AUSTRALIAN GOVERNMENT
ATTORNEY-GENERAL'S DEPARTMENT

INDUSTRIAL RELATIONS CONSULTATION

IMPROVING PROTECTIONS OF EMPLOYEES' WAGES AND ENTITLEMENTS: STRENGTHENING PENALTIES FOR NON-COMPLIANCE

Submission

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SCOPE OF SUBMISSION

1. At the outset, I note that the Discussion Paper prepared and published by the Attorney-General's Department[1] focuses on two matters identified in the Migrant Workers' Taskforce Report,[2] namely:

   i) the adequacy of existing penalty framework; and
   ii) the introduction of criminal sanctions for the most serious form of exploitative workplace conduct.

2. While these two issues have garnered much public interest, it is challenging to deal with these matters in isolation from other aspects of the compliance and enforcement landscape, including the resourcing and strategy of the Office of the Fair Work Ombudsman (***FWO***), detection mechanisms, alternative compliance initiatives and enforcement tools, processes for effective worker redress and the regulatory role played by various actors beyond the FWO. Nonetheless, given the focus of the current Discussion Paper and the possibility to make further contributions in the future, this submission is largely concerned, but not necessarily confined, to questions relating to penalties and liability.

BACKGROUND

3. It is increasingly difficult to maintain that underpayment and other exploitative behaviours is confined to a 'small number of employers'.[3] Various investigations, inquiries, reports and research have confirmed that underpayment Australia is not only widespread, but potentially becoming worse over time.[4] In the past week, Woolworths has admitted to underpaying up to $300 million over a 10 year period.[5] This is a staggering sum. The Woolworths case is now set to eclipse 7-Eleven as the biggest instance of systemic underpayment ever recorded in this country. While this latest scandal is shocking, it is not necessarily novel – Woolworths has now joined a long list of large corporate firms that have underpaid their direct workforce.[6]

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[1] Attorney-General's Department, 'Improving protections of employees' wages and entitlements: Strengthening penalties for non-compliance', Discussion Paper, 2 (***Discussion Paper***).
[2] Australian Government, *Report of the Migrant Workers' Taskforce*, March 2019 (***Migrant Workers' Taskforce Report***).
[3] Discussion Paper, above n 1, 2.
[4] Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Worker Survey* (November 2017); Fiona Macdonald, Eleanor Bentham and Jenny Malone, 'Wage Theft, Underpayment and Unpaid Work in Marketised Social Care' (2018) 29(1) *Economic and Labour Relations Review* 80; Stephen Clibborn and Chris Wright, 'Employer Theft of Temporary Migrant Workers' Wages in Australia: Why has the State Failed to Act?' (2018) 29(2) *The Economic and Labour Relations Review* 207.
[5] Peter Ryan and David Chau, 'Woolworths investigated after admitting it underpaid 5,700 staff up to $300 million', *ABC News*, 30 October 2019.
[6] Anna Patty, 'Worker underpayment at Woolworths sparks calls for company payroll audits', *The Sydney Morning Herald,* 31 October 2019.

4. As noted in the Discussion Paper, the enforcement framework underwent significant reform in 2017.[7] The flow-on effects of these reforms are yet to be fully realised or measured.[8] Cases brought under the new provisions are only now filtering through the courts.[9] However, as these latest scandals emerge, it seems that the problem of employer non-compliance has reached 'epidemic'[10] proportions and further steps are urgently required.

5. There is no shortage of ideas about how the current system might be improved. Over the past five years, there has been an almost constant stream of inquiries – at both state and federal levels.[11] Combined, these inquiries have generated a host of recommendations designed to enhance employer compliance with workplace laws. These recommendations include establishing a labour hire licensing or registration scheme, mandating the payment of salaries and wages into bank accounts to improve transparency,[12] providing courts with specific powers to make adverse publicity orders and banning orders,[13] expanding the scope and application of infringement notices and compliance notices[14] and reviewing forums for redress –

[7] *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth).

