accessorial liability for advisers,[34] is acting as a sufficient deterrent to the deliberate manipulation of the law. The deterrent nature of section 357 was substantially boosted when the High Court handed down a judgment on its terms in December 2015.[35] In that case the High Court unanimously allowed an appeal from a Full Federal Court, holding that s 357(1) prohibited the misrepresentation of an employment contract as a contract for services with a third party. The judgment has meant that sham contracting poses even greater risks for employers, a matter that commentators have emphasised.[36]

Where a business has entered into a sham arrangement, there is already a substantial penalty. The existing provisions governing sham contracting are also sufficiently strong. Fair Work Inspectors can seek the imposition of penalties for contraventions of sham contracting arrangements and the courts may impose a maximum penalty of $54,000 per contravention. The Courts have shown a willingness to impose tough penalties. For example, in relation to a Federal Circuit Court finding of sham contracting in one matter, the Court decided to impose a total of $57,024 in penalties ($47,520 ordered against the company, and $9,504 ordered against the director) despite the underpaid wages and entitlements owed to the worker amounting to no more than $1,858.53.[37]

The existing provisions governing sham contracting are sufficiently strong. However item 10 of the Bill seeks to repeal current subsection 357(2) of the FW Act and to replace it with a new provision. The EM at paragraph 24 says that the "replacement 357(2) introduces an objective test such that an employer is not involved in sham contracting if they believed the contract was a contract for services and a reasonable person would have believed the contract was a contract for services." Whilst the EM sets out the matter simply, the Australian Chamber does not believe the wording of the proposed provision itself reflects that simplicity, a matter taken up below.

The new provision is opposed. The first basis for this position is that it confuses misclassification with sham contracting. Unfortunately, this inappropriate conflation also appears to be a central consideration in the Productivity Commission's recommendation 25.1[38] which calls for a change to

[32] Productivity Commission 2015, op. cit. p. 808.
[33] [2013] FCCA 1323.
[34] Exemplified in Centennial, op. cit.
[35] Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd [2015] HCA 45 (2 December 2015)/
[36] See for example Prowse et al *Sham Contracting Poses Great Risks for Employers* ACLN 166 January/February 2016, p. 36.
[37] *Fair Work Ombudsman v Jooine (Investment) Pty Ltd & Anor* [2013] FCCA 2144.
[38] Productivity Commission 2015, op. cit.

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subsection 357(2). This is illustrated by the following extract from its final report on the workplace relations framework as part of the argument leading up to the relevant recommendation:

> *The practice of misclassifying employees as independent contractors appears to be common in some industries. For example, up to 13 per cent of self-defined contractors in the building and construction industries may be misclassified (FWBC 2012).*[39]

The law is not directed towards punishing misclassification. That often inadvertent process has a number of adverse consequences: potential prosecution for breach of a modern award or other industrial instrument, together with back pay, often with interest, together with other legal claims e.g. for superannuation contributions and leave entitlements. Misclassification does not represent the deliberate manipulation of the law that characterises sham arrangements. It should not be caught up with remedies to discourage the much more egregious practice of sham contracting.

At the heart of sham contracting is the idea that it involves the deliberate attempt to conceal the true nature of the relationship. As was said by the Australian Building and Construction Commission (ABCC) in its 2011 report on sham contracting[40]:

> *At common law, a 'sham arrangement' occurs where the parties to an employment relationship intentionally misrepresent or disguise that relationship as being a contracting relationship. There are elements of premeditation and subterfuge; such arrangements are intended to hide the actual relationship between the parties and make it appear as though there is a totally different kind of relationship. Parties know and intend to create an employment relationship (contract of service), but try to masquerade it as a contracting arrangement (contract for services) for the benefit of one or both parties. In this sense, a 'sham arrangement' involves intended deception.*[41]

After extensive investigation the ABCC found that sham contracting was not widespread in the building and construction industry as had been claimed by the CFMEU in its discredited report on the subject.[42] The ABCC also rejected proposals for changes to legislation. Instead the recommendations appropriately focused on measures to improve education and administrative arrangements. In this context, the Australian Chamber does not therefore understand the statement in the EM at paragraph 25 that the provision would give effect to the "Sham Contracting Inquiry Report by the ABCC in 2011." That statement appears to be made in error.

The second major issue is that the proposed test would require a great deal more administration and costs for employers. The offence would clearly cover misclassification: under subsection 357(1) the employer would clearly be representing the relevant contract as other than a contract of service where the employee was misclassified as de jure working under a contract for services.

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[39] Productivity Commission 2015, op. cit., p. 807.

[40] https://www.fwbc.gov.au/industry-issues/sham-contracting-inquiry/outcomes-sham-contracting-inquiry

[41] Ibid, para 1.4.

[42] ibid, para 71 - the report *Race to the Bottom: Sham contracting in Australia's construction industry* CFMEU, March 2011 is said to have conclusions which are not reliable.

