Chapter 5

Others measures contained in the bill

5.1 This chapter turns to several other parts of the bill raised by submitters, including:

- the higher scale of penalties for 'serious contraventions' of workplace laws;
- the increased penalties for record-keeping failures; and
- the amendment expressly prohibiting employers from unreasonably requiring their employees to make payments.

Higher scale of penalties for 'serious contraventions'

5.2 The bill seeks to increase maximum civil penalties for certain 'serious contraventions' of the Fair Work Act.[1] The maximum civil penalty for a 'serious contravention' involving deliberate conduct will be 600 penalty units for individuals, and 3000 penalty unites (or five times higher) for bodies corporate.[2] This equates to a maximum of $108 000 for individuals, and $540 000 for bodies corporate.[3]

5.3 Proposed section 557A establishes the regime for 'serious contraventions' under the Fair Work Act, and provides that a contravention is only a 'serious contravention' if the contravening conduct was 'deliberate' and 'part of a systematic pattern of conduct relating to one or more other persons'.[4]

5.4 The EM sets out that the new penalties apply in addition to those already contained in the accessorial liability provisions of the Fair Work Act:

> The new regime for 'serious contraventions' supplements the existing penalty regime in the Fair Work Act, under which intention does not need to be proved (i.e. it is strict liability).[5]

5.5 The EM also provided guidance on how proposed section 557A may operate:

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1 See Part 1 of Schedule 1, Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017.

2 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Explanatory Memorandum*, p. 2.

3 Department of Employment, *Submission 1*, p. 5. Note: The Department of Employment also noted that if the Crimes Amendment (Penalty Unit) Bill 2017 passes both houses of Parliament, Commonwealth penalty units will increase from $180 to $210 on 1 July 2017.

4 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Explanatory Memorandum*, p. 4. See also proposed subsection 557A(1).

5 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Explanatory Memorandum*, p. 2.

> The new section requires several steps to be taken. First, identify the relevant proscribed conduct in the applicable civil penalty provision (e.g. a term of a modern award has been contravened under section 45; or employee records have not been made or kept under section 535(1)). The proscribed conduct may consist of an act or omission. Second, consider whether the conduct was deliberate (e.g. the term of a modern award was deliberately contravened, or employees' records were purposefully not made or kept). New section 557B explains how a body corporate's conduct may be assessed to determine whether it 'deliberately' contravened the law for the purposes of new subsection 557A(1). Third, consider whether the conduct formed part of a systematic pattern of conduct.[6]

5.6 The bill provides some guidance to the second element of the new serious contraventions arrangements, that is the meaning of 'deliberate':

> a contravention…by a body corporate is deliberate if it expressly, tacitly or impliedly authorised the contravention.[7]

5.7 Regarding the third element, the Department of Employment stated that a contravention is more likely to be considered part of a systematic pattern of conduct if:

- there are a number of contraventions of the Fair Work Act occurring at the same time;
- the contraventions have occurred over a prolonged period of time, or after complaints were first raised;
- multiple employees are affected; and
- accurate employee records have not been kept, and pay slips have not been issued, making alleged underpayments difficult to establish.[8]

Need for the new penalty regime

5.8 The Department of Employment noted that the need for stronger penalties to deter the exploitation of employees was highlighted in the Senate Education and Employment References Committee's 2016 report into the exploitation of temporary work visa holders. For example, the report stated:

> Evidence from a broad range of submitters drew attention to the fact that the current penalty regime under the FW Act does not deter deliberate contraventions of workplace law. Professor Allan Fels, for example the

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6 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Explanatory Memorandum*, p. 4.

7 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, proposed subsection 557B(1).

8 Department of Employment, *Submission 1*, p. 5. Note: the Department of Employment also noted that the factors listed are intended to be indicative only, and a 'serious contravention' may still be established if one or more of the factors are not present.

> former chairman of the ACCC, noted that the penalties and enforcement arrangements under the FW Act are 'obviously weak'…
>
> Indeed, the current penalty regime under the FW Act almost invites unscrupulous employers to treat the law with impunity. The current penalties on company directors under the FW Act operate as the equivalent of a parking fine for some of the unscrupulous 7-Eleven franchisees, and directors of labour hire companies, who have built the systematic exploitation of visa works into their business models.[9]

5.9 The FWO submission detailed the deterrent value of the proposed arrangements:

> This two-tier penalty regime, where courts can order more severe penalties for serious contraventions, would act as a more effective deterrent to employers engaged in systematic exploitation of workers, while also ensuring the penalty regime does not become disproportionately harsh where other less serious contraventions occur.[10]

