SUBMISSIONS OF THE AUSTRALIAN WORKERS' UNION

FAIR WORK AMENDMENT (PROTECTING AUSTRALIAN WOKERS) BILL 2016

SENATE EDUCATION AND EMPLOYMENT LEGISLATION COMMITTEE

1. INTRODUCTION

The Australian Workers' Union (**AWU**) welcomes the opportunity to make submissions in relation to the proposed *Fair Work Amendment (Protecting Australian Workers) Bill* 2016 ('the **Bill**') in order to contribute to the inquiry led by the Education and Employment Legislation Committee.

This document sets out the AWU's preliminary views in relation to the proposed provisions, however further comment, or subsequent review at a later date may be provided by the AWU on its own initiative, or on request.

The AWU acknowledges the need to provide accessible workplace regulation that is not overly complex, as well as the general object of the *Fair Work Act* 2009 (Cth) ('the **FW Act**') to promote a balanced framework for workplace relations, taking into account productivity and economic prosperity, as well as social inclusion for all Australians. We confirm that the proposed amendments are in keeping with these objects.

We note that the key provisions of the proposed Bill address the civil penalty provisions of the FW Act – civil penalties being founded on the notion of preventing and or punishing public harm. Prosecutions and investigations in particular by the Fair Work Ombudsman (**FWO**) reveal the worrying prevalence of migrant exploitation, sham contracting, and illegal phoenixing activity.

The AWU consider that that there is a clear need to:

1. Provide greater access to justice for migrant workers; and
2. Combat corporate and individual deviance in relation to sham contracting and illegal phoenixing activity; and
3. Improve compliance and deterrence measures in the key civil liability provisions under the FW Act.

The AWU supports the Bill because it will assist in addressing these serious issues.

2. PROTECTING MIGRANT WORKERS

2.1 Exploitation of Migrant Workers

Migrant workers, and in particular illegally working migrants, are more vulnerable to exploitation than other employees. The Fair Work Ombudsman (**FWO**) has noted that migrants (who represent only 10% of all enquiries to the FWO) are disproportionately represented in civil penalty litigations, and other enforcement activities of the FWO.[1]

We refer to the FWO's figures in 2014-2015:[2]

- Of 50 civil penalty litigations filed, 21, or 42%, involved migrant workers;
- Of 42 enforceable undertakings signed, 20, or just under 48%, involved migrant workers;
- Of 118 compliance notices issued, 37, or just over 31%, involved migrant workers; and
- Of 348 infringement notices issued, 124, or just under 36%, involved migrant workers.

In the revealing high profile proceedings against the 7-Eleven franchise, we can see that underpayments are emerging in a setting where there is a threat of deportation regarding illegally performing work under the *Migration Act* 1958 (Cth). In various FWO prosecuted cases, the courts have ordered back-payments to workers who have worked outside the terms of their 573 Student visa[3] Sub-class 801 Spousal visa[4], or the Primary Sub-class 457 visa[5].

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1 Fair Work Ombudsman, Letter to the Productivity Commission, 8 September 2015, 2 ('*FWO Letter to the PC*').

2 Ibid 2.

3 *Fair Work Ombudsman v Bosen Pty Ltd* (unreported, Magistrates' Court of Victoria Industrial Division, 21 April 2011); *Fair Work Ombudsman v Haider Enterprises Pty Ltd (in liq)* [2015] FCCA 1999.

4 *Fair Work Ombudsman v Shafi Investments Pty* [2012] FMCA 1150.

The vulnerable circumstances of migrant a worker has allowed employers to underreport hours, and to procure labour at an illegally low rate, apparently in order to satisfy an employee's visa requirements (such as a weekly hours cap). In this regard we note the importance of section 559E of the Bill (discussed below at 5.3), which states that a victim's consent or acquiesce, is no defence.

2.2. "just and favourable conditions of work"

The AWU supports the notion of "just and favourable conditions of work" to "everyone" as set out in Article 7 of the International Covenant on Economic, Social and Cultural Rights (**ICESCR)** as set out below:

Article 7:

> *The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:*
>
> *(a) Remuneration which provides all workers, as a minimum, with:*
>
> *(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;*
>
> *(ii) decent living for themselves and their families in accordance with the provisions of the present Covenant;*
>
> *(b) Safe and healthy working conditions;*
>
> *(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;*
>
> *(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays*[6]

The proposed provisions discussed in this section 2 of our submissions address the issue of migrant worker exploitation and engagement with available workplace protections. We confirm that these provisions are compatible with, and act in furtherance of the rights as set above in relation to Article 7 of the ICESC. We note that the ICESCR is a schedule to the *Human Rights (Parliamentary Scrutiny) Act*

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5 *Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd* [2012] FMCA 258.

6 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

2011, and has appropriately been considered in the process of drafting this Bill in the Statement of Compatibility with Human Rights.

