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Submission from the Salvation Army Australia and the Synod of Victoria and Tasmania, Uniting Church in Australia to the Inquiry into improving protections of employees' wages and entitlements: strengthening penalties for non-compliance

25 October 2019

The Salvation Army and the Synod of Victoria and Tasmania, Uniting Church in Australia, welcome the opportunity to submit to this inquiry of the Attorney-General's Department into the current penalty, compliance, and enforcement framework for breaches of the *Fair Work Act 2009* (Fair Work Act).

The vulnerabilities that migrant workers experience are well documented both internationally and domestically. A recent study prepared by Minderoo Foundation's Walk Free initiative and the International Organization for Migration (IOM) for the Alliance 8.7 Action Group on Migration, suggested connections exist between migration and criminal forms of exploitation such as human trafficking, forced labour and modern slavery. [i]

The submitting bodies acknowledge the Government's commitment to protecting all vulnerable workers, including migrant workers. The introduction of more stringent penalties, additional resources and strengthened investigative powers for the Fair Work Ombudsman (FWO) are some of the steps taken by the Government to eliminate exploitation in some Australian workplaces.

Nevertheless, some groups remain more vulnerable than others, such as women, children, ethnic minorities, and people who lack resources. Limited English language skills, lack of awareness of Australian workplace laws, and fear of visa cancellation or removal from Australia are only some of the factors which make migrant workers particularly vulnerable to workplace exploitation. Those with irregular status, in particular, are often denied basic entitlements and services.

At present, the rights of many migrants remain precarious, as highlighted by a report recently published by the National Union of Workers[ii] which focused on the exploitation occurring in the Australian farm sector. The report gives voice to migrant workers who live and work in Australia, mainly from South East Asia and across to the Pacific. The research found that only 35% of the workers speaking out reported holding a valid work visa, with two-thirds of all the farmworkers surveyed earning below the minimum wage.

There is a close connection between abuses and severe forms of exploitation, like forced labour, and the shadow economy. It is estimated that the shadow economy could be as large as 3 per cent of GDP (roughly $50 billion).[iii] The shadow economy undermines the integrity of Australia's economy, tax and welfare systems by creating an uneven playing field. If left unchecked, it enables and entrenches the exploitation of workers.

The Migrant Workers' Taskforce Report concluded "the problem of wage underpayment is widespread and has become more entrenched over time", with as many as half of temporary migrant workers may be underpaid.[iv]

The Synod of Victoria and the Salvation Army recognise that a clear focus of this inquiry is in ensuring that the industrial relations system does not contain impediments to shared gains for employers and employees. A key focus for the submitting bodies is how the current penalty framework can be improved in order to address wage underpayment and employee exploitation.

Part I: Civil penalties in the Fair Work Act

Current approach to determining penalties

1. What level of further increase to the existing civil penalty regime in the Fair Work Act could best generate compliance with workplace laws?

Review of criminological literature on what works to deter crime finds that there is substantial evidence that it is the perceived risk of apprehension that is more effective in deterring crimes than the level of penalty once the level of punishment is adequate.[v] This literature finds that perceived certainty of punishment is associated with reduced intended offending, assuming again the penalty is adequate.[vi] The conclusion is that with an adequate penalty, it is the risk of apprehension and not the severity of the legal consequences ensuing from prosecution that is the more effective general deterrent.[vii]

In this case, the level of repeat offending by businesses engaged in wage theft is a reliable indicator that the penalty is not adequate. A report released in November 2018 by the FWO, found that 184 (38 per cent) of the 479 employers previously found to be in breach of their obligations still fell short of the mark.[viii] Of all the businesses that were found to be breaking the law a second time, only two were prosecuted, while the rest were given formal cautions or infringement notices or other compliance incentives.[ix] The fact that businesses are engaging in repeated wage theft activities is a reliable indicator the penalty is not yet sufficient to act as either specific or general deterrence.