[8] But see the special issue on 'Emerging Business Models and the Evolving Regulatory Response: Perspectives from Australia and Beyond' (2019) 32 *Australian Journal of Labour Law.*

[9] As at October 2019, the FWO had initiated at least seven cases under these new laws. This included three matters involving allegations of false and misleading information being providing to a Fair Work Inspector, namely: *Fair Work Ombudsman v Desire Food Pty Ltd & Chern Ming Lee*; *Fair Work Ombudsman v Pulis Plumbing Pty Ltd & Anor*; and *Fair Work Ombudsman v China Bar Buffet (Epping) Pty Ltd & Ors*. There are also three ongoing matters involving allegations of 'serious contraventions' (i.e. *Fair Work Ombudsman v IE Enterprises & Anor; Fair Work Ombudsman v Mashnicisa Pty Ltd & Anor*; and *Fair Work Ombudsman v Blue Sky Kids Land Pty Ltd* & Ors). So far, only one matter has reached final determination stage (see *Fair Work Ombudsman v A & K Property Services Pty Ltd & Ors* [2019] FCCA 2259 (16 August 2019). See Fair Work Ombudsman Annual Report 2018/19, 3 and Sandra Parker, 'Address by the Fair Work Ombudsman' (Speech delivered to the Australian Human Resource Institute – NSW ER/IR Network Forum 2019, 17 October 2019). There has also been at least one other case brought under these provisions by an individual (as opposed to the regulator). See *Ghimire v Karriview Management Pty Ltd (No 2)* [2019] FCA 1627 (3 October 2019).

[10] Elizabeth Knight, 'Woolworths the latest perpetrator in the wage underpayment epidemic', *The Sydney Morning Herald*, 30 October 2019.

[11] Senate Education and Employment References Committee, *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, Parliament of Australia (2016); Anthony Forsyth, *Victorian Inquiry into Labour Hire and Insecure Work – Final Report* (2016); Senate Economics References Committee, *Superbad – Wage Theft and Noncompliance of the Superannuation Guarantee,* Parliament of Australia (2017); Senate Education and Employment References Committee, *Corporate Avoidance of the Fair Work Act 2009*, September 2017; Australian Government, *Black Economy Taskforce*, Final Report, October 2017; Queensland Parliamentary Committee, Education, Employment and Small Business Committee, 'A Fair Day's Pay for a Fair Day's Work? Exposing the True Cost of Wage Theft in Queensland' (Report No 9, November 2018); Senate Education and Employment References Committee, Parliament of Australia, *Wage Theft? What Wage Theft?! The Exploitation of General and Specialist Cleaners Working in Retail Chains for Contracting or Subcontracting Cleaning Companies*' (2018). In 2019, the Western Australia Department of Mines, Industry Regulation and Safety initiated its own state inquiry into Wage Theft in Western Australia. As yet, the Final Report of this inquiry has not been released.

[12] Black Economy Taskforce, above n 10, 58

[13] Migrant Workers' Taskforce Report, Recommendation 7.

[14] Ibid, Recommendation 10.

either by enhancing the small claims process[15] or directing claims to the Fair Work Commission.[16]

6. However, as already noted, the Discussion Paper is centred on a number of key reform options, many of which have also been canvassed in previous inquiries, namely to:
   i) increase the maximum civil penalties available under the FW Act;
   ii) extend liability beyond employers to third party businesses and individuals;
   iii) strengthen the sham contracting provisions in the FW Act; and
   iv) criminalise certain forms of so-called 'wage theft'.[17]

   Each of these reform options will be discussed in turn below.

INCREASE TO MAXIMUM CIVIL PENALTIES

7. In order to enhance the deterrence effects of enforcement litigation brought under the FW Act, the Migrant Workers' Taskforce recommended an increase in the maximum civil penalties available under the statute – suggesting that they be aligned with the penalty regimes applicable in other regulatory spheres, such as consumer laws.

8. The Woolworths case, together with the many matters that preceded it, highlight the need for re-examining not just the level of maximum penalties under the FW Act, but a reconsideration of the way in which the grouping provisions under s 557 have a dampening effect on the penalty assessment by the court.

