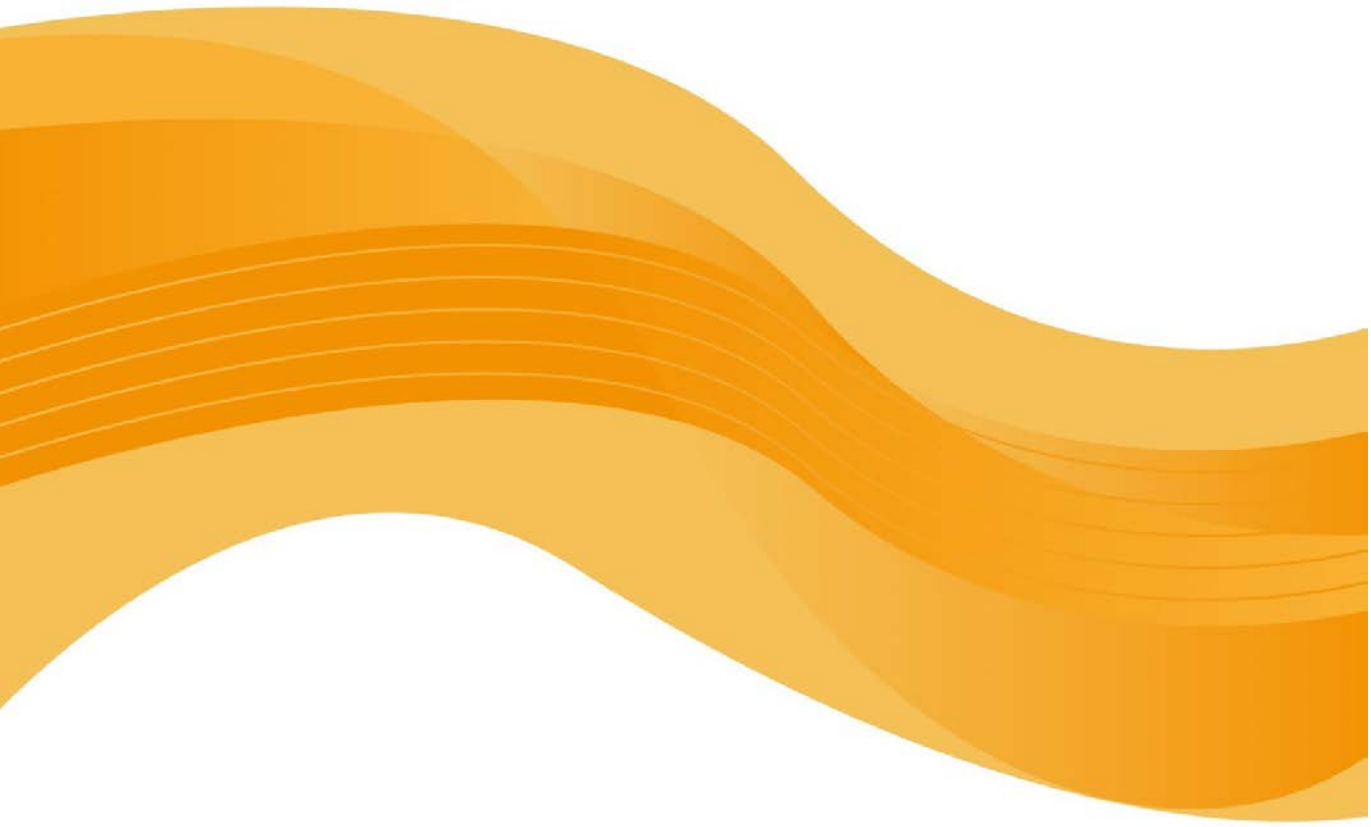
Fair Work (Protecting Australian Workers) Bill 2016

Submission to the Senate Education and Employment Legislation Committee

4 April 2016



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Introduction

Since our formation in 1927, the ACTU has been the peak trade union body in Australia. There is no other national confederation representing unions. For over 86 years the ACTU has played the leading role in advocating in the Fair Work Commission, and its statutory predecessors, for the improvement of employment conditions of employees. We have consulted with governments in the development of almost every legislative measure concerning employment conditions over that period.

The ACTU consists of affiliated unions and State and regional trades and labour councils. There are currently 43 ACTU affiliates with members who are engaged across a broad spectrum of industries and occupations in the public and private sector.

This Bill deals with issues that are critically important to working people. It speaks to issues that our affiliates have been pursuing throughout Australia for decades in support of their members. We welcome the fact that the issue of worker exploitation in Australia has become something that is publicly acknowledged as a problem that needs addressing. We commend the policy decisions that have driven this Bill and welcome this inquiry. We also welcome the recognition that worker exploitation, beyond its immediate and disastrous consequences on the persons we represent, breeds unfair competition in markets which can have compounding effects.

Regrettably, it seems that some of the beneficial policy intent that has driven this Bill has not fully translated into its text. This is generally to be expected of non-government Bills given the resource constraints associated with their development. Our comments in this submission are largely technical and are directed toward achieving some improvements to the Bill in line with the policy intent.