5.10 The FWO stated that under the current system there was evidence suggesting that unscrupulous employers considered the financial incentive of breaching the law to be greater than the deterrent effect of possible action by the FWO or possible penalties by the courts. The FWO also stated that it had numerous examples of cases where it had sought court ordered penalties for Fair Work Act contraventions against an employer, only to have the same employer continue to display non-compliant behaviour, even after being penalised:

> Arguably, in these cases, the penalties ordered in the first instance were not sufficient to deter the employer from reoffending and were also unlikely to deter other similar operators from breaching workplace laws.[11]

Adequacy of proposed penalties

5.11 A number of submitters indicated support for the higher scale of penalties proposed, including the Uniting Church of Australia (Synod of Victoria and Tasmania); the ACTU; 7-Eleven; the Salvation Army; the ICA; and WEstjustice.[12]

5.12 Dr Hardy and Dr Tham observed that some of their recent research on employer behaviour indicated that the relationship between deterrence and compliance was not necessarily straightforward (i.e. that high sanctions did not automatically lead

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9 Senate Education and Employment References Committee, *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, March 2016, p. 324.

10 Fair Work Ombudsman, *Submission 4*, p. 31

11 Fair Work Ombudsman, *Submission 4*, p. 27.

12 Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 15*, p. 1; Australian Council of Trade Unions, *Submission 8*, p. 7; 7-Eleven, *Submission 28*, p. 3; Salvation Army, *Submission 25*, p. 4; Independent Contractors Australia, *Submission 32*, p. 1; WEstjustice, *Submission 2*, p. 11.

to greater compliance outcomes). Although acknowledging that the increase in penalties for serious contraventions was designed to act as an effective deterrent, Dr Hardy and Dr Tham argued that in additional to increasing the available penalties, it was equally critical to increase the perceived risk of detection. On this point, they noted that it was crucial that the FWO, as the workplace regulator, be adequately resourced and supported in its goals. Dr Hardy and Dr Tham stated that the proposed reforms to record-keeping and investigative powers contained in the bill were therefore vital in this respect.[13]

Definitional issues

5.13 Professor Stewart raised concerns about the threshold for establishing a 'serious' contravention. While acknowledging the appropriateness of the amendments requiring that the contravention be 'part of a systematic pattern of conduct relating to one or more other persons', he expressed concern about the requirement that the contravention be 'deliberate':

> For individual defendants (i.e. those who are not corporations), this clearly requires that the contravention not be innocent or inadvertent. But what degree of knowledge must be shown on the part of the defendant? Must they have known exactly what provision of the FW Act (or of a particular modern award or enterprise agreement, etc) they were contravening? Or is it sufficient – as I would argue it should be – that they were recklessly indifferent to the existence of a particular requirement under the Act (or an award or agreement, etc)?[14]

5.14 Professor Stewart's submission emphasises why the term 'deliberate' is not entirely helpful:

> Paragraph 22 of the EM states: 'The term "deliberate" is not defined, but is intended to be read synonymously with the term "international" that is used elsewhere in the Fair Work Act'. With respect, however, that is not very helpful. The relatively few uses of the term 'intentional' in the rest of the Act involved particular *conduct* needing to be intentional (such as hindering an entry permit holder, or damaging property), rather than a *contravention*.
>
> A more relevant analogy might be found in s 550 of the FW Act, which imposes 'accessorial' liability for being 'involved' in someone else's contravention. There has been extensive case law on this and similar provisions in other legislation…[15]

5.15 To remedy this, Professor Stewart recommended that proposed section 557A be reworded to make it clearer what level of knowledge is required.[16]

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13 Dr Tess Hardy and Dr Joo-Cheong Tham, *Submission 26*, p. 4.

14 Professor Andrew Stewart, *Submission 3*, pp. 2–3.

15 Professor Andrew Stewart, *Submission 3*, p. 3. Emphasis in original.

16 Professor Andrew Stewart, *Submission 3*, p. 3.

5.16 ACCI also queried the meaning of the term 'deliberate', suggesting that the term be better qualified in the bill:

> …the Australian Chamber had understood that the Government's 'serious contravention' policy response was intended to capture employers that are aware their behaviours and actions are illegal when committing breaches of employment law. They are intending to avoid the law, and do so knowingly or recklessly, rather than not understanding the law properly or not being able to give it proper effect. If this policy intent is to be reflected in the bill, it should be necessary to establish not only that the employer intended to commit the act/omission giving rise to the breach, but that in doing so they also knew they were falling foul of the relevant provisions of the Act.[17]