The submitting bodies are concerned that when penalties are limited by what a business can afford to pay, it means the business owners are capable of knowing the size of their business will limit the size of the penalty. Further, it provides incentives to those engaged in deliberate wage theft to structure their business arrangements to avoid higher levels of penalty by making sure they can argue that a higher penalty will drive them out of business. There is a need to acknowledge where a company has engaged in substantial wage theft, they may have gained a significant competitive advantage, resulting in other businesses collapsing with the employees and shareholders in those businesses harmed. Further, they may have destroyed the ability of other employers to provide decent jobs for their employees if they wish to remain competitive. Therefore, where business

owners have engaged in deliberate and substantial wage theft, the penalties should not be limited by what the business can afford. Driving criminals out of business is likely to be better for the industry in question as a whole. Further penalties need to flow over onto the individuals involved, to remove the incentives to set up legal arrangements that limit the impact of sanctions. For example, it is our understanding that both unions and community legal centres often encounter structures where employees are employed by a company with no assets so that there are no assets to pursue in a wage theft case. A separate company owns the real assets of the business.

2. What are some alternative ways to calculate maximum penalties? For example, by reference to business size or the size of the underpayment or some measure of culpability or fault.

The submitting bodies believe that the principle that should apply here is that the penalties need to be sufficient to ensure that it is not worthwhile for the business to engage in deliberate wage theft or reckless underpayment of wages. A small fine and repayment of the wages will not be sufficient to deter business owners that are willing to steal from their employees. Thus the penalty should be calculated as a multiple of what has been stolen. However, the size of the final penalty would be left to the discretion of the regulator, in this case, the Fair Work Ombudsman.

For example, with the Australian laws covering bribery of foreign officials, the penalties for a body corporate can be three times the benefit obtained, if the benefit from the bribe can be calculated. If the benefit from the bribe cannot be calculated, then the penalty is 10% of the company's annual turnover.[x]

Given the anecdotal high use of shell companies with few assets as vehicles for wage theft, penalties must attach directly to those who own and control the body corporate used to carry out the wage theft as individuals. Significant financial penalties only aimed at the corporate vehicles are likely to encourage those that deliberately carry out wage theft to set up such corporate arrangements to ensure there are insufficient assets attached to the body corporate to be able to repay the wages stolen and certainly nothing to pay a fine.

For a more substantial penalty, flexibility could be allowed for the conditions of repayment, allowing the stolen wages and associated fine to be repaid within a reasonable timeframe.

As noted above, limiting the penalties based on what a business can afford to pay and stay in business will continue to encourage people setting out to conduct wage theft to set up corporate structures for that purpose. The structures conducting wage theft have few assets.

The role that artificial corporate structures play in cases of wage theft highlights the need for the other corporate reforms the government has conducted consultations on, including:

- The introduction of a Director Identification Number;
- Reforms of the Australian Business Number system to ensure the information attached to the ABN is accurate and up-to-date;
- Improvements of the business registry, ensuring the information contained in it is accurate and up-to-date and managed by a regulator that is committed to that outcome; and
- The introduction of an ultimate beneficial ownership register. However, this would only be helpful if the information contained in the register is made public so as to assist employees who have been subjected to wage theft to know who is likely to be ultimately responsible.

The Fair Work Ombudsman investigation into the network of labour hire businesses that were used to employer workers at several sites of chicken processing corporation Baiada highlighted the problems with the current system of corporate regulation. The use of shell companies with false addresses was used to frustrate the Fair Work Ombudsman. For example, concerning the Hanwood site, the Fair Work Ombudsman reported:[xi]

> *As Figure 5 demonstrates, this site has a complicated procurement chain at the bottom level and the Inquiry was unsuccessful in its efforts to engage with a number of the lower level contractors, with all but one ceasing operations when contacted by the FWO.*
>
> *DMY Trading Pty Ltd and Yu Lin Trading Pty Ltd, operated by husband and wife directors, provided Fair Work Inspectors with records for their six subcontractors at the Hanwood site. When Fair Work Inspectors attempted to serve a Notice to Produce on one subcontractor, they found an automotive workshop. The director of that business advised he had been at the registered address for 25 years and had never heard of the subcontractor named in the Notice.*
>
> *Contact with two further entities identified they operated as clothing manufacturers and were not involved in the poultry processing industry. One of these entities had ceased operating in 2012, and the other ceased operating during the course of the Inquiry. Referrals are being made to other relevant enforcement agencies.*

As a further example of labour hire companies under investigation for wage theft just shutting down in an attempt to disappear and escape sanction, in the Baiada investigation the Fair Work Ombudsman reported:[xii]