Interaction between the Migration Act and the Fair Work Act

We understand that the intended purpose of proposed section 15A is to permit recovery of underpayments (and the enforcement of other rights) by workers who have come from outside Australia and who have been working outside the work restrictions imposed either by their visa or by the *Migration Act.* We support this intent. Without going so far as to express a concluded a view as to whether the proposed amendment is effective to achieve the intent, we do raise one concern in this regard.

The expressions "employed, or usually employed", "employs, or usually employs" and the "ordinary meaning" of the words "employee" and "employer" as used in the *Fair Work Act* presumably invite consideration as to whether a contract of employment exists. At least some of the circumstances that would be captured by proposed section 15A are considered likely to circumstances where the legal position would be that any purported contract of employment was void *ab initio* on the grounds of illegality[1]. Where this occurs, there exists no contract upon which the expressions "employed, or usually employed" etc. may attach. We are concerned that proposed section 15A might be insufficient to remedy this. In light of that, it might be considered desirable for complementary amendments to be made to the *Migration Act* so as to give a clear indication as to the extent to which contracts of employment in breach of the offence or other relevant provisions remain valid and enforceable notwithstanding those contraventions.

A related approach may be warranted in relation to work performed by persons who have come from overseas under contracts that genuinely are contracts *for services*, in order that they may be able to take advantage of the provisions of the *Independent Contractors Act*.

[1] See *Australian Meat Holdings v Kazi* [2004] QCA 147.

Fair Work Information Statement

We support the provisions at Items 4-6 of the Bill, which would give effect to this requirement. Outside of the legislative process, is recommended that the relevant translations be made available on the Fair Work Ombudsman's website. More generally it would also be desirable if the Fair Information Statement and translations of it were also available from the "Your Workers" section of the Australian Tax Office website.

Education in relation to these provisions is particularly important and we would recommend that this be taken into account in either or both of the timing of the regulations or the commencement dates of the relevant provisions.

Adverse Action

We support Item 9. It will provide more comprehensive protection in particular to workers who query the status of their working arrangement. The law as it stands provides little protection to workers who are in law independent contractors who make inquiries about their status, mainly because the workplace right to make inquires and complaints without victimization is limited in terms to *employees*[2]. The right to protection from victimization in response to queries about one's workplace rights and entitlements ought to be universal rather be contingent on some threshold issue as to the true status of engagement. Such a reform is certainly consistent with the policy intent in section 342 that independent contractors receive protection against adverse action.

Further to our earlier comments, the position *vis a vis* workers from overseas might require consideration of complementary amendments to the *Migration Act* so as to avoid the circumstance that the illegality of any contracts that might be necessary for the worker to be classified under column 1 of the table at section 342(1) of the *Fair Work Act* deprive those workers of the protection those provisions are intended to afford.

[2] See section 341(1)(c)(ii) of the *Fair Work Act.*

Sham Contracting

The reforms proposed by Item 10 are not novel and we support them as they are a significant improvement on the current defence to the sham contracting provisions.

We recognise that the proposed amendment is intended to fit into a legislative platform that, as it stands, provides incentives to users of labour to classify that labour in ways that fall outside of the regulatory envelope. It is an appropriate amendment in such context. However, we would not wish for our support of such reform within that context to be taken as an endorsement of those underlying incentives, loopholes and regulatory choices that we regard as inappropriate limitations on labour regulation in this country. The fact that both the existing sham contracting provisions and the proposed amendments operate on the premise that ignorance of the law *is* an excuse is but one dimension of the problem, and to go on treating the symptom rather than the disease is not viable in the medium-long term.

Our preference for the medium-long term is rather to work toward a greater universality of rights and protections for workers, irrespective of the legal form their engagement takes. A Private Member's Bill is not the vehicle to progress such fundamental reform to conclusion as such reform would require considerable resources from the highly experienced and skilled policy experts in the Australian public service.

We note that the sham contracting prohibition itself, in section 357(1), also relies on the existence of a contract of employment. For reasons earlier expressed this also points to the need to consider whether there is a need to make complementary amendments to the *Migration Act*.

Phoenixing Compensation Orders

We support the amendments at Item 14 and elsewhere to introduce these proposed orders. There are three minor matters where additional consideration may be desirable:

- It is presently unclear to us whether these provisions would also operate in circumstances where the winding up and phoenixing occurred only *after* a contravention was proved and judgment for compensation issued (i.e. after proceedings for the contravention had concluded). It would be preferable if it could be clarified that such orders could also be pursued in these circumstances. We suspect that this is the intention of proposed subsection (4) of section 545A although it would be desirable to put the matter beyond any doubt.

- We are unsure whether the absence of any nexus between an underpayment and the proof of debt referred to in proposed section 545A(1)(e) is intentional.