5.17 Additionally, the Law Council of Australia raised concerns that the term 'deliberate' was not defined in the bill, and recommended it be changed to 'intentional':

> The Law Council considers that the word 'deliberate' is nebulous and vague, as it does not appear in the Fair Work Act nor other relevant Commonwealth legislation that may be instructive. Therefore, to ensure that the provision is effect, and can be interpreted by a court in a way that is consistent with the intention of the provision, if 'deliberate' is intended to be used analogously with the word 'intentional', that it should be substituted for the word 'intentional'.[18]

5.18 Professor Stewart was equally concerned about proposed section 557B in the bill:

> The same point can be made about proposed s 557B, which states that a corporation's contravention is to be regarded as deliberate if it has 'expressly, tacitly or impliedly authorised' the contravention. The issue again is whether a corporation can be said to have authorised a contravention (as opposed to the conduct that amounts to a contravention) if the relevant managers were not aware (or not precisely aware) of the legal requirements being contravened. Again, this should be clarified.[19]

5.19 Professor Stewart also noted that there was some ambiguity around the interaction with the accessorial liability provisions of the Fair Work Act contained in section 550, and recommended that it be clarified:

> If a person is knowingly 'involved' in another person's serious contravention, would that expose them to the higher penalties proposed in the bill? And if not, why not? The FWO has repeatedly used s 550 to pursue managers, directors and advisors who are involved in an employer's contravention. This is especially important where the employer is a company that goes into liquidation without sufficient assets to meet its liabilities. It is at least arguable that the 'guiding mind(s)' behind a serious

17 Australian Chamber of Commerce and Industry, *Submission 5*, p. 6.

18 Law Council of Australia, *Submission 36*, p. 10.

19 Professor Andrew Stewart, *Submission 3*, pp. 3-4.

> contravention should be exposed to the higher level of penalties, bearing in mind that the maximum will always be one fifth of that set for a corporation.
>
> As the bill stands, it is unclear whether s 550 would apply to a serious contravention (as opposed to the underlying 'ordinary' contravention). The EM does not appear to address the matter. Whatever the intent here, it could usefully be clarified.[20]

Breadth of application

5.20 Dr Hardy and Dr Tham welcomed the changes relating to 'serious contraventions', but cautioned that the amendments did not extend to breaches of Part 3-1 of the Fair Work Act:

> In our view, this is a serious omission. There is clear evidence that the exploitation of migrant workers is *not* restricted to non-payment under-payment and, in many cases, involves breaches of the rights under Part 3-1 of the Fair Work Act, including provisions relating to adverse action and sham contracting.[21]

5.21 As such, Dr Hardy and Dr Tham recommended that the provisions in the bill relating to 'serious contraventions' be amended to include breaches of the general protections contained in Part 3-1 of the Fair Work Act.[22]

5.22 In this regard Dr Hardy and Dr Tham considered that the exclusion of the sham contracting provisions of the Fair Work Act from the increased penalty regime relating to 'serious contraventions' constituted a significant omission, given the growing body of evidence that businesses incorrectly classify employees as independent contractors as a way to circumvent minimum employment standards.[23]

Committee view

5.23 Given the serious nature of several high-profile breaches of the Fair Work Act that have occurred in a small number of franchises, the committee believes that the proposed penalty regime is an appropriate and balanced response to the underpayment of vulnerable workers.

Increased penalties for record-keeping failures

5.24 If passed, the bill will increase the maximum penalty for certain record-keeping obligations imposed by the Fair Work Act, and insert a new civil penalty

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20 Professor Andrew Stewart, *Submission 3*, p. 4.

21 Dr Tess Hardy and Dr Joo-Cheong Tham, *Submission 26*, p. 3. Emphasis in original.

22 Dr Tess Hardy and Dr Joo-Cheong Tham, *Submission 26*, p. 4.

23 Dr Tess Hardy and Dr Joo-Cheong Tham, *Submission 26*, pp. 3–4.

provision for 'serious contraventions'.[24]The maximum penalty for 'strict liability' contraventions relating to employee records and payslips in sections 535 and 536 of the Fair Work Act doubles from 30 to 60 penalty units for individuals ($10 800), and from 150 to 300 penalty units for bodies corporate ($54 000).[25]

5.25 The Department of Employment stated that the current penalties in the Fair Work Act are, in many cases, too low to deter businesses which have manipulated records in order to disguise underpayments:

> These higher penalties are an acknowledgement of the important role employment records and payslips play in proving and recovering underpayments for employees, and deterring employers who may be considering undertaking these practices.[26]

