AMWU

Australian Manufacturing Workers' Union

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

5 April 2016

Contents

Executive Summary

The Australian Manufacturing Workers' Union (AMWU) represents approximately 100,000 members working across major sectors of the Australian economy. AMWU members are primarily based in manufacturing industries, in particular; metal, vehicle, and food manufacturing, but also in the industries of mining, building and construction, printing and graphic arts, repair and service and laboratory and technical services.

The AMWU supports the initiatives contained within the *Fair Work (Protecting Australian Workers) Bill 2016*, and views the reforms as vital, especially given the recent spate of abuses involving widespread and systematic underpayments, phoenixing activity, and mistreatment of temporary visa workers. The reforms have broad-ranging support, and the problems they seek to ameliorate have been identified and acknowledged for some time, with the AMWU making submissions to an Australian Treasury Discussion Paper regarding the damaging effect of phoenixing in February 2010.[1] The time to deal with these issues is now.

The well-being of Australian workers, along with the certainty and trust they deserve at their workplaces, is at the focal point of the legislation. However, the costs of phoenixing, underpayments and dubious business arrangements are keenly felt by Australian businesses and the government. In this respect, the legislation will be beneficial to employers and employees alike, and assist in stamping out unfair employment practices, along with protecting employers who do the right thing from unfair competition.

The AMWU has made several policy recommendations aimed at more closely aligning the provisions with the intended policy outcomes. We have also attached a case study involving Mr. Mason, a member from our Queensland Branch, along with two newspaper articles concerning phoenixing activity effecting AMWU members.

[1] Australian Manufacturing Workers Union, 'Action Against Fraudulent Phoenix Activity', http://archive.treasury.gov.au/documents/1892/PDF/Australian_Manufacturing_Workers_Union.pdf.

Fair Work Information Statement

The AMWU supports the amendments in Item 6 requiring an employer to provide the Fair Work Information Statement in a language in which the employee is more proficient. The amendments have the dual effect of supporting employer engagement with temporary visa employees, or employees with English as a second language, and more effectively informing such employees as to their workplace rights.

Recommendations

- Given the potential for a high level of unfamiliarity with Australia's workplace laws amongst temporary visa workers, supplementary information concerning workplace rights (such as access to adverse action protections, unfair dismissal, and freedom of association) should be made available along with the Fair Work Information statement to such workers.

Protections for independent contractors

The AMWU supports the introduction of Items 9 and 10, relating to sham contracting, into the *Fair Work Act 2009* (the Act). It is widely acknowledged that sham contracting adversely impacts the most vulnerable workers in Australia,[2] and potentially undermines the industrial relations system by allowing unscrupulous employers to effectively disregard industrial safety nets, be it from awards or legislation. Further, the practice puts employers who are not part of sham arrangements at a competitive disadvantage, and must either "join in the indecency of sham contracting or go out of business".[3]

Strengthening the test for sham contracting and giving protection to workers who query their entitlements is a positive step towards ameliorating these issues. The deficiencies in the current s. 357 have been identified, not only in academia,[4] but also by the Productivity Commission.[5]The 2015 Workplace Relations Report noted that the current drafting of s. 357(2)(b) creates a "high burden of proof" in establishing recklessness, and recommended that the test instead be based on an assessment of "reasonableness".[6] The recent Senate Report "A National Disgrace: The Exploitation of Temporary Work Visa Holders" came to a similar conclusion.[7] The 2010 Australian Building and Construction Commission discussion paper into the use of sham arrangements and labour hire noted that the provisions in the Act would only "generate modest success in addressing the widespread problem of sham contracting".[8] This demonstrates that a broad level of consensus has been built around this issue.

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[2] Productivity Commission, "Workplace Relations Report 2015", p. 807.
[3] Leigh Johns, quoted in Cameron Roles and Andrew Stewart, 'The reach of labour regulation: Tackling sham contracting' (2012) 261.
[4] Cameron Roles and Andrew Stewart, 'The reach of labour regulation: Tackling sham contracting' (2012); and Helen Anderson, ' Fraudulent Transactions Affecting Employees: Some new Perspectives on the Liability of Advisers' (2015).
[5] Productivity Commission, 'Workplace Relations Report 2015', Recommendation 25.1.
[6] Productivity Commission, 'Workplace Relations Report 2015', Recommendation 25.1.
[7] Senate Report, 'A National Disgrace: The Exploitation of Temporary Work Visa Holders' March 2016 – Recommendation 30.
[8] Australian Building and Construction Commission discussion paper, 'Sham Arrangements and the use of Labour Hire in the Building and Construction Industry