- We would also recommend that section 545A(1)(i) be reviewed to ensure that neither an employee in receipt of an advance under the *Fair Entitlements Guarantee*, nor the Commonwealth's recovery rights in relation to the scheme, are prejudiced in any way. The two mechanisms should be designed to work in a complementary way to ensure whoever it is that has borne losses compensable by the proposed provisions is able to access those provisions to meet that loss.

Higher penalties

We consider that there is a good case for an elevation in penalties associated with the underpayment of wages of and entitlements.

We are less convinced of other features of the proposed provisions. The "small business exemption" in particular seems at odds with the public outrage expressed in relation to some recent examples of underpayment. It would be most surprising if none of the 7 eleven franchisees who have underpaid their workers, none of the Pizza Hut franchisees that had misclassified and underpaid their delivery drivers or none of the entities in the Myer cleaning contracting chain are (or were) small business employers[3]. Moreover, both the small business employer exemption and the relatively unusual imposition of a fault requirement in this proposed civil penalty provision also give further expression to the notion that ignorance of the law *is* an excuse and that persons are not equal before the law.

A more attractive formulation, in our view, would be one in which the imposition of a higher tier penalty could be guided by other considerations, such as the nature and extent of the underpayment, any loss or damage suffered as a result of the underpayment, the circumstances in which the underpayment took place and whether the person has previously been to have engaged in any similar conduct (all of which are matters relevant to penalties under section 76 of the *Competition and Consumer Act*).

[3] We are not ignorant of the argument that underpayments by smaller businesses are "caused" by the practices and power relationships with other entities in their supply chain or by their competitors. A fulsome analysis of that argument is not called for in this submission suffice to say that even if one accepts it, addressing systemic or market perpetuated exploitation is best done if both ends of the supply chain (the employer and the other "person involved") are targeted by regulation.

Disqualification Orders

We regard disqualification from managing a corporation, in the proposed manner which is consistent with Part 2D.6 of Chapter 2D of the *Corporations Act,* an appropriate discretionary penalty for conduct associated with the underpayment of wages and entitlements.

The provision would be better expressed if the small business exemption and the requirement to prove intention under proposed subsection 546A(1)(b) were removed, for reasons already expressed. In addition, inadvertence, arithmetic error and poor advice are all matters capable of assessment under the discretionary limb of proposed section 546A(2)(b). The unpredictability of the discretion may also be a factor which leads to a greater level deterrence than might otherwise be the case.

Offences

We do not dispute the notion that some extreme cases of worker exploitation warrant criminal sanction. However, in our view, the particular aspects of exploitative behavior which ought to attract criminal sanction are distinct from the bare fact of non-compliance with obligations to pay workers particular amounts, notwithstanding that both may occur at the same time.

Broadly speaking, the argument for the introduction of criminal penalties into industrial relations laws is in our view not a compelling or coherent one and an examination of the relevant provisions of this Bill are illustrative of this, notwithstanding its well intentioned underpinnings.

Attempting to apply the imported terms of "threat" and "coercion" to circumstances far removed from their original context in Division 270 of the *Criminal Code* is problematic. Their purpose in that context is (broadly) to define conduct which causes, or which a person subjected to would reasonably consider to cause, a deprivation of personal liberty in various forms. A deprivation of personal liberty can be present irrespective of whether or not any wages paid to the person are legal.

Having regard to the public statements which accompanied this Bill, the issue that these particular provisions appear to want to address is a circumstance where a person underpays an employee *because* they believe or expect that, due to some particular vulnerability or circumstance of that employee, that employee will not take any action to contest the underpayment (for example a visa a worker who faces a risk of deportation if their employment is terminated). We anticipate that few would disagree that such conduct is reprehensible. This more discrete issue is one which we would support being considered further. Whether it is appropriately structured as a criminal offence or instead adapted into a "General Protections" type civil provision (given its obvious structural similarities) ought be considered in the light of advice from policy experts in the public sector and in the community.

Attempting to tie together the entirety of potential forms of "coercion" and "threat" with non-compliance with wages and entitlements provisions however captures far broader circumstances. For example, an irate worker who threatens to do something "detrimental" when their employer rightly requires them to supply evidence in relation to their sick leave pursuant to a term of an enterprise agreement or modern award (for example) is presumably not the target of these provisions. This is perhaps appreciated by the statement in the Explanatory Memorandum that the relevant Items relate to "underpayments of employees, sham contracting and the treatment of temporary visa workers"[4], but does not appear to be reflected in the text of the Bill itself.

Finally, we note that proposed sub-paragraph 559C(2)(c) relies upon the definition at Item 2 of a "temporary overseas worker", which in turn and in part refers back to concepts used in the *Migration Act.* Sub-paragraph 559C(2)(c) presumably requires the worker concerned to fit the definition of "temporary overseas worker" at the time the events constituting the offence take place. We are uncertain of the position of an unlawful non-citizen who is the victim of exploitation under these provisions. We presume, given the intention expressed in proposed section 15A, that such persons are intended to be entitled to recover their underpayments. It ought to follow that that their exploiters are also subject to these offence provisions where the other elements of the offence are made out.

[4] At page 9

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