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The new test would require an employer to take positive steps to prove first that the belief was held that the relevant contract was a contract for services. Secondly, it would be difficult, without external advice, to be sure how to satisfy the test of "not reasonably being expected to know" that the contract was a contract of employment. An objective test is not normally related to a state of knowledge. The conduct of a person accused of an offence is normally measured against that of a hypothetical person, such as a "reasonable" or "ordinary" person in a similar situation. But here uncertainty would be created by bringing into the second limb of the proposed test a matter that is normally part of a subjective test: the state of knowledge of the person accused which would be compared against some amorphous notion of an expectation of knowledge.

That proposition then leads to the third basis of opposition: the proposed test would create uncertainty in the application of the law and would confound the common law test that currently distinguishes a contractor from an employee and which is embedded as the appropriate test in the *Independent Contractors Act 2006* (Cth). That statute recognises the legitimacy of independent contracting as a primarily commercial form of work arrangement and provides for the regulation of those relationships by commercial law. That is the better approach to reform than seeking to regulate independent contractors through the FW Act. In this context, the Australian Chamber commends the Productivity Commission Recommendation 25.2 which is as follows:

> *The Australian Government should amend the Fair Work Act 2009 (Cth) so that enterprise agreement terms that restrict the:*
>
> *(a) engagement of independent contractors and labour hire workers, or regulate the terms of their engagement, should constitute unlawful terms under s. 194 of the Act*
> *(b) engagement of casual workers should constitute unlawful terms under s. 194 of the Act.*
>
> *The Australian Government should also specify in the Act that enterprise agreement terms could not restrict an employer's prerogative to choose an employment mix suited to their business — for example by deterring or discouraging the use of casual workers by restricting their hours of work.*[43]

The tests proposed in the Bill are broader and more onerous than proposed by the Productivity Commission which also recommended a test of "reasonableness." It did not, however, articulate how the test would operate in practice merely stating:

> *There do not appear to be any obvious disadvantages from switching to a 'reasonableness' test given that such tests are frequently applied in many other civil contexts without much concern. Such a shift would address the weaker incentives under the current regime.*[44]

Taking into consideration the disadvantages set out above, the Australian Chamber cannot support the changes proposed to section 357(2) of the FW Act. The Productivity Commission's suggestion

[43] Productivity Commission 2015, op. cit., p. 820.
[44] ibid, p. 815.

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that there would be no obvious disadvantages associated with a change to the test is challenged once the detail of the proposed provision is considered. A better separation of the commercial law from workplace relations law and the immediate introduction of the changes proposed by the Productivity Commission in Recommendation 25.2 would deliver better reform. To undermine the current common law test for distinguishing employees from independent contractors would be a retrograde step.

The principles which guide this recommendation are longstanding Australian Chamber policy. The Australian Chamber has long advocated the following principles in support of independent contracting:

- Recognition that the underlying principle of freedom of contract is the basic pillar on which the system of commerce and industry operates;
- That persons genuinely and freely entering into contracts for the provision of their personal services as contractors should, provided those contracts are lawful, not have them varied, redefined, reshaped, annulled, downgraded or otherwise interfered with by persons or bodies (including governments, regulators, tribunals or courts) who are not parties to those contracts;
- That the common law generally provides a proper and sufficient basis on which the law should give legal recognition to a contract for services and a proper basis for setting out the necessary elements of a contract for services, although additional certainty can be provided by statute so long as common law rights are not prejudiced;
- That contracts of employment where employees are labelled as contractors, but where in fact and law they are really employees, are sham contractor arrangements and do not have legal recognition as contracts for services at common law;
- That arrangements which are non-consensual or which are tainted by coercion or undue influence are not enforceable and do not have legal recognition as contracts for services at common law;
- That genuine and consensual contracts for services under which work is performed as principal and contractor are in and of themselves a legitimate, welcome and beneficial form of commercial arrangement that adds value to the Australian economy, and in particular is no less welcome than contracts of employment;
- That genuine and consensual contacts for services are not inherently exploitative, unfair or otherwise requiring the attention of consideration of governments, parliaments or regulators;
- That contracts for services provide a flexibility, efficiency and productivity that is of real value to the parties and the economy and society as a whole;
- That the values of entrepreneurship, risk taking, investment and choice which underpin contracts for services are values that should be welcomed, encouraged and highly regarded by policy makers; and
- Governments should not be in the business of deciding what working arrangements suit a business or individuals. Regulating true independent contractors as employees is a

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regulation of entrepreneurship, and not something that even the International Labour Organisation has recommended.

6 Officer liability for amounts owed by failed companies

Item 14 of the Bill would insert proposed section 545A in the FW Act. The provision is described at paragraph 30 of the EM as giving effect to "Labor's commitment to hold executive officers responsible for non-payment of wages, when a company with which they are associated is phoenixed." The provision, if it were to proceed, would sit better in the corporations law. The specific objects of the FW Act in section 3 are based on providing "a balanced framework for cooperative and productive workplace relations." Specific anti-phoenixing measures should take into account the interests of subcontractors and small businesses. In addition, phoenixing involves the use of multiple corporate structures, as explained below, and hence measures which affect only incorporated entities in that sense should be located within the corporations law.