9. By way of example, the underpayments by Woolworths appear to be both significant and sustained and may have affected up to 6000 employees. However, as a result of s 557, it is possible that the maximum civil penalties will not properly reflect the scale of the wrongdoing or the quantum of the underpayment because the relevant contravention appears to have arisen out of single course of conduct.[18]

10. While the size of the business is one of the factors taken into consideration by the court in exercising its remedial discretion and determining the appropriate penalty, the court is ultimately hamstrung by the maximum penalties embedded in the FW Act. Although the maximum penalties for 'serious contraventions' have increased tenfold as a result of the PVW Act,[19] the penalty amounts available under the FW Act still pale in comparison to the penalty levels applicable in other statutory schemes. The current penalty amounts also appear to be trifling when set against the enormity of the

[15] Ibid, Recommendation 12.
[16] Sally McManus, 'Change the Rules for More Secure Jobs and Fair Pay' (Speech delivered to the Press Club, 21 March 2018).
[17] Migrant Workers' Taskforce Report, above n 2.
[18] It appears that managerial employees who received an annualised salary under the relevant employment contract were not ultimately paid for all hours worked in accordance with the General Retail Industry Award, resulting in those employees being underpaid. See 'Ombudsman warns boards after Woolies underpayment revelation', *Workplace Express*, 30 October 2019.
[19] Each 'serious contravention' attracts a maximum penalty o f $630,000 for a corporation and $126,000 for an individual.

underpayments that have recently come to light,[20] and the annual turnover of many of these larger firms.

11. While it is true that repaying these significant sums to the affected employees may provide a level of specific deterrence, it does not necessarily deliver general deterrence given that, in the intervening period, the contravening firm has effectively evaded its legal obligations and potentially profited from this avoidance. Competitor firms who have fully complied with the relevant legal responsibilities are arguably placed at a disadvantage.

12. While I strongly support increasing the maximum penalties available under the FW Act, and I consider that this in line with optimal regulatory practice, it is very difficult to accurately estimate or ascertain the level of maximum penalties that 'could best generate compliance with workplace laws.'[21] Rather, this is a task that should be reserved for the courts by providing enhanced flexibility in the way maximum penalties are calculated (e.g. by allowing the court to impose a penalty based on a fixed number of penalty units; three times the value of the benefit derived from the contravention; or 10 per cent of annual turnover).

13. However, even with a substantial uplift in the maximum penalties and additional remedial options, it is not entirely clear that this alone will 'send a strong message of deterrence to would-be lawbreakers'.[22] In particular, in previous research undertaken with Professor John Howe, we found that firms' recollection of the quantum of civil penalties imposed against other employer businesses was 'generally imprecise and inaccurate.'[23] Most employers were not aware of the cases that the FWO had previously brought in their industry and had even less knowledge of the amount or target of the penalty orders. These findings suggest that businesses are not necessarily rational and calculative: a critical assumption of classical deterrence theory.

14. As this study was undertaken prior to the PVW reforms, we acknowledge the possibility that higher penalty amounts, or criminal sanctions, may 'penetrate the corporate consciousness in a way that other penalties do not'.[24] However, we also express caution regarding the somewhat appealing, but possibly misleading, notion that higher sanctions will automatically lead to greater compliance.[25] Instead, our research confirms that the frequency of inspection, combined with strategic use of

[20] For example, in the past 12 months alone, Super Retail Group has reported that it had underpaid workers $32 million, Michael Hill Jewellers conceded that it underpaid its workforce $25 million, Australian Broadcasting Commission believes it has underpaid employees a total of $23 million, Wesfarmers has revealed that it has underpaid staff by $15 million, Thales has admitted to a total underpayment of $7.4 million and Sunglass Hut has identified underpayments worth $2.3 million. See Patty, above n 6.

[21] Discussion Paper, above n 1, 6.

[22] Sandra Parker, 'Address by the Fair Work Ombudsman' (Speech delivered to the 2019 AiG Annual National Policy-Influence-Reform Conference, 3 June 2019) 3.

[23] Tess Hardy and John Howe, 'Creating Ripples, Making Waves? Assessing the General Deterrence Effects of Enforcement Activities of the Fair Work Ombudsman' (2017) 39 *Sydney Law Review* 471.

[24] Ibid (citing Robert A Kagan, Neil Gunningham and Dorothy Thornton, 'Explaining Corporate Environmental Performance: How Does Regulation Matter?' (2003) 37(1) *Law & Society Review* 51, 40).

[25] Ibid (citing Christine Parker and Vibeke Lehmann Nielsen, 'Deterrence and the Impact of Calculative Thinking on Business Compliance with Competition and Consumer Regulation' (2011) 56(2) *The Antitrust Bulletin* 377).

media, may be more powerful in fuelling a firm's perception of risk and foster a greater willingness to commit to compliance in the longer term.