> *In one example, the director of DHA Australia Pty Ltd operating in Hanwood and Azurenet Pty Ltd operating in Beresfield agreed to meet with Fair Work Inspectors. The day before the meeting was to take place, he sent an email advising Fair Work Inspectors that as a result of the inquiry, he was liquidating the entities. The liquidator sought records from the director, which he failed to provide.*

In another example, a labour hire business with weak identification of the real ownership and control structure was reported by FWO as not being able to account for a large amount of money it had been paid and was shut down to avoid repaying workers it had stolen money from. As reported by FWO:[xiii]

> *Early on in the Inquiry, another principal contractor Mushland Pty Ltd (Mushland), provided a limited number of records though failed to disclose information that was specifically requested by Fair Work Inspectors. During the course of the Inquiry, the phones of both the company director and accountant were disconnected, and the Baiada Group was unable to provide any further contact details for the parties.*
>
> *Analysis of the limited records, which included invoices and pay records provided by Mushland, identified the entity was paid $255,415.07 by the Baiada Group for the month of October 2013 (the Inquiry's sample period). The records also disclosed Mushland paid $52,460.85 in wages to 18 employees during this period, leaving a margin of $202,954.22.*

An underpayment of $3,378.76 for 11 employees during the one month sample period was also identified. Mushland deregistered on 16 July 2014 without back payment to the workers being made.

As far as the submitters are aware, there were no consequences for the wage theft for the managers and ultimate beneficial owners of Mushland Pty Ltd, whomever they might have been.

3. Should penalties for multiple instances of underpayment across a workforce and over time continue to be 'grouped' by 'civil penalty provision', rather than by reference to the number of affected employees, period of the underpayments, or some other measure?

Currently, through the operation of section 557 of the *Fair Work Act*, the Court is permitted to treat two or more contraventions of certain civil remedy provisions as a single contravention if they arise out of the same course of conduct. As highlighted in the discussion paper, "if a company engages in a course of conduct that contravenes a single term of a modern award in respect of ten employees, the court can group these ten contraventions so as to attract a single penalty". In other words, ten instances of wage underpayments by a company will only attract a maximum penalty of $63,000 rather than a total potential penalty of $630,000 if the contravention arises out of the same breach. We believe that the penalties should increase in proportion to the extent of the violation, extending the ability of the courts to punish repeat recalcitrant employers severely.

Fair Work Amendment (Protecting Vulnerable Workers) Act 2017

4. Have the amendments effected by the Protecting Vulnerable Workers Act, coupled with the FWO's education, compliance and enforcement activities, influenced employer behaviour? In what way?

On 5 September 2017, the Parliament had passed the *Fair Work (Protecting Vulnerable Workers) Act 2017 (Cth)* (Protecting Vulnerable Workers Act). The legislation amended the *Fair Work Act* intending to establish stronger penalties and provide the FWO more powers. The submitting bodies welcome these reforms.

The impact of these reforms has been constrained by the limits of the FWO's resources. As noted by the Australian Council of Trade Unions (ACTU) secretary Sally McManus, in 2018 there were only about 200 FWO inspectors charged with enforcing workplace laws for more than 12 million workers.[xiv] The limits of the FWO resources mean that there is a risk that "at the moment employers know the chances of being caught are low so it is worth the risk".[xv] More power to unions to inspect records and recover stolen wages could be an additional way of achieving better compliance.

5. Has the new 'serious contravention' category in the Fair Work Act had, or is it likely to have, a sufficient deterrent effect?

While the increased penalties are welcome, on their own, they are not likely to have much impact. There is a need also to increase the probability of being caught. There is also a need to ensure that any financial sanction imposed is paid.

This is the case of labour hire business Maroochy Sunshine Pty Lt and its director, who were imposed a penalty of $227,300 for deliberately exploiting vulnerable foreign workers after luring them to Australia with a string of false promises.[xvi] Twenty-two seasonal workers from Vanuatu were

underpaid $77,649 over just seven weeks when they were employed to pick fruit and vegetables at sites in the Lockyer Valley, Sunshine Coast and Bundaberg areas. Maroochy Sunshine Pty Ltd was penalised $186,000 and its sole director, Emmanuel Bani, a further $41,300 in the Federal Circuit Court in Brisbane in March 2017 following legal action by the Fair Work Ombudsman.