Further, presaging a change on there first being a contravention of the FW Act involving an underpayment of wages, as is the case with proposed section 545A, disenfranchises those who are not classified as employees, such as independent contractors. Legislative solutions to phoenix activities are necessarily complex so to narrow the class of those who might be entitled to a remedy by reason of the provisions of the FW Act is not supported. That is particularly the case when there is in existence a scheme which provides for the payment of wages and other entitlements on liquidation or insolvency of an employer. The Fair Entitlements Guarantee (FEG) came into effect on 5 December 2012 and applies to employer insolvency events that occurred on or after that date.[45]

Phoenix activity has no widely accepted definition either at law or generally but the definition used in the comprehensive report authored by PWC[46] seems, from the terms of that report, to be useful:

> *Phoenix activity is 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.*

The Australian Chamber views phoenix activity as a blight on the corporate landscape. The Australian Chamber supports measures to combat it. In general, and as reflected in the definition set out above, phoenix company arrangements have two elements. Firstly, an incorporated business entity fails, and acts with the intention of denying payment to its creditors. Secondly, within a nominal period, sometimes as little as three months, another business is formed, which may use some or all of the assets and even a name quite similar to that of the old ('failed')

[45] http://www.employment.gov.au/general-employee-entitlements-and-redundancy-scheme-geers .
[46] PWC *Phoenix Activity: Sizing the Problem and Matching Solutions* June 2012.

business, and the new business is controlled by the same directors (or their associates) as the previous business.

Genuine business failure must be clearly distinguished from phoenix company behaviour – the former of which is likely to be the result of legitimate business reasons; the latter, however, is driven by a conscious desire to defeat the proper interests of creditors. Businesses can, and do, fail for a range of proper reasons: bad economic policy settings (in particular, high interest rates or lack of availability of credit); poor commercial decision-making; failure of debtors; inadequate record keeping; family pressures; amongst a myriad of other factors.

Genuine entrepreneurial endeavour should not be punished; legitimate business failure should not be an offence, either in the public perception or in the corporate law. As a market economy whose economic and social foundations are based on private sector dynamism, it is inappropriate to penalise bona fide entrepreneurship and risk taking. However, equally, regulators should not ignore the misconduct of those who abuse the privileges afforded by the corporations law, in particular that of limited liability. The challenge is how to punish the malevolent, intent on abusing the corporate processes by engaging in fraudulent phoenix company activities, without completely dampening the entrepreneurial spirit of those legitimately engaged in commerce and industry.

Relatedly, it is important that reforms to assist the efficiency of the system relating to liquidations do not facilitate the problem of phoenix activity. This was recognised by the Productivity Commission in its reference on business closures:[47]

> *While the purpose of this inquiry is not directed at illegal phoenix activity — that is, the shifting of a business's assets but not liabilities away from a distressed business to a newly created company that continues to trade free of tax and other debts from the distressed business — it is important that reforms intended to expedite the liquidation process do not inadvertently facilitate phoenix activity. It has been estimated that around 2000 businesses per year are involved in phoenix activity, at a total cost to employees, business and governments of $1.8 to $3.2 billion per year.*[48]

In the current context, the sentiment underpinning Productivity Commission's findings are useful: a small regulatory measure was proposed together with reliance on the existing law. Rather than the creation of new offences or agencies, the Productivity Commission focused on improving the capacity to enforce existing laws. The regulatory change proposed was small but incisive: support for the introduction of simple safeguards around identification of company directors. The Productivity Commission recommended the introduction of a director identification number, underpinned by an identification process along the lines required to establish a bank account, to enable the monitoring of director registration (including the detection of disqualified or fraudulent directors), the collection of data regarding director appointments over time (to establish patterns of director involvement in repeat business failures) and detection of possible fraudulent and phoenix

[47] Productivity Commission 2015 Final Report *Business Transfer, Set Up and Closure* http://www.pc.gov.au/inquiries/completed/business/report/business.pdf

[48] ibid, p. 28.

activity by the Inter-agency Phoenix Forum and investors. This would be an addition to existing requirements for director information.

These measures contrast with the radical scheme encapsulated in proposed section 545A which does not properly distinguish phoenix activity from genuine entrepreneurial activity. The structure of the section has the ability to capture legitimate businesses who have merely failed for the reasons outlined earlier.

The test for capture is broad. The steps are first that there has been a contravention of the FW Act involving an underpayment of wages. This could occur in any normal business failure. The second step that the company is wound up and the underpayment has not been redressed, is also commonplace. The third step is where the relevant executive officer becomes executive officer of a new company within 12 months, labelled by the provision at section 545A(1)(g) as the "phoenix company". Many entrepreneurs could be expected to, and should be encouraged to, start a new business after an old business fails. In fact many successful businesses are built on experiences learned from the failure of earlier businesses.[49] Merely establishing a new corporate entity within 12 months does not constitute phoenix activity. The final step is that the second company uses assets of the so-called failed company. That asset use could be quite minor and yet trigger the provision.

Whilst clause 32 of the EM expresses that these steps reflect the ASIC definition of phoenixing, the Australian Chamber disagrees. The question of intent, the dark fraudulent heart of phoenixing, is not considered. Hence, the provision fails as it does not address the problem which it purports to address. Instead, it brands those who establish a new corporate entity within the 12 month period after the first failure as "phoenixers." The net is cast too wide.