15. If the perceived threat of inspection is important, it is perhaps concerning that various commitments to boost the FWO's funding has not resulted in any discernible increase in the number of staff or Fair Work Inspectors over the past few years.[26] As at October 2018, there was a total of 717 staff engaged by the FWO. Of those, only 188 were Fair Work Inspectors.[27] The remainder of the staff were engaged in a range of other operational roles relating to policy, mediation, management, legal etc. Assuming around 80% of all employed persons[28] and employing businesses[29] are covered by the core provisions of the FW Act and within FWO's remit,[30] then on current data there is roughly 1 FW Inspector for every 54,000 employed persons and 1 FW Inspector for every 3,700 employing business. Even with additional resourcing,[31] the ratio of inspectors to workers is set to remain highly disproportionate.

16. The FWO's stretched resources is likely to shape the inspectorate's inclination (or otherwise) to undertake resource-intensive activities, such as civil remedy litigation. It is also likely to affect the number of criminal prosecutions that can be pursued (if the FWO is assigned this task in the future). Indeed, in the past financial year, the number of litigation matters brought by the FWO has dropped to 23 cases – which is the lowest level of litigation activity since the *Fair Work Act 2009* (Cth) was introduced. However, what this figure does not reveal is the nature of the litigation proceedings, including the target(s) of liability and the remedial orders sought. This information is essential in assessing the regulatory value of the litigation, including the potential ripple effects of the relevant intervention.[32]

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[26] The FWO's annual budget and average staffing levels are set out in further detail in Tess Hardy, 'Trivial to Troubling: *The Evolution of Enforcement under the Fair Work Act'* (2020) 32(1) *Australian Journal of Labour Law*, forthcoming.

[27] Evidence to Senate Estimates Committee – Education and Employment, Parliament of Australia, Canberra, 24 October 2018, 104 (Michael Campbell – Deputy FWO).

[28] As at December 2018, there were 12,711,600 employed persons in Australia. While this data suggests that the person is 'employed', this is not strictly correct as it not only counts employees (in the common law sense), but also 'business owners or self-employed people'. See Australian Bureau of Statistics, *Labour Force Survey* (Cat 6202.0, Australia, December 2018).

[29] At the end of 2016-17, there were 868,248 (38.8%) employing businesses and 1,370,051 (61.2%) non-employing businesses. Most employing businesses (70.1% or 608,733) at the end of 2016-17 employed between 1 and 4 people whilst 0.5% (3,915) of employing businesses employed more than 200 people. Australian Bureau of Statistics, *Counts of Australian Businesses, including Entries and Exits* (Cat 8165.0, Australia, February 2018).

[30] The FWO generally has responsibility in relation to common law employees falling within the national system of workplace relations regulation and not employed in the building and construction sector. The numbers of employed persons and employing businesses falling within state systems is harder to estimate and varies widely between different states. Applying this assumption (of 80% coverage) means that roughly 10,169,280 employed persons and 694,400 employing businesses fall within the FWO's remit.

[31] In the pre-election budget handed down in April 2019, the Coalition Government allocated an extra $10.8 million over four years from 2019/20 to strengthen the federal inspectorate's ability to conduct investigations into underpayment and related matters. In addition, the FWO received a further $9.2 million over four years from 2019/20 to establish a dedicated sham contracting unit. 'Budget funds labour hire scheme, crackdown on sham contracting', *Workplace Express*, 2 April 2019.

[32] See generally Tess Hardy, John Howe and Sean Cooney, 'Less Energetic, but More Enlightened? Exploring the Fair Work Ombudsman's Use of Litigation in Regulatory Enforcement' (2013) 35 *Sydney Law Review* 565.