In his judgment, Judge Michael Jarrett described Mr Bani's "appalling treatment" of the workers as having deprived them of the appropriate basic living standards expected in Australia and causing a "profound impact" upon them and their families.

One of the workers gave evidence that working for Mr Bani's company was like "slavery times" and that he had "never before experienced working a full day without even a cup of tea and only being fed tomatoes".

Workers were sometimes forced to work entire days harvesting produce without any food or drink and for no pay.

The Court heard that Mr Bani would get angry and scream if workers asked him about their pay, sometimes threatening to call the police and have the workers thrown in prison.

The Court ordered Maroochy Sunshine to back-pay the workers their outstanding entitlements of $77,649. If the company did not make the back-payment, the Court ordered that the penalty imposed on Mr Bani go towards partially rectifying the underpayment of the workers.

However, the workers who had their wages stolen have not, to date, been repaid the money ordered by the court, suggesting that Emmanuel Bani was able to escape the court-imposed penalty. The Australian Catholic Religious Against Trafficking in Humans continue to pursue the case, seeking repayment of the stolen wages.

Extending liability

6. Do the existing arrangements adequately regulate the behaviour of lead firms/head contractors in relation to employees in their immediate supply chains?

There is a need to ensure that employers willing to benefit from wage theft are not able to do so by the use of contractors and subcontractors engaged in the activity. A business can gain an advantage by using a contractor or subcontracting arrangement involving wage theft as the contractor then offers a lower price for the service than a company paying the legal wages would be able to offer. The challenge for the law is to deter such arrangements without placing unreasonable burdens on companies that have genuine arms-length contracting arrangements. However, even where the contracting arrangement is for legitimate purposes the contracting company needs to have incentives to take reasonable steps to ensure that the employees of contractors and subcontractors are not being subjected to wage theft and other abuses.

As observed by the Migrant Workers' Taskforce in its latest report, a comprehensive accessorial liability provision is currently missing. To promote voluntary compliance with employment standards in complex business structures where a 'lead business' who is not the direct employer benefits from the labour of the relevant employees, the Taskforce supported the use of compliance partnerships. Compliance partnerships would be an additional avenue to hold individuals and businesses to account for their involvement in breaches of workplace laws, with specific reference to:

a) extending accessorial liability provisions of the *Fair Work Act 2009* also to cover situations where businesses contract out services to persons, building on existing provisions relating to franchisors and holding companies

b) amending the *Fair Work Act 2009* to provide that the Fair Work Ombudsman can enter into compliance partnership deeds and that they are transparent to the public, subject to relevant considerations such as issues of commercial in confidence.

In addition to this, there is a need for a national labour hire licensing scheme to ensure that unscrupulous operators cannot abuse labour hire arrangements and take advantage of vulnerable workers. A 2018 report released by the Senate Education and Employment References Committee considers that such an initiative would be highly beneficial in assisting lead firms in choosing ethically sound and legally compliant labour hire operators to engage with.[xvii]

7. Should actual knowledge of, or knowing involvement in, a contravention of a workplace law be the decisive factor in determining whether to extend liability to another person or company? If not, what level of knowledge or involvement would be appropriate? Would recklessness constitute a fair element to an offence of this type?

As stated by the Attorney-General Christian Porter,[xviii] the submitting entities agree that the scope of this review should not be to provide criminal sanction to employers who make genuine mistakes and move swiftly to rectify them. However, when underpayment is substantial, sustained, and there is a level of knowledge that is very high where employers knew or could be inferred to know of the breaches harsher penalties should be imposed to provide for a higher level of general deterrence. Criminal sanctions should rightly apply to offending where there is clear evidence of deliberate or reckless persistent or repeat offending or offending on a significant scale.

What emerged from the report of the Migrant Workers' Taskforce is that the enforcement of existing laws is a challenge, especially when labour hire operators are numerous, hard to identify and readily able to 'illegally phoenix'. The submitting bodies agree with the Taskforce that government regulators should enhance their monitoring and enforcement of labour hire operators, including through the effective use of data-sharing and joint investigations.[xix] However, the law needs to be reformed to make it easier for regulatory authorities to detect and prosecute cases of wage theft. Meaningful and enforceable penalties need to apply then so that where a prosecution occurs, it contributes to general deterrence of others that would be tempted to benefit from wage theft.