The definition of executive officer is so broad that the term loses meaning. It is defined to include persons who are concerned in or take part in the management of the company whether or not they are a director. Whilst this might, as is stated at paragraph 34 of the EM, "allow compensation orders to be sought from persons who use a dummy director or figurehead" the ambit of who would be able to be caught as liable under these provisions is extraordinarily wide. Being "concerned in" the management of the company equates to being "interested and involved" per its everyday meaning, far too broad a consideration on which to found a deemed liability as created in the proposed scheme. It would be unworkable in practice.

Proposed paragraph 545A(1)(j) brings in a basis for avoiding the wide net cast by the other provisions of the section. It says that the court must make an order for payment of the unpaid wages etc where it is satisfied "the liable person should not be exempt from this section in relation to the contravention." This double negative represents difficult drafting. But it leads the reader to subsections 545A(5) and 545A(6). Subsection 545A(5) provides the court with power to exempt

[49] See for example *Jane Lu credits her business start-up's 'utter failure' for success of second fashion venture ShowpO* http://www.news.com.au/finance/business/jane-lu-credits-her-business-startups-utter-failure-for-success-of-second-fashion-venture-showpo/news-story/c07bda49e257f7e7f316e545dfd71372

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the liable person only if the court is first satisfied that the liable person has acted honestly. There is then a further very broad consideration introduced: that having regard to all of the circumstances of the case the liable person should be exempt. Subsection 545A(6) then directs the court to matters which it must have regard to in reaching that latter conclusion; these proposed statutory criteria are in fact the broad indicia of what a phoenix company might look like. However, again the criteria are very broad: for example paragraph 545A(6)(g) requires the court to consider "whether anything done, or omitted to be done, by the liable person or the phoenix company is likely to create the misleading impression that the failed company and the phoenix company are the same entity."

Asking a court to rule in relation to the notion of whether something creates an "impression" is poor policy. The plain meaning of that term includes the amorphous: a notion, remembrance, belief, etc., often of a vague or indistinct nature.[50] The difficulty in pinning down a definition of phoenixing at law is brought home with this requirement. The proposed section is impractical, too widely drawn and would be highly problematic if enacted.

The Australian Chamber supports the recent findings of the Productivity Commission as a means to tackle the problem of fraudulent phoenix activity. However, the provisions of the Bill are poorly designed and inappropriate and are strongly opposed by the Australian Chamber.

7 Disqualifying people from managing corporations

Proposed s 546A at item 18 of the Bill would introduce provisions empowering relevant courts to disqualify persons from managing corporations. That disqualification would occur on satisfaction of a three part test. First there must be a contravention of one or more of eight provisions of the FW Act.[51] Secondly, the conduct was intentionally engaged in by a body corporate that was not a small business employer[52] and, thirdly, the court was satisfied that the disqualification was justified. This remedy appears to better sit within the corporations law than under the FW Act. This proposition is underlined when proposed paragraph 546A(2)(a) is considered. That provision indicates that in considering whether the disqualification is justified the court must have regard to "the person's conduct in relation to the management, business or property of any corporation (within the meaning of the *Corporations Act 2001*)." Proposed subsection 546A(4) ensures that any disqualification order is part of a number of orders that a court may make. Accordingly an existing remedy identified in the corporations law is, in effect, triggered by the deliberate breach of certain civil penalty provisions of the FW Act.

The Corporations Act provision that is most relevant to the matters set out in proposed paragraph 546A(2)(a) is section 206B. It defines the notion of 'managing a corporation' widely. This has been noted by Bagaric and Alexander[53] thus:

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[50] http://dictionary.reference.com/browse/impression

[51] Sections 44,45,50,280,293,305,323,357

[52] Section 23 FW Act defines this term; the nub of the criterion is that the employer employs fewer than 15 employees

[53] M Bagaric and T Alexander *A rational Approach to Sentencing White Collar Offenders in Australia* (2014) 34 Adelaide Law Review, p. 317.

> *'Managing corporations' is defined expansively, not only prohibiting offenders from acting as company directors, but also from participating in corporate decision making or significantly affecting a company's financial standing, or from communicating instructions or wishes to directors who might customarily act in accordance with those instructions. It, thus, operates as an effective total ban on any managerial involvement with a company.*[54]

Following on from the definition are the provisions of section 206C. It operates where a declaration has been made under the civil penalty provisions of the Corporations Act. The court must be satisfied that the disqualification is justified taking into account the matters in subsection 206C(2) as follows:

(a) the person's conduct in relation to the management, business or property of any corporation; and
(b) any other matters that the Court considers appropriate.

Alternatively, a disqualification order can be made using the provisions of section 206E. This provision may be used where a person has at least twice been an officer of a body corporate that has contravened the Act or that person has at least twice contravened the Act whilst an officer. These criteria operate provided in either case that the court is satisfied the disqualification is justified, having regard to the same matters as apply in section 206C.

