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Submission to Attorney-General's Department

Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance

Introduction

1. The Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**) represents, nationally, over 120,000 people in a range of industries including constructions, mining, forestry, maritime, furniture and building products and power generation. Our membership includes many self-employed people and small business operators, as well as tens of thousands of wages earners/PAYG taxpayer in the blue collar trade and in non-trade classification of work.

2. The CFMMEU welcomes the opportunity to provide this short submission to the enquiry being conducted by the Attorney-General into the adequacy of Australia's current penalty, compliance and enforcement framework in addressing the growing problem of 'wage theft'.

3. Specifically, the CFMMEU understands that the Attorney-General's enquiry will be focussed on two issues arising from the *Report of Migrant Workers' Taskforce*, being:

    a. the adequacy of the existing penalty framework; and
    b. the adequacy of compliance and enforcement tools available to workplace regulators and the court.

4. For reasons that will be canvassed in the submissions to follow, the CFMMEU maintains that whilst calls for the criminalisation of 'wage theft' may have popular appeal, it constitutes little more than a feel good slogan given the failure of regulators to prosecute employers under the existing civil penalty regime.

5. The erosion of the powers that were historically available to union officials to investigate instances of alleged wage theft, including through the inspection of wage records, has created an environment that is ripe for widespread exploitation of workers by unscrupulous employers.

6. Instead, the CFMMEU submits that rather than imposing criminal sanctions on those responsible for 'wage theft', the focus should be on empowering unions to resolve wage claims at a worksite level without the need for parties to resort to litigation.

Wage theft in the building & construction industry

7. Wage theft is a term that has been increasingly adopted in the media and throughout the community to broadly describe 'the underpayment or non-payment of wages or entitlements to a worker by an employer'[1] or a 'range of activities that deny workers their legal entitlements'.[2]

8. There are a number of practices adopted by employers to facilitate wage theft which are particularly widespread in the building and construction industry, including:

    a. the use of 'sham contracting' (the practice of disguising an employment relationship as one of principle and independent contractor), which is an ongoing, widespread and acute problem in the construction industry. Sham contracting deliberately deprives workers of their basic rights and entitlements owing under the *Fair Work Act 2009* (**FW Act**) ,the relevant Modern Awards and under workers' compensation laws. This problem was discussed at length in the CFMEU's 2011 *"Race to the Bottom"* report, which is available here;

    b. abuse of the ABN system is a central feature of the sham contracting problem, including the fraudulent and abusive use of multiple ABN holders and complete inactive ABNs. There is a widespread belief in the construction industry that having an ABN automatically confers the status of 'independent contractor', regardless of the working arrangement in place. Whilst there are of course legitimate contracting arrangements in place throughout the industry the prevalence of sham contracting, which is facilitated through the abuse of the ABN system, is responsible for denying many employees their legal entitlements. This issue was discussed in the CFMMEU's submission to the Black Economy Taskforce, which is available here;

    c. the deliberate and pre-meditated use of corporate insolvencies are routinely used to defeat claims of creditors (and employees), in addition to avoiding the remittance of tax. This practice is commonly known as "phoenixing"; and

    d. cash-in-hand payments, non or under-reporting of income, and the maintenance of poor or false records contribute to the widespread underpayment and non-payment of wages and entitlements. It is alarmingly common for employers to underpay employees by reference to the *minimum* wages and conditions owing under the relevant Modern Award.

9. In 2014/15, the Fair Work Ombudsman (**FWO**) undertook a targeted campaign of the building and construction industry in response to the high rates of contraventions of the FW Act throughout the industry.[3] As a part of the campaign, the FWO audited the compliance of 700 businesses nationally. The campaign found that only 59% of employers were compliant with all requirements, 25% of employers were not paying their employees correctly and 23% per cent were not meeting their record keeping and pay slip obligations. The problem is also acute for apprentices, with the FWO finding that a staggering 35% of employers were non-compliant with wage requirements.

[1] 'A fair day's pay for a fair day's work? Exposing the true cost of wage theft in Queensland'. Report No.9, 56th Parliament Education, Employment and Small Business Committee November 2018, pg 21
[2] *Ibid.*
[3] National Building & Construction Industry Campaign 2014/2015 Report

10. There are several unique features of the building and construction industry that result in workers being particularly vulnerable to wage theft.

11. Firstly, the construction industry is characterised by many small employers who compete within complex systems of contracting and subcontracting, so that very few construction workers are engaged directly by head contractors. The head contractors – often large corporations – are responsible for pricing projects. Intense competitive pressures amongst employers lead many to cut corners and seek unfair competitive advantages in order to win a contract, so that wages and other employment entitlements have become the predominant basis upon which employers compete. Many resort to wage theft knowing that the likelihood of being caught and penalised is negligible.