2.3 Amendments to the Fair Work Information Statement

Provisions proposed under items 4 and 6 of the proposed Bill (sections 124(2A)(2B)(2C) and 125(1A)) are aimed at improving communication pathways to migrant employees, enabling them to better understand and access the entitlements afforded to them under the FW Act. These provisions refer to the Fair Work Information Statement ('the **FWIS**') – already a mandatory document to be provided to employees upon commencement of their employment.[7] Item 4 sets out amendments to be made to the FWIS itself, to include information about the relationship between workplace laws and the *Migration Act* 1958 (Cth) ('the Migration Act'), as well as information regarding opportunities for redress for temporary overseas workers affected by contraventions of workplace laws.

Items 4 and 6 do not appear controversial, as they do not create substantial entitlements at the expense or burden to either employers or regulators. However, to the extent that the employer is obliged under section 125(1A) to provide the FWIS to a new employee in the language in which they are most proficient – we say this is a straightforward task that does not create a true administrative burden or expense. When engaging a new employee, we would suggest in the normal course of enquiry, an employer would ascertain an employee's native language regardless of section 125(1). The requirement to provide the appropriate translated FWIS is not onerous, and clearly enhances access to critical employment information at the outset of the employment relationship.

2.4 Clarification of the Fair Work Act

Item 3 of the Bill introduces section 15A to clarify that the FW Act applies irrespective of immigration status.[8] As referenced in the Explanatory Memorandum ('the **EM'**) to the Bill, the AWU accepts the reliance on the Productivity Commission's reasoning – that clarification under 15A should motivate more migrants to report their employer to the relevant authorities or organisations, thereby reducing instances of exploitation.[9] The AWU sees this provision as providing critical information that is not well understood.

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7 *Fair Work Act* 2009 (Cth) 125.

8 See Explanatory Memorandum, Fair Work Amendment (Protecting Australian Workers) Bill 2016 (Cth), 4, 7 ('*Explanatory Memorandum*').

9 Productivity Commission 2015, Workplace Relations Framework, *Final Report*, Canberra, 930 ('*PC Report'*).

In the Productivity Commission's Draft Report, the decision of Commissioner Bissett of the Fair Work Commission (**FWC**) in *Smallwood v Ergo Asia Pty Limited*[10] was noted as the authority for the principle that an employment contract contrary to the Migration Act is invalid and unenforceable; and by implication, the FW Act does not apply to migrants in breach of the Migration Act.[11] This is clearly not the case as set out above, and suggests that clarification such as the proposed section 15A of the Bill is appropriate not just for the public at large, but for those actively engaged with industrial relations law.

We acknowledge that even with the introduced measures, it will be difficult for exploited workers to come forward if the worker risks deportation, or some other penalty under the Migration Act. We encourage more discussion concerning the intersection between migration and industrial relations law in this respect.

3. SHAM CONTRACTING

The Bill addresses the issue of sham contracting by amendment to the general protections provisions, and amendment to the defence to sham contracting. We consider briefly the general protections amendment, followed by the newly drafted defence.

3.1 Amendment to the general protections provisions

Item 9 introduces an adverse action subsection to section 340 as follows:

> *(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.*
>
> *Note: This subsection is a civil remedy provision (see Part 4-1).*

This subsection protects a person who might ask about the existence of a workplace right in relation to them or another person. As explained in the EM this provision will ensure that adverse action cannot be taken in response to a worker asking if someone is an independent contractor. [12] This provision encourages a healthy dialogue between employees and employers, as well as between employees. A workplace should be a safe environment where workers can ascertain what their workplace rights are without fear of retribution. This additional protection for vulnerable workers is clearly justified and there should be no reason for opposition to its inclusion.

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10 [2014] FWC 964.

11 *PC Report*, above n 9, 930-931.

12 *Explanatory Memorandum*, above n 8, 21, 5.

3.2 Amendment to the defence to sham contracting

Section 357(1) of the FW Act forbids an employer from representing an employment contract as a contract for services (work to be performed by an independent contractor), whether that misrepresentation is made to a potential or current employee.

Item 10 of the Bill leaves this provision intact, but replaces the employer's defence of "not knowing"; and being "not reckless" as to the nature of the contract with the following:

> *(2) Subsection (1) does not apply if the employer proves that, when the representation was made, the employer:*
> *(a) believed that the contract was a contract for services rather than a contract of employment; and*
> *(b) could not reasonably have been expected to know that the contract was a contract of employment rather than a contract for services.*

This defence introduces a reasonable person test, and requires an employer to establish the affirmative state of mind of *believing* a person to be an independent contractor, rather than the negative state of "not knowing". We prefer the redraft in the affirmative, and see the defence in its current form as supporting employers claiming ignorance. The reckless defence is an inheritance from Work Choices[13] and has been criticised as being ambiguous and overly generous, with the test of "reasonableness" being preferred.[14]

We note that the Productivity Commission also prefer the recalibration of the test, citing that it is "too easy under the current test…to escape sham contracting."[15] In fact, the removal of the recklessness defence has been recommended since 2012,[16] and the provision itself was first seen in the defence as set out at 900(2) in the *Workplace Relations Legislation Amendment (Independent Contractors) Bill* 2006 ('the **IC Bill**'), as it was first introduced to Parliament in respect of the *Workplace Relations Act* 2006.