This total ban is obviously imposed and sought by ASIC where the most egregious breaches of the law are at issue. This is because the courts have made it clear that the banning order is designed to protect the public by seeking to safeguard the public interest in the transparency and accountability of companies and in the suitability of directors to hold office.[55] Whilst deterrence is relevant, the remedy is principally designed to stop the misuse of the corporate structure and hence best sits within the context of the corporations law.

As stated, where there is a breach of a civil penalty provision the ability to currently apply for disqualification exists. Again as noted by Bagaric and Alexander:

> *It should be noted that white-collar offenders can also be subject to disqualification orders consequent upon civil penalty proceedings, even where there are no criminal proceedings afoot. The discretion resides with the prosecuting authority, and there is no bar to pursuing a white-collar offender criminally after the conclusion of a civil penalty proceeding.*[56]

It is noted that disqualification in essence takes away the right of the person affected to earn a living. It is accordingly only generally ordered in the most blatant and wrongful cases of corporate law breaches.[57] In that context the following has been noted as governing the court's consideration:

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[54] M Bagaric and T Alexander , op. cit., p. 329.
[55] See for example *Re Gold Coast Holdings Pty Ltd ASIC v Papatto [2000] WASC 201; (2000) 35 ACSR 107 at 112*
[56] M Bagaric and T Alexander , loc. cit., p. 330 (footnotes in the original omitted).
[57] For example *Asic v Adler and 4 Ors* [2002] NSWSC 483

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> *The eight criteria to govern the exercise of the court's powers of disqualification set out in Commissioner for Corporate Affairs v Ekamper (1987) 12 ACLR 519 have been influential. It was held that in making such an order it is necessary to assess:*

- *Character of the offender*
- *Nature of the breaches*
- *Structure of the companies and the nature of their business*
- *Interests of shareholders, creditors and employees*
- *Risks to others from the continuation of offenders as company directors*
- *Honesty and competence of offenders*
- *Hardship to offenders and their personal and commercial interests; and*
- *Offenders' appreciation that future breaches could result in future proceedings.*[58]

The utility of the proposed remedy in the context of the FW Act is questioned. This is especially the case given that, in the Corporations Act context, having regard to the fact that the disqualification may deprive a person from earning a livelihood, section 206G gives a disqualified person the right to apply to a court to manage a corporation or a class of corporation on grounds established by the court.

Having regard to these considerations, it appears that the remedy provided in the Bill is not necessary for the protection of the public. If the conduct complained of comprises a pattern of abuse of the corporate structure then the current corporations law provisions are adequate. If the remedy is proposed merely to expand the deterrent effect of the FW Act, there is no demonstrable evidence that the successful enforcement work currently undertaken by the FWO requires the addition of the proposed remedy, particularly as there is an absence of the discretionary relief element available under section 206G of the corporations law. The provision would be disproportionate to any problem identified. It is unnecessary.

8 Increased penalties for intentional breaches

Item 16 of the Bill proposes a new subsection 546(2A) which states:

> *For a contravention of subsection 44(1), section 45, 50, 280, 293 or 305, or subsection 323(1) 357(1), involving conduct intentionally engaged in by a body corporate that is not a small business employer, the pecuniary penalty must not be more than 3_times the maximum amount that would otherwise have applied under subsection (2) of this section.*

This proposed provision also includes the following note:

> *This subsection might apply for an individual who is involved in a contravention by a body corporate (see section 550).*

[58] Id at para 56

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In considering the impact of this provision it is necessary to identify the contraventions to which this provision is directed:

- subsection 44(1) provides that an employer must not contravene a provision of the National Employment Standards (NES);
- section 45 provides that a person must not contravene a term of a modern award;
- section 50 provides that a person must not contravene a term of an enterprise agreement;
- section 280 provides that a person must not contravene a term of a workplace determination;
- section 293 provides that an employer must not contravene a term of a national minimum wage order;
- section 305 provides that an employer must not contravene a term of an equal remuneration order;
- subsection 323(1) provides that an employer must pay an employee amounts payable to the employee in relation to the performance of work:
    - in full (except as provided by section 324); and
    - in money by one, or a combination, of the methods referred to in subsection (2); and
    - at least monthly;
- subsection 357(1) provides that a person (the ***employer***) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contract for services under which the individual performs, or would perform, work as an independent contractor.

Section 546 currently provides that a court may order a person to pay a pecuniary penalty that it considers appropriate if it is satisfied that the person has contravened a civil remedy provision. As mentioned earlier, maximum penalties for the above provisions are 60 penalty units (currently $10,800) for an individual and 300 penalty units (currently $54,000) for a body corporate. Labor's "Protecting Rights at Work" policy suggests that these existing penalties "are clearly an inadequate deterrent given the brazen and systematic underpayment of workers we have seen in the last 12 months". As already noted, there is no evidence of a widespread pattern of dishonesty or exploitation and the Australian Chamber cautions against imposing regulation as a result of the actions of a very small minority.