Independent contractors represent a sizeable portion of the workforce in Australia. In November 2013, there were 986,400 independent contractors in Australia, accounting for 8.5% of all employed persons.[9] Of these, 62% had "authority over their own work", 64% were able to sub-contract their own work, and 80% had no employees.[10] This data does not show that all (or even most) independent contractor relationships are illegitimate. However, it does show that identifying sham arrangements is difficult, and that a clear legislative scheme is needed.

The current state of s. 357 indicates that ignorance of a sham contracting arrangement, along with a lack of recklessness, is sufficient to defeat liability under the section.[11]This is clearly at odds with the imperatives of creating a "balanced framework for co-operative and productive workplace relations",[12] along with an engaged management class, who are aware of their industrial obligations. It is acknowledged that Australia's international standing in management and leadership has been steadily falling in recent years, along with the ability of Australian businesses in "attracting, developing and retaining talent and identifying innovation".[13] Provisions which encourage ignorance of the law are highly unlikely to assist in reversing this trend.

Recommendations

- The role of external workplace advisers in arranging sham contracting should be further considered. The current and proposed provisions may allow for an employer to escape liability by relying on legal advice which suggests that the arrangement is not a sham. If an employer is able to use s. 357(2) as a defense and rely on the advice of a workplace lawyer, it may be possible to avoid a contravention by showing that they could not "reasonably have been expected to know" that the arrangement is a sham.

[9] Australian Bureau of Statistics, Forms of Employment 6359.0.
[10] Australian Bureau of Statistics, Forms of Employment 6359.0.
[11] *Construction, Forestry, Mining and Energy Union v Nubrick* [2009] FMCA 981.
[12] *Fair Work Act 2009*, s. 3.
[13] *Australian Industry Group*, 'Addressing Enterprise Leadership in Australia', June 2015, 12.

Section 550 is drafted to apply to a person "who is involved in a contravention of a civil penalty provision", and since there was no contravention, the adviser may escape liability. A deterrent needs to be considered to prevent the giving of advice that would result in a contravention of s. 357.[14]

[14] See Helen Anderson, 'Fraudulent Transactions Affecting Employees: Some New Perspectives on the Liability of Advisers' *Melbourne University Law Review*, [2015], 14.

Phoenixing Arrangements

The AMWU supports the introduction of Item 14, being orders for penalties against executive officers of phoenix companies. Phoenix arrangements result in an enormous cost to employees through lost entitlements, a loss to Australian business through unpaid debts, and a cost to government through the Fair Entitlement Guarantee Scheme. Phoenixing activity resulted in an average loss of $9,897.76 per employee in 2009/10.[15] However, it this figure does not represent the total amount of the owed entitlements; given that GEERS (and its current incarnation, FEGS) caps a number of entitlements, such as wages and redundancy payments, and unremitted superannuation entitlements cannot be claimed under the scheme.

Whilst the metal manufacturing industry is considered "low risk" for the purposes of phoenixing activity, it is considered a "significant issue" in the labour hire industry, which itself feeds into metal and metal product manufacturing.[16] Further, upper bound modelling suggests that phoenixing represents a total cost to employees within the metal and metal products manufacturing industry of $14,746,178.[17]

It is clear that the current legislative framework is insufficient in protecting workers' entitlements in the event of a phoenixing operation. The protections in Part 5.8A of the *Corporations Act 2001* operate to "protect the entitlements of a company's employee's from agreements and transactions that are entered into with the intention of defeating the recovery of those entitlements".[18]However, the efficacy of these provisions is questionable, given the difficulty in satisfying the director's "intention" requirements.[19] Helen Anderson suggests that the difficulty associated with proving the directors intention in relation to

[15] Fair Work Ombudsman, "Phoenixing Activity: Sizing the Problem and Matching the Solutions" June 2012, 15.
[16] Ibid 16 and 17.
[17] Ibid 20.
[18] *Corporations Act 2001*, s. 596AA(1).
[19] *Corporations Act 2001*, s. 596AB(1).

phoenixing activity "makes it unlikely that the liquidator will use the company's remaining assets to fund an action under Pt 5.8A".[20]

Writing at the time of the *Corporations Law Amendment (Employee Entitlements) Act 2000*, Michael Reynolds noted that "the effectiveness of the Act as a deterrent to the corporate community who wish to avoid their obligations to their employees will only follow if these persons are successfully prosecuted".[21]Given the lack of successful prosecutions under this section, a new deterrent is needed for phoenixing operations.