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13 *Workplace* Relations Act 1996 (Cth) as it existed subsequent to the amendments made by the *Workplace Relations Amendment (Work Choices) Act* 2005, 900(2).

14 Andrew Stewart and Cameron Roles, Submission to the Australian Building and Construction Commission, *ABCC Inquiry into Sham Arrangements and the Use of Labour Hire in the Building and Construction Industry*, 2011, 9.

15 *PC Report*, above n 9, 47.

16 Department of Education, Employment and Training 2012, *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation*, Canberra, 243, 247.

4. IILEGAL PHOENIXING ACTIVITY BY "EXECUTIVE OFFICERS"

4.1 Prevalence

We adopt the following definition of fraudulent phoenixing activity as involving the "evasion of tax and other liabilities such as employee entitlements through the deliberate, systematic and sometimes cyclic liquidation of related corporate trading entities."[17] This form of phoenix activity is currently difficult to address under the FW Act, and to the extent that worker exploitation has become a serious issue – the introduction of a dedicated civil liability provision is welcomed.

Under the 2012 Australian Labor Party (**ALP**) government, the FWO commissioned Price Waterhouse Coopers (**PWC**) to prepare a report ('the FWO/PWC Joint Report' into the prevalence of phoenix activity – revealing a range of negative impacts to employees, other creditor businesses, and government revenue in the form of unpaid wages, unperformed services or production of goods, and unpaid taxes.[18] PWC were able to make a total impact assessment within a range of $1.78 and $3.19 billion per annum, with the specific cost to employees ranging between $191.25 million and $655.20 million.[19] We are satisfied that even at the lower estimate; these figures demonstrate a significant current problem in Australia.

4.2 Coverage

Given the three-pronged cost (to employees, other creditor businesses, and government revenue), it is appropriate to address this issue under the FW Act in order to support the work of trade unions and the FWO in addition to the powers of the Australian Taxation Office (**ATO**), and the Australian Securities and Investment Commission (**ASIC**) under their respective tax and corporations legislation.

It is generally difficult to pursue enforcement against companies that have entered into liquidation as under section 471B of the *Corporations Act* 2001(Cth), a person cannot issue proceedings in court during the winding up of a company without the leave of the Court. Phoenix activity is generally addressed by ASIC in relation to breach of director duties, fraud by officers, and section 596 – entering into agreements or transactions to avoid employee entitlements, though this latter section has been reportedly difficult to utilise due to the criminal standard of proof.[20] We note that,

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17 Treasury, 2009, *Actions against fraudulent phoenix activity: proposals paper*, 1

18 Fair Work Ombudsman and Price Waterhouse Coopers, *Phoenix activity: Sizing the problem and matching the solutions* 2012, 2 ('*FWO/PWC Report*').

19 Ibid 3.

20 See Australian Securities and Investments Commission, Supplementary submission to the Productivity Commission, *Inquiry into Business Set-up, Transfer and Closure*, July 2015, 17–18.

despite the introduction of the *Corporations Amendment (Phoenixing and other measures) Act* 2012, considerable exposure remains for unpaid employees and unsecured creditors.[21] More is needed in order to address this issue, particularly in relation to sophisticated phoenixing in corporate groups involving parent and subsidiary companies.

The FWO has sometimes been able to utilise the accessorial liability provisions of the FW Act under section 550, but lament that this is not always possible.[22] Section 550 sets out the derivative liability of persons involved in a contravention of a civil liability provision. A person "involved" is a person that:

a) *has aided, abetted, counselled or procured the contravention; or*
b) *has induced the contravention, whether by threats or 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.*

Although section 550 might capture penalties from the liable person, these penalties will often fall short of substantial underpayments. Where the company has gone into liquidation, the employee's underpayment may never be rectified.

The FWO/PWC Joint Report made the suggestion that the FW Act be amended to include civil remedy provisions to prohibit an employer entering into a transaction with the intention of preventing its employees from recovering their employee entitlements.[23] The current Bill appropriately addresses this recommendation, and is set out below at 4.3.

4.3 Proposed Provisions

Item 14 of the Bill introduces section 545A, holding executive officers responsible for underpayments owed by a company that is actively phoenixed for the purposes of avoiding liability. As set out at paragraph 9 of the EM, this is consistent with the provisions introduced by the ALP in relation to director liability for unpaid superannuation guarantee contributions under the *Tax Laws Amendment (2012 Measures No. 2)* 2012.