The proposed subsection 546(2A) contemplates that there would be a threefold higher penalty imposed for the contraventions identified above provided the following further criteria are met:

- the contravention involves conduct "intentionally engaged in" by a body corporate; and
- the body corporate is not a "small business employer". (Section 23 of the FW Act provides that a national system employer is a "small business employer" at a particular time if they

employ fewer than 15 employees at that time, determined in accordance with subsections 23(2)-(4)).

From a technical perspective, if the proposed provision is targeted at intentional contraventions, its drafting may give rise to unintended consequences. In particular the proposed subsection 546(2A) is directed at "conduct intentionally engaged in", as opposed to *contraventions* intentionally engaged in. "Conduct" may give rise to a contravention without it being intentional.

If proposed subsection 546(2A) is directed at the 'intent' of the body corporate, it is also unclear how that body corporate's intent might be established.

The Australian Chamber opposes these changes, particularly in the absence of evidence that such an increase will enhance compliance outcomes. In the Australian Chamber's view increased penalties are more likely to have the opposite effect by pushing those who operate outside the system even further underground. Furthermore, businesses faced with significant penalties may not be able to meet the cost of high penalties and may be forced into insolvency with broader effects upon the workplace, including unemployment. The best outcome from actions for breach taken under the identified provisions should be remediation of the breach and prevention of future breaches.

The note at the end of the proposed subsection also suggests that individuals could face the same penalties for the conduct by a body corporate captured by the new provision. In the Australian Chamber's view individual liability for contraventions by a body corporate should be restricted to conduct of an 'extreme' nature and should remain the exception rather than the rule. Notwithstanding this consideration, the FW Act provides a mechanism where persons other than the employer can be considered an accessory to contraventions of the FW Act and be held liable pursuant to section 550 of the FW Act which provides that:

> *(1) A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.*
> *(2) A person is **involved in** a contravention of a civil remedy provision if, and only if, the person:*
> *(a) has aided, abetted, counselled or procured the contravention; or*
> *(b) has induced the contravention, whether by threats of promises or otherwise; or*
> *(c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or*
> *(d) has conspired with others to effect the contravention*.

The FWO's focus on contraventions pursuant to section 550 has been heightened in recent times and the consequences of a contravention can be significant. For example, in its 2014-2015 Annual Report, the FWO reported that in that year 26 matters involved an accessory with $571,889 in penalties ordered against the individuals.[59] Noting that the proposal to increase penalties is also

[59] Fair Work Ombudsman, Annual Report 2014-15, p. 41.

directed at sham contracting is also worth noting (as an adjunct to the earlier discussion on this topic) that the FWO initiated six cases involving sham contracting allegations in 2014-15 and stated in its Annual Report:

> *We take action against employers who engage employees as contractors to avoid paying minimum entitlements. In one case decided, a Melbourne travel services company was penalised $228 000 for paying flat hourly rates of $9-$11 to a migrant worker who should have been paid as a casual employee. The underpayments totalled $19 567 over eight months. In another case, the court found two travel businesses deliberately misclassified workers as independent misclassified workers as independent contractors to unlawfully cut costs. Six workers, who should have been classified as employees, were underpaid more than $25 000. As our attempts to rectify the situation were ignored, and with consideration to the seriousness of the matter, we initiated legal action. The businesses were penalised a total of almost $138 000.*[60]

There is no evidence of either regulatory or enforcement inadequacy in relation to employers who are in deliberate breach of their obligations or in relation to third parties involved in contraventions. Given the complexity and detail of existing legislation regulating the workplace and the serious consequences of non-compliance, further regulation is not required.

It is also important to distinguish deliberate non-compliance from unintended non-compliance. The FWO itself has acknowledged:

> *In our experience, most employers want to do the right thing. There are a range of reasons why an employer may not be compliant with workplace laws, including the complexity of the system, or an oversight or misunderstanding of the legislation.*[61]

Accordingly, the Australian Chamber cautions against being drawn into an exaggerated response of increasing the regulatory burden as a result of the actions of a very small minority of employers. Other mechanisms can be utilised to enhance compliance outcomes, such as helping to connect businesses to employer and industry associations. Employer and industry associations play a critical role as trusted advisors in assisting their members to navigate and comply with the complex web of employment regulation. This role can be leveraged in many ways. Members of employer and industry associations are typically demonstrated to have higher levels of compliance.

More broadly, with Australia's systems of workplace regulation being highly complex (including by international standards), it presents challenges for employers and people who are new to Australia and its legal system and who may have limited English literacy skills. As already noted, the Australian Chamber made comprehensive submissions to the Productivity Commission's inquiry into the workplace relations framework which seek to address this issue.

The Australian Chamber maintains the view that a simplified and streamlined system will deliver productivity benefits, better support compliance outcomes and lead to an enhanced understanding

[60] Fair Work Ombudsman, Annual Report 2014-15, pp. 42-43.
[61] Ibid., p. 9.

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of rights and obligations from the perspective of both employers and employees. It would reduce the apprehension businesses have for directly employing workers. That apprehension would only be increased were the proposed provision made law.