EXTENDED LIABILITY

17. In particular, the model of strategic enforcement developed by Professor David Weil hinges, to some extent, on being able to influence the 'compliance calculus' of lead firms and encourage them to take into account the social, as well as the private, benefits and costs when deciding how to structure and run their business.[33] However, evidence suggests that lead firms are generally unwilling to change their compliance commitments by their own initiative.[34]

18. A survey of franchisors undertaken in early 2017 underlines the importance of 'hard law' in this regard. Prior to the passage of the PVW Act, most of the surveyed franchisors only provided information, training and advice to their franchisees. Less than one third conducted internal audits or checks. However, after the PVW Act was introduced, and franchisors were potentially liable for the misdeeds of their franchisees, it was found that almost one quarter of franchisors were putting 'an action plan in place' and over half of the franchisor respondents were investigating what needs to be done.[35]

19. This research confirms that credible threats of liability are essential in encouraging and/or coercing lead firms to take on some of the enforcement burden, particularly the costs associated with monitoring, calculating and rectifying underpayments. Assuming this is true, the next thorny question is how to identify the most effective legal mechanism for achieving this change in compliance posture.[36] In a recent article, I compared different liability mechanisms across the US, Canada and Australia. Ultimately, I concluded that while the expanded liability provisions of the PVW Act are not perfect, they are potentially more compelling than the concept of joint employment (which is the relevant touchstone in the US) and more useful than the existing accessorial liability provisions under the FW Act.[37] More specifically, the relevant liability provisions introduced by the PVW Act:[38]
    i) are better placed to combat counterproductive liability avoidance – where the firm does less not more in a bid to reduce legal exposure; and

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[33] David Weil, T*he Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press, 2014).

[34] See Tess Hardy, 'Good Call: Extending Liability for Employment Contraventions Beyond the Direct Employer' in Ron Levy, Molly O'Brien, Simon Rice, Pauline Ridge and Margaret Thornton (eds) *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, 2017) 71.

[35] For further discussion of this research, and franchising regulation more generally, see Tess Hardy, 'Shifting Risk and Shirking Responsibility? The Challenge of Upholding Employment Standards Regulation within Franchise Networks' (2019) 32 *Australian Journal of Labour Law* 62.

[36] For consideration of relevant normative and instrumental questions in this respect, see Tess Hardy, 'Who Should be Held Liable for Workplace Contraventions and On What Basis?' (2016) 29 *Australian Journal of Labour Law* 78.

[37] See Tess Hardy, 'Big Brands, Big Responsibilities? An Examination of Franchisor Accountability for Employment Contraventions in the United States, Canada and Australia' (2018) 40 *Comparative Labor Law and Policy Journal* 285. See also Stephen Ranieri, 'Accessories and the Fair Work Act — Section 550 and an Individual's "Involvement" in a Contravention: Is Reform Needed?' (2018) 31 *Australian Journal of Labour Law* 180.

[38] FW Act, s 558B.

ii) shift the court's attention to the relationship between the lead firm and the subordinate business (rather than focusing solely on the relationship between the lead firm and the employees).[39]

20. Drawing on this research, Professor Andrew Stewart and I prepared a submission for the 2018 Senate Inquiry into the Exploitation of General and Specialist Cleaners Working in Retail Chains for Contracting or Subcontracting Cleaning Companies (***Stewart and Hardy Submission***). The Stewart and Hardy Submission set out a number of recommendations in relation to extending liability to other types of lead firms (beyond franchisors and parent companies). This proposal was ultimately adopted as a recommendation in the Final Report of the Inquiry.[40] A copy of this submission is attached for reference (see Attachment A).

SHAM CONTRACTING

21. The Stewart and Hardy Submission also dealt briefly with the sham contracting provisions of the FW Act (please see Attachment A). In short, we concurred with the conclusions and recommendations made in various inquiries, namely that the defence of recklessness should be narrowed to one of reasonableness.[41]

22. In addition, I believe that it is appropriate for s 539(2) to be amended so as to enable the higher level of penalties that attach to 'serious contraventions' to apply to knowing and systematic contraventions of the sham contracting provisions.

CRIMINAL SANCTIONS

23. As set out in previous submissions to state-based wage theft inquiries,[42] criminal sanctions hold significant symbolic value (stigmatisation etc), offer a number of practical benefits (e.g. convicted individuals are generally prohibited from holding directorships of corporations) and may strengthen the deterrence effects of the relevant intervention.[43] However, as noted above, there is limited evidence which supports the idea that criminalisation of 'wage theft' will alone act as a regulatory panacea, particularly if the enforcement apparatus is not sufficiently resourced to pursue criminal proceedings on a frequent and sophisticated basis.