The recent experience of employees at Forgecast (Mitcham, Victoria) illustrates the difficulties in clawing back employee entitlements in these circumstances. Ian Beynan, the owner of Forgecast, was reported to have said "I don't owe them any money, the company owes them money".[22] This demonstrates the fiction that allows employee entitlements to be obscured, and all too often, lost.

Recent cases demonstrate that executive directors are being pursued through the accessorial liability provisions in s. 550, coupled with the civil penalty provisions in s. 539(2). One of the key difficulties in this regard is that s. 550(2) requires an assessment of the executive officer's intention and state of mind; with Helen Anderson noting that a contravention requires a "substantial degree of culpability".[23] Section 545A(6) would largely overcome this difficulty.[24] The introduction of s. 545A would likely reduce reliance on s. 550 and the civil penalty provisions in pursuing executive officers responsible for phoenix operations. This is appropriate given that such provisions were not explicitly crafted for pursuing such claims, and remain an imprecise policy mechanism for properly giving effect to the personal liability of such officers.

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[20] Helen Anderson, 'Corporate insolvency and the protection of lost employee entitlements: Issues in enforcement' (2013) 26 Australian Journal of Labour Law 80.
[21] Michael Reynolds, 'The Corporations Law Amendment (Employee Entitlements) Act 2000 (Cth): To What Extent Will It Save Employee Entitments? [2001] Queensland University of Technology Law and Justice Journal 134.
[22] Herald Sun, 'Staff lose in Buyouts', Sunday 31 January 2010. (See Case Study 9)
[23] Helen Anderson, "Phoenix Activity and the Recovery of Unpaid Employee Entitlements - 10 Years On", (2011) 24 Australian Journal of Labour Law, 144.
[24] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Beynon* [2013] FCA 390.

Recommendations

- The proposed s. 545A(5) allows for the exemption of a liable person if that person has acted honestly, and the person "ought fairly to be exempt from this section". Subsection (6) then enumerates matters that the Court must have regard to in assessing whether an exemption should be granted under s. 545A(5). The AMWU proposes two additional criteria for consideration, being (a) the extent to which employees have been pressured to take their leave entitlements, and (b) whether employees have recently been converted from permanent to casual status. This is consistent with the indicators of phoenix activity as outlined in the 2012 Fair Work Ombudsman's report.

Increased Penalties

The AMWU supports increased the increased penalties outlined in Item 16 for the intentional contravention of provisions in the Act.

Recommendations

- It would be advisable that the small business exemption be expressed more precisely. Many of the underpayments which have been expressed over the past 12 months often relate to enterprises which are small businesses and part of a franchise arrangement (7-Eleven and Pizza Hut are two notable examples). The proposed s. 546(2) would not apply to such businesses in it current drafting. It may be that a more targeted provision would exclude small business part of a larger franchise from the exclusion.

Criminal Penalties

The AMWU supports the introduction of criminal penalties for serious contraventions of the Act, through the implementation of Item 22. The policy recognizes the lacuna in the current legislative scheme and seeks to address the gap in circumstances which don't meet the definition of slavery as per Div. 270 of the *Criminal Code 1995*.

Specifically in relation to s. 559C(2), it is acknowledged that many temporary overseas workers also have English language difficulties, along with an general unfamiliarity with Australia's industrial relations system and a dependence on a third party (their sponsoring employers) for continued residence in Australia. Accordingly, such workers are already under a special disadvantage.

The 2015 Senate Report, "A National Disgrace: The Exploitation of Temporary Work Visa Holders" noted the lack of criminal penalties under the *Fair Work Act 2009*.[25] The Fair Work Ombudsman also noted that the "existing legal framework did not effectively deter unscrupulous employers who deliberately set out to avoid their legislative obligations" and suggested that "having the option of criminal penalties...may provide a stronger disincentive when dealing with a party who is prepared to deliberately ignore the operation of the *Fair Work Act 2009*"[26] (Emphasis added).