9 Imprisonment and penalty for 'serious contraventions'

The Australian Chamber strongly opposes proposed section 559C which may result in a custodial sentence for non-compliance. The proposed section provides:

> ***559C Offences for serious contraventions of this Act***
>
> *(1) A person commits an offence if:*
>
> *(a) the person engages in conduct; and*
> *(b) the conduct contravenes subsection 44(1), section 45, 50, 280, 293 or 305, or subsection 323(1) or 357(1); and*
> *(d) the contravention involves the use of coercion or a threat (both within the meaning of Division 270 (slavery and slavery-like conditions) of the Criminal Code).*
>
> *Penalty: Imprisonment for 2 years of 240 penalty units, or both.*

This provision will have effect when a person engages in conduct which:

- contravenes the NES, a modern award, an enterprise agreement, a workplace determination, a national minimum wage order or an equal remuneration order, the method and frequency of payment provisions or where they knowingly or recklessly misrepresent employment as an independent contracting arrangement; **and**
- the contravention involves the use of coercion (defined to include force, duress, detention, psychological oppression, abuse of power, taking advantage of a person's vulnerability) or a threat (defined to include a threat of coercion, a threat to cause a person's deportation or removal from Australia, or a threat of any other detrimental action, unless there are reasonable grounds for the threat of that action in connection with the provision of labour or services by a person).

Paragraph 56(b)(ii) of the EM provides that "[t]his offence is intended to penalise conduct which is serious, but which falls short of existing offences relating to forced labour, servitude and the like". Offences under criminal law typically refer to the outcome of an offence. The proposed provisions do not take into consideration the consequence of the contravention. They do not focus on the need to prevent future contraventions. Rather, they are simply a vehicle for punishing employers which is likely to result in significant negative impacts on the person committing the offence and others in the workplace which are disproportionate to the offence.

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In 2013 the Council of Australian Governments (COAG) developed guidelines to assist in achieving a nationally-consistent and principles-based approach to the imposition of personal criminal liability for directors and other corporate officers as a consequence of a corporate offence. Whilst these guidelines are not concerned with circumstances where directors and individuals may be held criminally liable directly or where they personally commit an underlying or some other offence, principles referenced within the guidelines are worthy of consideration. They are worthy of consideration in the context of establishing criminal liability for contraventions in relation to a failure to provide employee entitlements strictly in accordance with the complex letter of the law that characterises the workplace relations system. In particular, among the COAG principles referenced in the guidelines is the principle that:

> *The imposition of personal criminal liability on a director for the misconduct of a corporation should be confined to situations where:*
> *(a) there are compelling public policy reasons for doing so (for example, in terms of the potential for significant public harm that might be caused by the particular corporate offending);*
> *(b) liability of the corporation is not likely on its own to sufficiently promote compliance; and*
> *(c) it is reasonable in all the circumstances for the director to be liable having regard to factors including:*
> *i. the obligation on the corporation, and in turn the director, is clear;*
> *ii. the director has the capacity to influence the conduct of the corporation in relation to the offending; and*
> *iii. there are steps that a reasonable director might take to ensure a corporation's compliance with the legislative obligation.*

The guidelines provide the following examples of underlying offences where compelling public policy reasons may exist for imposing liability on directors. Non-compliance will create a real risk of serious public harm, such as:

- death or disabling injury to individual;
- serious damage to the environment and/or serious risk to public health and safety;
- conduct likely to undermine confidence in financial markets; or
- conduct that would otherwise be highly morally reprehensible (e.g. serious offences under child protection or animal welfare legislation).

The Australian Chamber does not condone businesses and individuals intentionally evading their legal obligations. However, the imposition of criminal liability for contraventions is not a step that should be taken lightly. A failure to provide employment entitlements strictly in accordance with industrial relations legislation does not automatically give rise to significant public harm of the nature described above. This has the implication that a person could be sent to gaol for a

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contravention even in circumstances where the impact of the contravention upon the individual is not significant.

The Australian Chamber is concerned that such a provision may also have the effect of removing a range of protections for an accused person. Offences that carry the risk of imprisonment should generally be decided by a jury in a superior court with the criminal standard of proof applied. Where a person is accused of conduct that may result in a custodial sentence, the conduct should be subject of the most robust legal processes including the entire spectrum of investigation, prosecution and legal defence.

A company's status as a separate legal entity and the corporate veil which protects individuals from bearing personal liability is essential to ensuring viable levels of economic investment. However, it is increasingly the case that legislation will permit the corporate veil to be lifted to impose liability on individuals. The provisions within the Bill will further erode the benefits of incorporation by imposing exceedingly harsh penalties on individuals through regulation which is in addition to a range of other corporations and taxation laws targeted toward fraud, directors' duties, insolvent trading and unpaid tax liabilities.

It is likely that the risk of a custodial sentence and higher penalties will discourage people from participating in decision making or taking on responsibility for essential functions within an organisation and will push non-compliance by persons operating 'outside the system' even further underground. Where a significant penalty or imprisonment is imposed, this may also result in the business ceasing to operate (e.g. because the financial penalty impacts the viability of the business or because key personnel are serving custodial sentences) with the effect that people may lose jobs or be less likely to recover unpaid entitlements. The provisions do not provide a balanced approach to personal liability nor are they likely to enhance compliance outcomes.

