Would you prefer this submission to remain confidential?

Yes ☐ No ☒

Your submission

1. The Australian Nursing and Midwifery Federation (ANMF) is Australia's largest national union and professional nursing and midwifery organisation. In collaboration with the ANMF's eight state and territory branches, we represent the professional, industrial and political interests of more than 275,000 nurses, midwives and carers across the country.

2. Our members work in the public and private health, aged care and disability sectors across a wide variety of urban, rural and remote locations. We work with them to improve their ability to deliver safe and best practice care in each and every one of these settings, fulfil their professional goals and achieve a healthy work/life balance.

3. Our strong and growing membership and integrated role as both a trade union and professional organisation provides us with a complete understanding of all aspects of the nursing and midwifery professions and see us uniquely placed to defend and advance our professions.

4. Through our work with members, we aim to strengthen the contribution of nursing and midwifery to improving Australia's health and aged care systems, and the health of our national and global communities.

5. The ANMF thanks the Attorney-General's Department for providing this opportunity to comment on the topic of 'Improving protections of employees' wages and entitlements: Strengthening penalties for non-compliance'.

6. The ANMF asks the Attorney-General's Department (AGD) to read our submission in conjunction with that of our peak body, the Australian Council of Trade Unions (ACTU). The ANMF supports the submission of the ACTU.

7. The ANMF wishes to address the following aspect of the paper issued by the AGD: "the adequacy of the existing penalty framework". The ANMF believes that an important aspect of this statement has been overlooked in the paper, which is who pecuniary payment orders are made to with respect to section 546 of the *Fair Work Act 2009* (FW Act).

8. Section 546 of the FW Act provides:

> *(1) The Federal Court, the Federal Circuit Court or an eligible State or Territory court may, on application, order a person to pay a pecuniary penalty that the court considers is appropriate if the court is satisfied that the person has contravened a civil remedy provision.*
>
> *…*
>
> *Payment of penalty*
>
> *(3) The court may order that the pecuniary penalty, or a part of the penalty, be paid to:*
> *(a) the Commonwealth; or*
> *(b) a particular organisation; or*
> *(c) a particular person.*

9. 'Organisation' in the context above means a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (RO Act). The ANMF is such an organisation. 'Eligible state or

territory court' is defined in section 12 of the FW Act to include a District Court, County Court, Local Court, a magistrate's court and the Industrial Court of New South Wales.

10. Numerous court cases have considered the provision of s.546(3) of the FW Act and its predecessors in industrial legislation. The current authority on the matter is *Sayed*[1]. The consequence of this Federal Court Full Bench decision is that civil penalties are to be paid to the successful applicant unless the applicant:

    a. is a Fair Work Ombudsman inspector (in which case the penalties are to be paid to the Commonwealth); or

    b. is an affected employee who has been supported by a union (in which case the penalties may be paid to the union).

11. The decision in *Sayed* is consistent with the Explantory Memorandum to the *Fair Work Bill 2008*, which relevantly provides:

> *2157. Subclause 546(3) provides that the court may order pecuniary penalties (or part of a pecuniary penalty) to be paid to the Commonwealth, a particular organisation or a person.* ***Ordinarily, any pecuniary penalty awarded by the court is paid to the applicant or, in the case of proceedings brought by a Commonwealth official such as an inspector, to the Commonwealth (on the basis that the applicant represents the Commonwealth).***
>
> *2158. Also, it gives the court the flexibility to award the penalty to someone other than the plaintiff or applicant where the plaintiff or applicant requests. For example, where an inspector brings penalty proceedings against the director of a company that has gone into liquidation, the inspector might request the court to pay any penalty to an employee rather than the Commonwealth in circumstances where the employee is out of pocket as a result of the company being liquidated.*(emphasis added)

12. The ANMF submits that whilst the legal interpretation is now well-established as to who should be awarded pecuniary penalties, and has been for a number of years (if not decades), this should be more explicit in the legislation. In *QNU v Red Cross*[2] the Queensland Branch of the ANMF was successful in gaining a pecuniary penalty order against the Australian Red Cross Society. However, the Federal Circuit Court of Australia ordered that pecuniary penalty be paid to the Commonwealth despite the fact the applicant was a registered organisation and the Commonwealth had no involvement in the case. The QNU is now known as the Queensland Nurses and Midwives' Union of Employees and also operates as the QNMU Branch of the ANMF.

13. The QNU was advised that appealing the order directing payment of the pecuniary penalty to the Commonwealth would most likely be successful. However, the cost of litigating the matter in the Federal Court made the appeal not worth the time and cost involved. The quantum of the penalty awarded was approximately equivalent to how much it would have cost to litigate the appeal in the Federal Court.

14. In the similar case of *Ramsay v Menso*[3], a union official appealed a decision of the same Federal Circuit Court judge who had decided *QNU v Red Cross.* The judge had awarded the pecuniary penalty to the Commonwealth. The Federal Court overruled this order and awarded the penalty to the applicants.

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[1] *Sayed v Construction, Forestry, Mining and Energy Union* [2016] FCAFC 4 (22 January 2016)

[2] *Queensland Nurses Union of Employees v Australian Red Cross Society & Ors (No.2)* [2016] FCCA 3132 (16 November 2016)

[3] *Ramsay v Menso* [2019] FCA 1273 (15 August 2019)

15. The ANMF submits that the existing penalty framework needs to be more explicit in the FW Act so that unions and individuals who are successful in proceedings which merit pecuniary penalties will receive those penalties. The discretion to award pecuniary penalties to a party other than the applicant should be limited to exceptional circumstances or be initiated at the request of the applicant. The ANMF submits this amendment would support the intent of s.546(3) of the FW Act.

16. The ANMF recommends that section 546(3) of the FW Act be amended so that:

    a. It is clear that the "usual order" is for the magistrate or judge hearing the matter to award any pecuniary penalty to the applicant(s).

    b. The discretion to award a pecuniary penalty to an entity or individual other than the applicant be limited to instances where exceptional circumstances exist or has been initiated at the request of the applicant.

17. Implementing the above recommendations would help to strengthen the enforcement regime of the FW Act. It would provide more certainty to individuals and unions that seek pecuniary penalties as they are the ones who took the risk in litigating the matter. The adequacy of the existing penalty framework will be enhanced when applicants have certainty that any pecuniary penalty order made by a court will be awarded to them or a person of their choosing. It will encourage unions and individuals to protect the rights of workers when there is this certainty. Applicants invest significant time and resources into wage recoveries. They should not be disadvantaged from vigorously pursuing matters.