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[39] This issue was present in the recent case *Fair Work Ombudsman v Hu* [2019] FCA 1034. The FWO has applied for special leave to appeal this decision to the High Court of Australia.

[40] Senate Education and Employment References Committee, Parliament of Australia, *Wage Theft? What Wage Theft?! The Exploitation of General and Specialist Cleaners Working in Retail Chains for Contracting or Subcontracting Cleaning Companies*' (2018), Recommendation 10.

[41] In particular, the 2012 FW Act Review, the Productivity Commission Inquiry, the Black Economy Taskforce, the Senate Inquiry into Corporate Avoidance of the Fair Work Act 2009 and the Queensland Wage Theft Inquiry have all recommended strengthening the sham contracting provisions by removing the 'recklessness defence' and replacing with a narrower test of 'reasonableness'.

[42] See, eg, Tess Hardy and Melissa Kennedy, Submission to Western Australia Department of Mines, Industry Regulation and Safety, *Inquiry into Wage Theft in Western Australia* (2019); Tess Hardy, Melissa Kennedy and John Howe, Submission to Queensland Education, Employment and Small Business Committee, *Inquiry into Wage Theft in Queensland* (2018).

[43] Daniel Galvin, 'Deterring Wage Theft: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance' (2016) 14(2) *Perspectives on Politics* 324, 326.

24. Indeed, in those jurisdictions where underpayment contraventions already constitute a criminal offence,[44] the data suggests that prosecutions of non-compliant employers are 'extremely rare'[45] and only used when employers and other duty holders defy the authority of state inspectors by disobeying compliance orders. For example, in Ontario, Canada, recent research has confirmed that there have been no criminal prosecutions in response to an employer or director violating an employee's rights to be paid in a minimum wage.[46] Similarly, in the United Kingdom, criminal prosecution is available in respect of a range of offences under various employment-related statutes, but remains 'an underutilised intervention in the enforcement arena'.[47] For example, since the introduction of the *National Minimum Wage Act 1998* (which came into force in April 1999), there have only been 14 NMW prosecutions.[48]

25. Notwithstanding the low utilisation of these provisions, the UK legislation does provide an illustrative example of how a criminal offence in this context might be framed. In particular, s 31(1) of the *National Minimum Wage Act 1998* (UK) states that: 'If an employer of a worker who qualifies for the national minimum wage refuses or wilfully neglects to remunerate the worker for any pay reference period at a rate which is at least equal to the national minimum wage, that employer is guilty of an offence.'

26. Section 31(8) further provides that in any proceedings for an offence under s 31(10, 'it shall be a defence for the person charged to prove that he exercised all due diligence and took all reasonable precautions to secure that the provisions of the Act…were complied with by himself and by any person under his control.'

27. It is notable, however, that this offence expressly applies to the 'employer'. It is far less clear whether this criminal offence – in its current form – would apply to any third party accessories, including directors and/or lead firms, and how liability would be attributed in these circumstances.

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[44] For example, the Employment Standards Act (2000), which prescribes minimum wages and hours regulation in Ontario, Canada, makes it offence to contravene the act or its regulations, or to fail to comply with an order or direction issues by an inspector. Individuals are liable to be fined up to CAD 50,000 or imprisoned up to 12 months. Corporations are liable to be fined up to CAD 100,000 for a first offence, CAD 250,000 for a second offence and CAD 500,000 for a third or subsequent offence. Offences under the ESA are prosecuted under Part III of the *Provincial Offences Act*. In addition, under the federal *Criminal Code of Canada* (1985), it is a criminal offence to intentionally falsify an employment record by any means. See Eric Tucker, 'When Wage Theft Was a Crime in Canada, 1935-1955: The Challenge of Using the Master's Tools Against the Master' (2017) 54 *Osgoode Hall Law Journal* 933. Similarly, the Fair Labor Standards Act of 1938 29 U.S.C. § 203 provides for criminal prosecution for willful violations of federal wage and hour laws. A conviction can result in a fine of not more than $10,000, imprisonment of up to six months, or both (albeit imprisonment is only available upon the second conviction).

[45] Eric Tucker et al, 'Carrying Little Sticks: Is There a "Deterrence Gap" in Employment Standards Enforcement in Ontario Canada' (2019) 35(1) *International Journal of Comparative Labour Law* 1, 26.