8. What degree of control over which aspects of a business is required before a business owner should be expected to check the compliance of contractors further down the supply chain?

Although the outsourcing of labour can be a legitimate business decision to meet seasonal or urgent demands, it is also essential to implement appropriate governance and oversight. Conducting regular audits of subcontractors (verified by third party accounting, legal or workplace relations professionals) to ensure compliance with Australian workplace laws should become a regular practice.

As emerged from a 2015 inquiry conducted by the Fair Work Ombudsman into the labour procurement arrangements of the Baiada Group in New South Wales, the poultry processing operator had adopted an operating model which created an environment where non-compliance of

workplace laws were occurring.[xx] Employees working at the Baiada Group's sites were not being paid their lawful entitlements. Several entities throughout an extensive supply chain network did not engage any workers or have any direct involvement in work undertaken within the Baiada Group's NSW processing plants or the sourcing or management of the people undertaking the work.

In other cases, even where risks of exploitation were acknowledged, mitigation measures were not adequately enforced by businesses, as emerged from the FWO's inquiry into the procurement of cleaners in Tasmanian supermarkets.[xxi] Thanks to this investigation, the FWO found that while Woolworths had measures in place to manage the risks of non-compliance in its supply chain relating to cleaning services (for instance, auditing, visitors' books, identification and limits of contracting), the company failed to invest in ensuring compliance with these measures. The FWO observed that Woolworths failed to appreciate the dynamics of the market below the principal contract level and therefore failed to manage its labour supply chain at the time properly.

In cases of non-compliance like the ones outlined above, the introduction of Proactive Compliance Deeds can be a useful innovation for the regulator. Compliance Partnership is a collaborative relationship between the regulator and a business who wishes to demonstrate its commitment to creating compliant and productive workplaces publicly. A Compliance Partnership is formalised through a Proactive Compliance Deed that is a document signed by both the FWO and the business. The Deed outlines the steps both parties will take to ensure compliance with workplace laws, especially where supply chain links enable main suppliers or franchisors to exercise influence on downstream firms.

9. What are the risks and/or benefits of further extending the accessorial liability provisions to a broader range of business models, including where businesses contract out services?

Although in 2017, the *Fair Work Act* was amended to establish liability for wage theft on the part of franchisors and lead companies in corporate groups, this should be further extended to apply to other organisational forms, such as supply chains and labour hire arrangements.[xxii] This approach could establish responsibility for remedying wage theft on the part of businesses at the top of supply chains or other corporate structures in which systemic underpayment of workers occurs. There is a need to strengthen provisions relating to franchise and holding companies.

The Migrant Workers' Taskforce found that the enforcement of existing laws is a challenge, especially when labour hire operators are numerous, hard to identify and readily able to 'illegally phoenix'. The submitting bodies agree with the Taskforce that government regulators should, as far as possible, enhance their monitoring and enforcement of labour hire operators through existing regulatory and enforcement frameworks, including through the effective use of data-sharing and joint investigations.[xxiii] However, there is a need for a national labour hire licensing laws that require such operators to identify who owns and controls them. To that end, we welcome the commitment of the Commonwealth Government to introduce a labour hire registration arrangement and look forward to contributing to the consultation on the development of the mechanism. The labour hire registration arrangement needs to include an offence for an employer to engage a labour hire business that is not registered.

Sham contracting

10. Should there be a separate contravention for more serious or systemic cases of sham contracting that attracts higher penalties? If so, what should this look like?

Sham contracting is when workers are wrongly and deliberately identified as independent contractors when by law, they should be employees. Sham contracting frustrates a worker's access to employee entitlements such as minimum wage, paid leave, and superannuation contributions. This unlawful practice has a high incidence in specific industries, such as construction, cleaning and security. It is prohibited under the *Fair Work Act 2009 (Cth).* Society is affected because sham arrangements facilitate tax avoidance by both employers and workers. Also, unscrupulous employers engaged in this practice get an unfair commercial advantage through reduced labour costs, both over law-abiding employers and those involved in genuine independent contracting arrangements. According to the Australian Council of Trade Unions (ACTU),[xxiv] in 2018, it was estimated that almost $2.5 billion per annum of tax revenue was lost in the construction industry alone through the abuse of sham contracting arrangements.