5.26 The Department of Employment also noted that the higher penalties proposed in the bill are not intended to apply to genuine mistakes or errors:

> The Fair Work Ombudsman is required to act as a model litigant and must only bring proceedings in cases where penalties are appropriate. Courts also have discretion in determining penalties, and will reserve the highest penalties for the most serious cases.[27]

5.27 The EM also clarified that the increase in penalties is designed to target deliberate record-keeping failures:

> …it is aimed deterring the small minority of employers who deliberately fail to keep records as part of a systematic plan to underpay workers and disguise their wrongdoing.[28]

5.28 ACCI expressed concern with the increased penalties for record-keeping failures and noted that the record-keeping requirements prescribed in the Fair Work Regulations are highly prescriptive, and as such the margin for error for those businesses without sophisticated human resource and payroll systems is high. As such, the submission noted:

> …it is appropriate to distinguish between those who fail to comply because they are seeking to disguise their deliberate non-compliance with the law and those who do fail to comply for other reasons. The strict liability nature

24 See Item 12 of Part 1 of Schedule 1, Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017.

25 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Explanatory Memorandum*, p. 3. See also Department of Employment, *Submission 1*, p. 6.

26 Department of Employment, *Submission 1*, p. 6.

27 Department of Employment, *Submission 1*, p. 6.

28 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Explanatory Memorandum*, p. 3.

> of the offence risks capturing administrative breaches that do not give rise to egregious conduct of the nature that gave rise to the bill.[29]

5.29 HIA also stated that the increased penalties for record-keeping breaches would have an unduly negative impact on small business, as 'the reality is that some of these employers struggle with their paperwork obligations'. The HIA suggested that the penalties that relate to breaches of the employee records and pay slips provisions of the Fair Work Act be maintained at the existing levels.[30]

5.30 The South Australian Wine Industry Association (SAWIA) informed the committee that it did not take comfort from the assurances in the EM that the increased penalties would not target those who genuinely overlooked record-keeping requirements and noted as 'there is nothing other than the Fair Work Ombudsman's internal policy position that will guide whether a business that has made an honest mistake in relation to record-keeping will be subject to prosecution or not'. As such, SAWIA stated that it opposed the blanket increase in penalties.[31]

5.31 The National Farmers' Federation also put forward a similar position, noting that there was no exception in the bill that indicated the higher penalties would not apply in cases where the breach was unintentional.[32]

5.32 The Ai Group stated that it supported the increased penalties for breaches of employee record and pay slip requirements, noting that the increase would bring the penalties into line with penalties for breaches of other provisions of the Fair Work Act.[33] The ACTU, the Australian Manufacturing Workers' Union, 7-Eleven and Anti-Slavery Australia also supported the measures.[34]

Committee view

5.33 The committee believes that stronger penalties for breaches relating to record-keeping requirements are necessary to deter a small minority of employers who deliberately fail to keep appropriate records as part of a systematic plan to underpay workers and disguise their wrongdoing.

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29 Australian Chamber of Commerce and Industry, *Submission 5*, p. 10.

30 Housing Industry Association, *Submission 10*, p. 5.

31 South Australian Wine Industry Association, *Submission 18*, p. 6.

32 National Farmers' Federation, *Submission 14*, pp. 12–13.

33 Australian Industry Group, *Submission 6*, p. 5.

34 See Australian Council of Trade Unions, *Submission 8*, p. 8; Australian Manufacturing Workers' Union, *Submission 17*, p. 1; 7-Eleven, *Submission 28*, p. 3; Anti-Slavery Australia, *Submission 29*, p. 6.

Preventing cash-back practices

5.34 The bill seeks to amend the Fair Work Act in order to address the problem of a small number of unscrupulous employers requiring their employees to pay back part of their wages.[35] The EM sets out the specific detail of the amendment as follows:

> Item 22 amends subsection 325(1) to clarify the section prohibits employers from directly or indirectly requiring an employee to give 'cashback' or pay any other amount of the employee's money or the whole or any part of an amount payable to the employee in relation to the performance of work (whether to the employer or another person) if:
>
> - the requirement is unreasonable in the circumstances; and
> - the payment is directly or indirectly for the benefit of the employer or a party related to the employer (e.g. an owner or director of an employer, or a relative of the owner or director of an employer).[36]

5.35 A cash-back arrangement can be used by unscrupulous employers to underpay their employees. It involves an employer paying the correct wages to an employee, only to then require the employee to withdraw a portion of those wages in cash and return them to the employer.[37]