[46] Ibid.

[47] David Metcalf, Director of Labour Market Enforcement, 'United Kingdom Labour Market Enforcement Annual Report 2017/18' (March 2019) 19.

[48] Ibid.

OTHER OPTIONS FOR REFORM

28. Another possible option for reform – but one that is not expressly identified in the Discussion Paper – would be to allow successful complainants to recover their legal costs in underpayment claims. Such an avenue is presently prevented by the general bar on costs orders in proceedings relating to the FW Act.[49]

29. Awarding costs might encourage or enable more private legal practitioners, unions and community legal centres to actively assist workers to pursue enforcement proceedings. Increasing the frequency of enforcement litigation in this way will not only reduce the burden placed on the FWO (and the taxpayer), it may also have the added benefit of enhancing deterrence and improving redress.

[49] FW Act, s 570.

ATTACHMENT A

Senate Education and Employment References Committee Inquiry into The Exploitation of General and Specialist Cleaners Working in Retail Chains for Contracting or Subcontracting Cleaning Companies

Submission by

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This submission is made in our capacity as academic experts on labour regulation, and the views expressed are ours alone.

Our focus is on the adequacy of the existing regulatory framework in dealing with the kind of issues exposed by the February 2018 report of the Fair Work Ombudsman (FWO) on the procurement of cleaners in Tasmanian supermarkets.[50] As the UTS Centre for Business and Social Innovation points out in its submission to this inquiry, the exploitation of cleaners is a problem not just in retail stores, but in other parts of the cleaning sector. We support the various recommendations in that submission, including greater government support for, and extension of, the Cleaning Accountability Framework. But we also believe that some of the business practices in the cleaning sector that contribute to so-called 'wage theft' and other forms of worker exploitation (including underpayment of leave, termination and superannuation entitlements) are merely examples of a broader challenge to the labour regulation framework. Our objective in this submission is to suggest one way in which that challenge might be met, for the benefit of both cleaners, as well as vulnerable workers in other business networks in the public and private sector.[51]

Australia has, by international standards, an exceptionally strong 'safety net' of rights and protections for employees. But the very strength of that safety net creates incentives for businesses to find ways of minimising or avoiding the costs associated with complying with the employment standards framework.

One form of avoidance involves the practice of 'sham contracting', or misclassifying workers as independent contractors. Previous reports suggest that this is a problem in the cleaning

[50] Fair Work Ombudsman, *Inquiry into the Procurement of Cleaners in Tasmanian Supermarkets*, February 2018.
[51] See eg Fair Work Ombudsman, *Inquiry into the Procurement of Security Services by Local Governments*, June 2018; Fair Work Ombudsman, *Inquiry into Trolley Collection Services Procurement by Woolworths Limited*, June 2016; Fair Work Ombudsman, *Inquiry into Procurement of Housekeepers by Four or Five-Star Hotel Groups*, May 2016.

sector, as well as in other industries.[52] In this regard, we support implementation of the Productivity Commission's recommendation to strengthen the provisions of the *Fair Work Act 2009* (FW Act) that seek to prohibit such arrangements.[53]

For present purposes, however, we are interested in another form of avoidance. This involves the fragmentation of corporate structures and working arrangements into loosely connected networks that blur responsibility for ensuring workplace compliance. A key feature in such arrangements, whether they involve subcontracting, labour hire, franchising, the use of corporate groups or other types of 'supply chain', is the creation of legal distance between a worker and a 'lead business' that ultimately benefits from their labour.[54] Even if the worker is employed, and can identify underpayments or other breaches of labour standards by their employer, all too often that employer no longer exists, or otherwise does not have the assets to meet any judgment against them.

Section 550 of the FW Act does extend liability for breaches of the statute to a person 'involved in' someone else's contravention. The provision applies to a person who has aided or abetted the contravention, procured or induced it, conspired with others to bring it about, or been in any way 'knowingly concerned'. It is routinely used to attach liability to directors or senior managers of a company. But the need to establish *actual knowledge* of the contravention makes it very hard to pursue lead businesses, regardless of the extent to which their business practices may have contributed to the relevant breaches.[55]

It was precisely this limitation that led the Turnbull Government to propose, and the Parliament to authorise, the enactment of Division 4A of Part 4-1 of the FW Act, as part of the changes made by the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017*.