For these reasons, the submitting organisations support stronger penalties for severe and systemic cases of sham contracting. The penalties should be proportionate to the harm caused and to the level of the benefit obtained by the entity or individuals responsible for the sham contracting arrangement and those profiting from it.

Together with the introduction of higher penalties for more serious or systemic cases of sham contracting, the submitting entities support changes to the *Fair Work Act* to properly define casual employment and provide casual employees with the right to convert to permanent employment after six months of service.

11. Should the recklessness defence in subsection 357(2) of the Fair Work Act be amended? If so, how?

The submitting entities agree with the Migrant Workers' Taskforce that for the most severe forms of exploitative conduct, such as where that conduct is clear, deliberate or reckless and systemic, criminal sanctions be introduced in the most appropriate legislative vehicle.

As highlighted in the 2019 McKell Institute's report, in order to send a clear message that wage theft cannot and will not be tolerated, "State and Territory governments should amend their criminal codes to criminalise intentional, reckless or grossly negligent instances of wage theft".[xxv] A tiered system of penalties could be introduced, where penalties are based on the seriousness of the conduct, providing a proportionate response to employers' conduct. This was the position adopted by the Queensland Education, Employment and Small Business Committee in its *Report No. 9, 56th Parliament - A fair day's pay for a fair day's work? Exposing the true cost of wage theft in Queensland* released on 16 November 2018.[xxvi]

Part II: Criminal sanctions

Current approach to criminal sanctions as part of the enforcement framework

12. In what circumstances should underpayment of wages attract criminal penalties?

Several lawyers and unions have been calling for laws making wage theft a crime and introducing a tiered system of fines and potential prison sentences to punish and deter employers.[xxvii] Such a system would reduce the procedural and cost limitations workers face recovering their unpaid wages in the civil system. Making wage theft a criminal offence would provide a mechanism to hold employers accountable and deter the use of wage theft as a viable business practice. As recently stated by Professor Allan Fels, former chairman of the Australian Competition and Consumer Commission, here should be the real prospect of prison sentences "in sustained, substantial and intentional cases".[xxviii] The Migrant Workers' Taskforce's call for monetary penalties as high as $10 million or 10% of annual turnover.

Together with the introduction of harsher penalties in the case of serious forms of exploitative conduct, the submitting entities urge that more resources be provided to support every vulnerable migrant worker with a court claim. Going to court is a huge obstacle for anyone. Going to court as an individual against a business with much greater power and resources is an even more significant challenge. Community Legal Centres and the FWO can only help a fraction of disadvantaged or vulnerable workers subjected to wage theft. Court proceedings can take years, and it can all prove too much for many underpaid workers.

13. What consideration/weight should be given to the whether an underpayment was part of a systematic pattern of conduct and whether it was dishonest?

It should be a serious matter where the underpayment was part of a systematic pattern, and such behaviour should attract a higher penalty where it was deliberate. It should also attract a penalty where it was reckless or negligent.

Higher penalties again should apply where there has been a deliberate attempt dishonestly conceal the wage theft from detection. Efforts to conceal wage theft should be taken as proof that wage theft was intentional. Such efforts might include keeping a second set of books to hide the wage theft or lying to regulatory authorities. Such behaviour could be the subject of a separate criminal offence, where it is not already a criminal offence.

14. What kind of fault elements should apply?

15. Should the Criminal Code [see the Schedule to the Criminal Code Act 1995 (Cth)] be applied in relation to accessorial liability and corporate criminal responsibility?

16. What should the maximum penalty be for an individual and for a body corporate?

17. Are there potential unintended consequences of introducing criminal sanctions for wage underpayment? If so, how might these be avoided?

18. Are there other serious types of exploitation that should also attract criminal penalties? If so, what are these and how should they be delivered?

Criminal penalties should apply where an employer compels an employee to pay back part of their wage to the employer where the law does not require such payment. The aim is to deter the behaviour reported where an employer seeks to make the accounts seem like the employee is being paid the correct wages, but the employee is being forced to return part of their pay to the employer secretly. Such an arrangement is another form of wage theft.

Further Information

The submitting bodies would welcome the opportunity to discuss the content of this submission should any additional information be of assistance.

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