



A M W U

National Research
Centre
Level 3, 133
Parramatta Road
Granville NSW 2151

Attorney-General's Department – Industrial Relations Consultation
Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance

Response of the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)

25 October 2019

1. The AMWU represents over 70,000 workers who create, make and maintain across major sectors in the Australian economy. The enforcement of our members' industrial entitlements is part of our core work.
2. The paper prepared by the Attorney-General's department identifies four broad areas in which the Attorney-General's department proposes to focus, with an emphasis on two areas in this paper.
3. We consider that the matters identified cannot be dealt with in isolation and it is appropriate that they be dealt with together. For the avoidance of doubt though, the AMWU intends to respond to any further paper that deals with the four broad matters that are identified in the opening of the paper.
4. The paper identifies the work performed by the Fair Work Ombudsman (FWO) and the Australian Building and Construction Commission (ABCC) in pursuing unpaid industrial entitlements for employees.
5. We do not consider that the \$1 million apparently recovered by the ABCC for employees is of any great moment, considering the size of the building and construction sector and the resourcing of the ABCC.
6. Table 1 of Attachment A of the paper identifies the enforcement tools used by FWO, being compliance notices, infringement notices, enforceable undertakings and litigation.
7. The AMWU is concerned that the deployment of lesser compliance tools by FWO in relation to significant underpayments made by well-resourced, industrially sophisticated employers does not properly serve the interests of employees whose legal rights have been affected or the public.
8. For example, the enforceable undertakings entered into by MADE Establishment Pty Ltd (MEPL),¹ required it to pay its employees in relation to over \$7.8 million of unpaid industrial entitlements, and to pay a \$200,000 "contrition payment" to the Commonwealth, along with a number of other non-financial obligations.
9. This underpayment was substantial in amount given the length of time. The latter point would, in the ordinary course of litigation be cured by a Court issuing orders in respect of accrued and accruing interest² in order to recognise the period in which employees are deprived of the utility of their pay. The contrition payment made by MEPL, even if it had been made to employees, rather than the Commonwealth, would not account for that interest. MEPL had the benefit of these amounts over a significant period of time.

¹ Fair Work Ombudsman (Cth), 'MADE Establishment signs undertaking' (Page Reference no: 9062, 18 July 2019) <<https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/july-2019/20190718-made-establishment-eu-media-release>>

² Section 547, *Fair Work Act 2009*.

10. Nor does the enforceable undertaking entered into by MEPL account for the possibility of further loss sustained by employees that flowed from MEPL's contraventions of the FW Act (for example, due to dishonour fees or loss of opportunity) or for the imposition of pecuniary penalties. The deterrent effect, both specific and general, of such a payment in these circumstances, is minimal.
11. The AMWU also notes the enforceable undertakings entered into by Thales,³ requiring that Thales repay \$7.44 million to 407 employees, along with a further, comparatively small, contrition payment of \$200,000. The amount paid to employees does, according to the undertaking, contain a component for interest paid to those employees. However, again, there is no component for further loss sustained by employees.
12. Courts, where satisfied of a contravention of the *Fair Work Act 2009* and depending on the jurisdiction, may issue orders in relation to loss,⁴ interest⁵ and pecuniary penalties.⁶ We accept, of course, that litigation is expensive, resource intensive and should be a tool of last resort. We also accept that regulators are required to manage finite resources. However, in the AMWU's view, the outcomes secured for employees by the enforceable undertakings and the associated deterrent effects were inadequate.
13. Unions are well placed to enforce industrial entitlements in a manner that adequately take into account their individual members' interests. We consider that a sensible and efficient proposal to deal with wage underpayment and employee exploitation must include close consideration of the role that unions have to play in securing and enforcing employees' industrial entitlements, including by:
- a. bolstering the currently limited ability of unions to inspect and review pay records and litigate on behalf of employees in relation to their claims;
 - b. the correct setting of civil penalties at increased rates that properly take into account specific and general deterrence;
 - c. the extension of liability for contraventions to corporate officers and advisors involved in a contravention and appropriate sanctions, such as loss of accreditation; and
 - d. the imposition of criminal liability.
14. The AMWU has reviewed, in draft form, the response prepared by the Australian Council of Trade Unions (ACTU) in relation to the paper prepared by the Attorney-General's department. The AMWU expresses support for the recommendations in that submission.

³ Fair Work Ombudsman (Cth) 'Thales signs court-enforceable undertaking', (Page reference No: 9022, 30 August 2019), <<https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/august-2019/20190830-thales-eu-media-release>>

⁴ Section 545(2)(b), *Fair Work Act 2009*.

⁵ Section 547, *Fair Work Act 2009*.

⁶ Section 546, *Fair Work Act 2009*.