Recommendations

- The drafting of the proposed s. 559C does not explicitly capture circumstances where coercion or a threat is made by a host company to a labour hire employee. The civil penalty provisions generally arise due to an employment, rather than a labour hire / host, relationship. Whilst a host company involved in a contravention of a civil penalty provision may

[25] Education and Employment References Committee, "A National Disgrace: The Exploitation of Temporary Work Visa Holders" March 2016, 9.157.
[26] Ibid 9.63.

be found in breach by operation of s. 550, further legislative clarification may be needed.

- The underlying intention of Part 4-1A relates to "underpayments to employees, sham contracting and the treatment of temporary visa workers".[27] However, the drafting of s. 559C appears to lack precision, and may capture other forms of conduct not intended within the scope of the legislation. The AMWU agrees with the Australian Council of Trade Union's (the ACTU) assessment that the target of the section is not, for example, an employee who threatens an employer with disturbing their business in the course of an Award or Agreement dispute. The fact that "threat" and "coercion" have the same meanings as that of Div. 270 of the Criminal Code which concerns "Slavery and slavery-like conditions" also underlines this intention. Nonetheless, an attempt should be made to identify the types of behavior that the provision specifically seeks to attach criminal penalties to.

[27] *Fair Work Amendment (Protecting Australian Workers) Act 2016*. Explanatory Memorandum at [56].

Case Study – Perry Mason

Mr. Perry Mason is a qualified sheet metal worker and AMWU member of our Queensland Branch. He began working in the industry as an apprentice, and became trade qualified in 1986. Perry's story demonstrates the importance of legislative measure to protect employees and employee entitlements from unscrupulous employers, and dubious corporate structures.

Mr. Mason started working with a company named C.T. Sheet Metal Works in 2003 and having a positive working experience there, enjoyed a good relationship with his co-workers. In 2011, after nearly 8 years of service with the company, Mr. Mason was promoted to Special Projects Manager.

However, in 2014 Mr. Mason was made aware that the company was facing financial difficulties and the company would be placed into Administration. Mr. Mason was told that another company, I-Pro Systems owned by the wife & family of the director of C.T. Sheet Metal Works would be taking over C.T Sheet Metal Works, along with the employees and their entitlements of accrued Long Service Leave and accrued Annual leave. This was not, however, provided for in writing by the Director or the General Manager of C.T. Sheet Metal Works who were husband and wife respectively. The former director of C.T. Sheet Metal Works and the former general manager now involved with and/or employed/owners with I-Pro Systems were reluctant to speak with the employees about the change in ownership and only did so after Mr. Mason and another manager approached the former Director and General Manager to offer an explanation to the employees. The workers were told that I-Pro Systems had taken over the employees and their entitlements as well. The other workers on site were worried, given that they had not been paid on time for several weeks beforehand.

C.T. Sheet Metal Works was subsequently placed into administration on 2 May 2014. The company employees continued on the following week with nothing changing for them, they still had the some duties, roles, and serviced the same customer base as with C.T. Sheet Metal Works.

The only change was the employees started receiving their pay slip from I-Pro Systems, rather than C.T. Sheet Metal Works, on or around 7th or 8th May 2014.

Mr. Mason decided to resign from I-Pro Systems, and affected his resignation on17 July 2014.

Upon leaving I-Pro Systems he approached the now Owner/Manager (former General Manager C.T. Sheet Metal Works.) regarding his entitlements owed and he was told that there were "cash flow problems" and they could not pay the total in one payment due to the amount owed, but stated the company would commit to paying out Mr. Mason's entitlements on a weekly basis. At the time of resignation, he was owed $21,565 in entitlements, in the form of 17.28 weeks of annual leave payments, and $475 in superannuation.

However, the company only made 2.5 weeks' worth of owed holiday entitlement payments to Mr. Mason and none of the outstanding superannuation payments.

Mr. Mason decided after nonpayment's to contact the AMWU, who emailed I-Pro Systems on his behalf, requesting that payment be made immediately. A response was received from I-Pro System's lawyers, who stated under instructions from I-Pro Systems that there had been no transfer of employee entitlements to the new company (despite 2.5 weeks of payments already having been made and confirmation from the Administrator regarding transfer of employee's entitlements was part of the sale agreement), and that Mr. Mason should apply through the General Employee Entitlements and Redundancy Scheme.