Under s 558B of the FW Act, a holding company may now be held responsible for a breach by one of its subsidiaries of the National Employment Standards (NES), an industrial instrument (such as an award or enterprise agreement), the rules concerning the payment of wages or the keeping of records, or the prohibitions on sham contracting. The same applies to a franchisor, in relation to a breach by one of its franchisees, but only if the franchisor has 'a significant degree of influence or control' over the franchisee's affairs. In each case, the franchisor or holding company, or one of their officers, must have known about the contravention, or should reasonably have known it, or could reasonably have expected that a similar contravention would be likely to occur. Liability can be escaped if reasonable steps have been taken, on the part of the holding company or franchisor, to prevent such contraventions.

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[52] See eg Fair Work Ombudsman, *Sham Contracting and the Misclassification of Workers in the Cleaning Services, Hair and Beauty and Call Centre Industries*, November 2011; Office of the Australian Building and Construction Commissioner, *Sham Contracting Inquiry Report*, November 2011. See also *Fair Work Ombudsman v Quest South Perth* (2015) 256 CLR 137.

[53] See Productivity Commission, *Workplace Relations Framework*, Inquiry Report No 76, 2015, pp 813–5.

[54] For just some examples from what now is a substantial body of academic literature on this trend, see Tess Hardy, 'Who Should Be Held Liable for Workplace Contraventions and on What Basis?' (2016) 29 *Australian Journal of Labour Law* 78; David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It*, Harvard University Press, 2014.

[55] See eg Fair Work Ombudsman, *A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven*, April 2016.

The adoption of this new form of secondary liability has significantly strengthened the regime for ensuring compliance with the employment standards established by the FW Act – but only for two particular types of business model. In our view, the arguments for holding companies and franchisors to be held responsible for certain contraventions affecting workers who they do not directly employ apply with equal force to other business models, whether involving labour hire, subcontracting, the use of affiliated companies that are not technically subsidiaries, or more elaborate supply chains.[56]

Our proposal incorporates some of the essential concepts in s 558B, but expresses them in terms that are sufficiently general to apply to any form of corporate or commercial arrangement, while retaining the safeguards in that provision to prevent regulatory overreach.

Specifically, we propose that a person (whether an individual or a corporate entity) should be liable for an employer's contravention of the NES, an industrial instrument, the rules concerning the payment of wages or the keeping of records, or the prohibitions on sham contracting, where the person:

(a) has a significant degree of influence or control over the employer's affairs, or over the wages or employment conditions of the relevant employee(s);

(b) knew or could reasonably be expected to have known that the contravention (or a contravention of the same or a similar character) would occur; and

(c) cannot show that they have taken reasonable steps to prevent a contravention of the same or a similar character.

Whether a person has significant influence or control over wages or employment conditions should be determined by reference to the substance and practical operation of arrangements for the performance of the relevant work.

A person should be deemed to have significant influence or control if it sets or accepts a price for goods or services, or for the use of property, at a level that practically constrains the capacity of the relevant employer to comply with its obligations.

In our opinion, the adoption of such a form of secondary liability, to complement the existing provision in s 550 for knowing involvement in another person's contravention, would be an appropriate response to the type of practices in the cleaning sector being investigated by the Committee. It would not only address similar issues in other industries, but would also minimise regulatory avoidance strategies.

Importantly, it would only apply to a lead business which has influence or control over the employer or the relevant employees' wages or working conditions, *and* has reason to believe that contraventions are likely to occur. This effectively sets the same threshold for secondary liability as that currently applied to franchisors and holding companies. The main change we recommend, in

[56] For an elaboration of the justifications for making lead businesses liable, see Tess Hardy, 'Good Call: Extending Liability for Employment Contraventions Beyond the Direct Employer' in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform*, 2017, p 71.

broadening its application to other types of arrangement, is the deeming provision. A business at the top of a lengthy supply chain may set a price or demand an economic return from a party with whom it is directly dealing that is so low that contraventions of employment standards further down the supply chain become inevitable. So long as that should be reasonably apparent to the lead business, it should not be able to hide behind its lack of direct influence or control over the actual employer or the working conditions of those performing the relevant