5.36 The Department of Employment stressed the need for the amendments in its submission:

> While the Fair Work Ombudsman's investigation into 7-Eleven highlighted the 'cashback' practice, it is important to emphasise that this behaviour is not contained in the franchising sector. In recent years, there have been reports of this practice occurring across a range of business models.[38]

5.37 JobWatch provided several examples of the cash-back arrangements. It stated that it frequently dealt with many young, immigrant, or otherwise vulnerable workers who experienced such conduct, and that the behaviour was not isolated or limited to large corporations.[39]

5.38 The FWO stated that its inspectors had observed increased instances of cash-back practices in recent years, often in situations involving vulnerable workers. The FWO provided details on the operation and impact of cash-back arrangements:

> In the FWO's experience, cash-back arrangements have been a particular concern in matters involving visa holders. In these cases, cash-back

35 See Part 3 of Schedule 1, Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017.

36 Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Explanatory Memorandum*, p. 12.

37 Fair Work Ombudsman, *Submission 4*, p. 38.

38 Department of Employment, *Submission 1*, p. 8.

39 JobWatch, *Submission 27*, pp. 7-8.

> arrangements are often being used as a way of creating the perception that visa requirements are being met and that employees are being paid their lawful wages. Visa holders often comply with unreasonable requests to repay their wages for fear of losing sponsorship or residency rights under other visas.[40]

5.39 The FWO emphasised that such conduct was deliberate, insidious, and often extremely challenging to detect and take action against under the current framework. The existing section 325 of the Fair Work Act precludes employers from unreasonably requiring employees to spend amounts of their wages, including where the intention of the cash repayments is to simply return a portion of the wages to the employer. The FWO informed the committee that in practice, however, it was difficult for it to satisfy all of the necessary elements of the provision, such that a court would determine that the provision had been breached. This was particularly the case given that cash-back arrangements were 'off the books', and as such it was extremely challenging for the FWO to obtain the necessary evidence.[41]

5.40 The FWO stated that the amendments proposed in the bill would assist it in proving contraventions of section 325, leading to better outcomes for affected employees:

> As worded currently, cash-back payments are only expressly prohibited where the monies paid back to the employer are directly linked to the employee's wages. The broadened scope of 'an employee's money' can apply to any amounts possessed by the employee that are required to be spent in an unreasonable way and for the benefit of the employer; removing the need to prove the link between the cash payments and the employee's wages.[42]

5.41 Numerous submitters indicated they supported the cash-back amendments, including the Ai Group, SAWIA, the ACTU, 7-Eleven, the Salvation Army, JobWatch, and the ICA.[43]

5.42 WEjustice recommended that the cash-back prohibitions be extended to prospective employees and suggested some proposed text to achieve it.[44]

5.43 Dr Hardy and Dr Tham suggested a similar extension, noting that as currently drafted the amendments did not include prospective employers and employees, and

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40 Fair Work Ombudsman, *Submission 4*, p. 38.

41 Fair Work Ombudsman, *Submission 4*, pp. 38–39.

42 Fair Work Ombudsman, *Submission 4*, p. 39.

43 See Australian Industry Group, *Submission 6*, p. 5; South Australian Wine Industry Association, *Submission 18*, p. 6; the Australian Council of Trade Unions, *Submission 8*, p. 10; 7-Eleven, *Submission 28*, p. 4; Salvation Army, *Submission 25*, p. 2; JobWatch, *Submission 27*, p. 7; Independent Contactors Australia, *Submission 32*, p.1.

44 WEstjustice, *Submission 2*, p. 12. For proposed text, see p. 25 of the submission.

would therefore not assist with combating the practice of prospective employers extracting payments from 417 visa holders.[45]

Committee view

5.44 The committee supports the cash-back amendments as it believes that they will improve the FWO's ability to pursue cash-back arrangements being used by a small number of unscrupulous employers to underpay vulnerable workers.

Concluding comments

5.45 The committee has a long-standing interest in the protection of vulnerable workers in Australian society. As noted at various points in this report and in the EM to the bill, the committee's references counterpart, the Senate Education and Employment References Committee, conducted a significant inquiry into the exploitation of temporary work visa holders which drew attention to the unsatisfactory behaviour of some employers.

5.46 The committee strongly believes that the deliberate and systematic exploitation of workers by a small minority of employers is unacceptable, and as such it sees the merit in appropriate measures that seek to deter unlawful practices and stamp out non-compliant behaviour.

Recommendation 4

5.47 Subject to the recommendations contained elsewhere in this report, the committee recommends that the Senate pass the bill.

Senator Bridget McKenzie

Chair

45 Dr Tess Hardy and Dr Joo-Cheong Tham, *Submission 26*, pp. 15–17.