The AMWU then advanced the matter to the Magistrates court. I-Pro Systems did not make an appearance on the hearing date. I-Pro Systems appointed a liquidator soon after the court date.

Mr. Mason is still currently owed 14.6 weeks of annual leave payments, and is attending creditors meetings. Mr. Mason is not alone in this respect. Whilst he is

unaware as to how much money the company owes to other employees, he estimates that it is approximately between $2 million for C.T. Sheet Metal Works & $2 million for I-Pro Systems. There are also several other companies put into administration/Liquidation with the same husband and wife combination giving an approximate amount of $ 4-5 million owed to Employees Superannuation, Employees Entitlement money, Wages owed, ATO and Creditors for all companies . Mr. Mason has subsequently been paid his superannuation entitlements after 5 months from leaving the company but he doubts and knows of some of the former employees that have not been paid superannuation owed.

Mr. Mason has a family, mortgage payments, along with bills and every day living expenses. His story tells of the necessity for stronger protections for employee entitlements. It also shows that harsher penalties are necessary in deterring employers who knowingly subvert the law, and engage in deceptive corporate practices. The passage of the *Fair Work (Protecting Australian Workers) Bill 2016* would give additional protections for employees like Mr. Mason through the enactment of s. 545A, which provides for the individual liability of executive officers of phoenix companies.

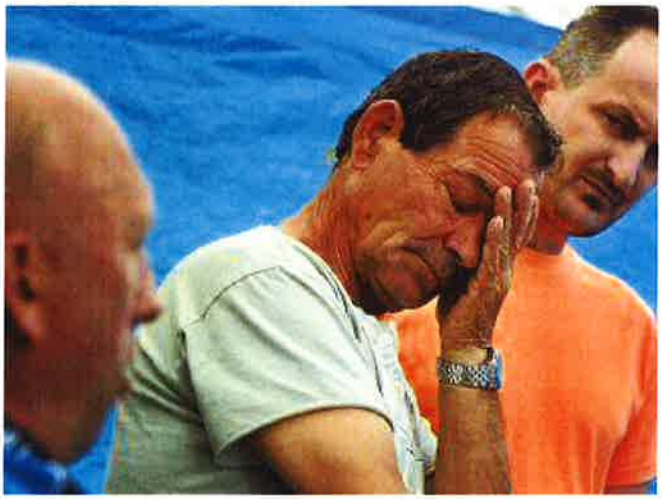
Case Study – Forgecast, Mitcham (Victoria)

Whitehorse Leader

http://whitehorse-leader.whereilive.com.au

No good tidings for sacked Mitcham workers

NEWS LOCAL NEWS 09 DEC 09 @ 10:00AM BY JAMES DOWLING



Mario Cantone has worked at Forgecast for 40 years. Picture: EUGENE HYLAND N24WH000

MILLIONS of dollars in entitlements are unlikely to be paid to 57 employees sacked from a Mitcham factory.

Forgecast went into receivership on November 11 this year and since early December the former employees have set up a 24-hour picket, where 34-year-old employee George Pavlov is among those making his voice heard.

Mr. Pavlov said he was owed more than $100,000 by the metal casting and forging company. He said employees were owed redundancy payments and up to 15 months of unpaid superannuation worth up to $4.4 million.

He said they would continue to fight for their entitlements, but he had no idea what work he would do next.

"This was my first and only job. I was 22 when I started and I've spent my bloody whole life here and now I don't know what to do," Mr. Pavlov said.

"But if we give up on our entitlements they are gone, we have to get something out of it and then we will move on."

Four of the five employees Leader interviewed had notched up more than 20 years service, while the other had given 12 years.

The company went into voluntary administration in 2004 but was later restructured and re-opened.

Australian Manufacturing Workers Union state secretary Steve Dargavel said the union believed the company was viable but just mismanaged into extinction.

He said the employees were first among the unsecured creditors, but it was unlikely the company's asset

sale would surpass what was owed to the secured creditors leaving little for the employees.

Receiver Stephen Dixon, of BDO Australia's business recovery and insolvency division, said they were attempting to sell the assets as soon as possible.

Mr Dixon said the company went under due to the financial pressure of outstanding superannuation and other debts.

He said the receivers were still assessing the company and its debts and would be able to give an answer on what it owes later this week.

Case Study – Forgecast, Mitcham (Victoria)

Staff lose in buyouts

Double click image to view as a PDF.