10 About the Australian Chamber

10.1 Who We are

The Australian Chamber of Commerce and Industry speaks on behalf of Australian business at home and abroad.

We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, making us Australia's most representative business organisation.

We speak on behalf of the business sector to government and the community, fostering a culture of enterprise and supporting policies that keep Australia competitive.

We also represent Australian business in international forums.

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Our membership comprises all state and territory chambers of commerce and dozens of national industry associations. Individual businesses also get involved through our Business Leaders Council

10.2 What We Do

The Australian Chamber strives to make Australia a great place to do business in order to improve everyone's standard of living. We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety and employment, education and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

Australian Chamber of Commerce and Industry

Australian Chamber Members

AUSTRALIAN CHAMBER MEMBERS: **BUSINESS SA** CANBERRA BUSINESS CHAMBER CHAMBER OF COMMERCE NORTHERN TERRITORY CHAMBER OF COMMERCE & INDUSTRY QUEENSLAND CHAMBER OF COMMERCE & INDUSTRY WESTERN AUSTRALIA NEW SOUTH WALES BUSINESS CHAMBER TASMANIAN CHAMBER OF COMMERCE & INDUSTRY VICTORIAN' CHAMBER OF COMMERCE & INDUSTRY MEMBER NATIONAL INDUSTRY ASSOCIATIONS: ACCORD – HYGIENE, COSMETIC & SPECIALTY PRODUCTS INDUSTRY **AGED AND COMMUNITY SERVICES AUSTRALIA** AIR CONDITIONING & MECHANICAL CONTRACTORS' ASSOCIATION **ASSOCIATION OF FINANCIAL ADVISERS** ASSOCIATION OF INDEPENDENT SCHOOLS OF NSW **AUSTRALIAN SUBSCRIPTION TELEVISION AND RADIO ASSOCIATION** AUSTRALIAN BEVERAGES COUNCIL LIMITED AUSTRALIAN DENTAL ASSOCIATION AUSTRALIAN DENTAL INDUSTRY ASSOCIATION AUSTRALIAN FEDERATION OF EMPLOYERS & INDUSTRIES AUSTRALIAN FEDERATION OF TRAVEL AGENTS **AUSTRALIAN FOOD & GROCERY COUNCIL** AUSTRALIAN HOTELS ASSOCIATION **AUSTRALIAN INTERNATIONAL AIRLINES OPERATIONS GROUP** AUSTRALIAN MADE CAMPAIGN LIMITED **AUSTRALIAN MINES & METALS ASSOCIATION** AUSTRALIAN PAINT MANUFACTURERS' FEDERATION **AUSTRALIAN RECORDING INDUSTRY ASSOCIATION** AUSTRALIAN RETAILERS' ASSOCIATION AUSTRALIAN SELF MEDICATION INDUSTRY AUSTRALIAN STEEL INSTITUTE **AUSTRALIAN TOURISM AWARDS INC** AUSTRALIAN TOURISM EXPORT COUNCIL **AUSTRALIAN VETERINARY ASSOCIATION** BUS INDUSTRY CONFEDERATION **BUSINESS COUNCIL OF CO-OPERATIVES AND MUTUALS** CARAVAN INDUSTRY ASSOCIATION OF AUSTRALIA **CEMENT CONCRETE AND AGGREGATES AUSTRALIA** COMMERCIAL RADIO AUSTRALIA **CONSULT AUSTRALIA** CUSTOMER OWNED BANKING ASSOCIATION **CRUISE LINES INTERNATIONAL ASSOCIATION** DIRECT SELLING ASSOCIATION OF AUSTRALIA **ECOTOURSIM AUSTRALIA** EXHIBITION AND EVENT ASSOCIATION OF AUSTRALASIA **FITNESS AUSTRALIA** HOUSING INDUSTRY ASSOCIATION **HIRE AND RENTAL INDUSTRY ASSOCIATION LTD** LARGE FORMAT RETAIL ASSOCIATION **LIVE PERFORMANCE AUSTRALIA** MASTER BUILDERS AUSTRALIA **MASTER PLUMBERS' & MECHANICAL SERVICES ASSOCIATION OF AUSTRALIA** MEDICAL TECHNOLOGY ASSOCIATION OF AUSTRALIA **NATIONAL DISABILITY SERVICES NATIONAL ELECTRICAL & COMMUNICATIONS ASSOCIATION** NATIONAL FIRE INDUSTRY ASSOCIATION **NATIONAL RETAIL ASSOCIATION** NATIONAL ROAD AND MOTORISTS' ASSOCIATION **NSW TAXI COUNCIL** NATIONAL ONLINE RETAIL ASSOCIATION **OIL INDUSTRY INDUSTRIAL ASSOCIATION** PHARMACY GUILD OF AUSTRALIA **PHONOGRAPHIC PERFORMANCE COMPANY OF AUSTRALIA** PLASTICS & CHEMICALS INDUSTRIES ASSOCIATION **RESTAURANT & CATERING AUSTRALIA** SCREEN PRODUCERS AUSTRALIA **VICTORIAN AUTOMOBILE CHAMBER OF COMMERCE**