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[21] See Helen Anderson, 'The Proposed Deterrence of Phoenix Activity: An Opportunity Lost' (2012) 34(3) *Sydney Law Review* 425–426.

[22] *FWO Letter to the PC*, above n 1, 5.

[23] *FWO/PWC Report*, above n 18, 4.

The proposed section 545A sets out when the courts may make an order against an executive officer, with the key components being that:

- there has been a contravention of subsection 44(1), section 45, 50, 280, 293 or 305 or subsection 323(1) or 357(1) of the Act (the civil remedy provisions);
- there is an underpayment of wages;
- at the time of the contravention the liable person was an "executive officer";
- the company is wound up without rectifying the underpayment;
- within 12 months after the failed company is wound up, the executive officer becomes executive officer of a phoenix company; and
- the phoenix company uses assets used by the failed company.

For ease of reference, we refer here to the civil remedy provisions, as including contraventions of:

- the National Employment Standards (section 44);
- a Modern Award (section 45);
- an Enterprise Agreement (section 50);
- a Workplace Determination (section 280);
- a National Minimum Wage Order (section 293);
- an Equal Remuneration Order (section 305);
- the requirements related to the method and frequency of payments (section 323); and
- the sham contracting prohibition (section 357)

Subsection 2 of 545A defines an "executive officer" of a corporation as someone that is "concerned in" or "takes part in" the management of the company. The EM explains the purpose of broadening the scope of liability beyond directors is to allow compensation orders to be sought from persons who use a shadow director or figurehead.[24] We see this as an appropriate attempt to impose personal liability on the persons who truly control a corporation. This is evidently necessary if we are to expect corporations to alter their behaviour.

The exemption under this section is tailored to protect non-fraudulent phoenix activity involving genuine business failure and resurrection. Subsection (5) of 545A exempts a liable person, where the court is satisfied the person has acted honestly; and having regard to all the circumstances – ought fairly to be exempt. In exercising this power, subsection (6) sets out the matters the court must consider. These matters include a detailed and comprehensive set of indicia that relate to illegal phoenix activity. The

[24] *Explanatory Memorandum*, above n 8, 34, 7.

AWU considers this test as set out, accurately captures the phenomenon of illegal phoenixing, and respectively, protects those engaging in legal phoenixing activity.

5: COMPLIANCE AND DETERENCE

As set out in our introduction, the AWU supports efforts to increase compliance with the critical civil liability provisions, and understands the need to impose greater deterrence for serious contraventions under the Act.

5.1 New maximum penalties for large corporations under section 546(2)

Item 16 imposes an increased maximum penalty for breaches of the civil penalty provisions but only where the employer is not a small business employer. The proposed section 546(2A) increases the penalties by 3 times the current maximum – being $10,800 for an individual, and $54,000 for a body corporate.

The AWU accepts the justification given in the EM to the Bill[25] – that a higher penalty reflects that large companies can be presumed to have sophisticated human resources personnel. These employers are better equipped to observe the requirements set out under the FW Act, and where contraventions are established, sentencing should reflect the active defiance to the FW Act.

5.2 Disqualification from managing corporations

The proposed disqualification provisions relate to intentional breaches of the discussed civil remedy provisions, again targeting persons managing larger corporations (employing 15+ employees). The court must consider such an order "justified", and may have regard to the person's conduct in relation to management, business, or property of any corporation, or any other consideration it deems appropriate. In addition to its deterrent quality, this provision offers an appropriate remedy to supplement section 545A in relation to illegal phoenixing. We note that disqualification from management is not a new concept, and is currently imposed by ASIC under the *Corporations Act* 2001 (Cth).[26]

5.3 Criminal offences for serious contraventions of the Fair Work Act

Item 22, section 559C(1) of the Bill, addresses persons engaging in a more sinister manner in contravention of any of the civil remedy provisions discussed. That is, where a person engages in coercion or threat within the meaning of Division 270 (slavery and slavery-like conditions) of the Criminal Code, the maximum penalty is 2

[25] *Explanatory Memorandum*, above n 8, 44, 8.
[26] See section 206F.

years or 240 penalty units, or both. Subsection 2 applies the same wording in relation to a temporary overseas worker. To avoid doubt section 559D clarifies that it is no defence that the victim consented to, or was acquiescent, to the conduct of the employer. These new offences reflect that conduct which falls short of forced labour and servitude, but which is sufficiently serious, ought to be appropriately penalised. The AWU support these sentiments as set out in the EM to the Bill at paragraph 56(b)(ii).

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Those are our submissions.

Scott McDine
NATIONAL SECRETARY
The Australian Workers' Union
6 April 2016