12. Secondly, work is often project-based and inherently short-term. This means that construction workers are usually engaged on a daily hire or casual basis, or through a labour hire arrangements, and therefore regularly suffer from chronic job insecurity throughout their working lives. Workers who face chronically precarious and unpredictable employment are frequently forced to undertake unpaid or underpaid work activities, or forego other legal entitlements such as the superannuation guarantee, in order to gain – or retain – employment.

13. Thirdly, it is an industry within which work is itinerant, meaning it is performed at construction sites, from location to location. This is extremely enabling for unscrupulous employers intent on evading their legal obligations, as they may simply abscond and not readily face the prospect of inspection by unions or government agencies. Further, the itinerant nature of the industry often means that any given employer is not vested with any real property (i.e land/premises) against which worker-creditors can stake a claim in the event of insolvency.

The erosion of union powers and how this is contributing to 'wage theft'

14. The CFMMEU and other unions play a critical role in educating, advising and advocating for their members with respect to their workplace rights; creating and maintaining minimum industry standards and assisting in the resolution of wage claims. However, the ability of the unions to perform this vital function has been greatly diminished as a consequence of conscious decisions by successive governments to disempower unions, particularly in relation to entering worksites for the purpose of investigating and resolving disputes such as wage claims. This has ensured that wage theft has become epidemic across a number of industries.

15. The introduction of the *Workplace Relations Act 1996* (Cth) (**WR Act**) heralded significant changes to the industrial relations landscape in Australia, and brought with it the first of many assaults on the powers of unions officials to enter workplaces for the purpose of providing representation to members. In fact, Australia's right of entry law have been to such an extent that they are now inconsistent with international standards.

16. Prior to the introduction of the WR Act, there were vastly fewer restrictions on the powers of union officials to enter worksites in order to meet with workers, and to investigate and resolve workplace issues. This is illustrated by the following right of entry clause from the *National Building and Construction Industry Award 1990:*

"*43. RIGHT OF ENTRY*

(1) The State Secretary or Branch Secretary or other duly accredited representative of the Union shall have the right to enter any place or any premises where employees are employed at any time, during normal working hours or when overtime is being worked, for the purpose of interviewing employees, checking on wage rates, award breaches or safety conditions or regulations so long as they not unduly interfere with work being performed by any employee during working time, and provided that they present themselves, with their authority as prescribed by this Award, to a representative of site management prior to pursuing their union duties on site.

(2) A representative of the Union shall be a duly accredited representative if he/she is a holder for the time being if a certificate signed by the general secretary of that organisation and bearing the seal of that organisation in the following form, or in a form not materially differing therefrom –

(Name of Organisation)

This is to certify that……is a duly accredited representative of the above named organisation for all purpose of this Award made under the Industrial Relations Act 1988.

(Seal) General Secretary.
Specimen signature of Holder.
Strictly not transferable."

17. Previously, this was all that was required for a union official to enter a site however the WR Act introduced the requirement that a union official obtain a right of entry permit, which the then Australian Industrial Relations Commission could refuse to issue if the official was not deemed to be a 'fit and proper person'.[4]

18. This requirement has been retained in subsequent legislation, with s 513 of the FW Act outlining the matters that must be taken into account when considering an application for a proposed permit holder. S 513(1)(d) specifically provides that the FWC must take into account whether the trade union official, or any other person, has ever been ordered to pay a civil penalty under the FW Act or any other industrial law in relation to the official's conduct. That is, a union official's record of contraventions of industrial laws, such as those contained in the *Building and Construction Industry (Improvement Productivity) Act 2016* (**BCIIP Act**), must be taken into account whether determining whether the proposed permit holder is a 'fit and proper person'.

19. The BCIIP Act was ostensibly enacted for the purpose of regulating the conduct of all building industry participants but has in practice been weaponised by the Australian Building and Construction Commission (**ABCC**) in bringing litigation almost exclusively against construction unions.[5] Consequently, union officials are increasingly precluded from investigating and identifying wage theft under right of entry provisions of the FW Act, even in circumstances where their record of civil contraventions arose out of conduct that was responsive to wage theft committed by employers.

[4] *Workplace Relations Act 1996* (Cth) s.742
[5] See ABCC, "Legal Cases", available online @ https://www.abcc.gov.au/legal-cases

20. There are a number of other restrictions first introduced in the WR Act that continue to impede the ability of unions to enter sites, including the requirement that permit holders of a registered organisations give prior notice in a prescribed form of their entry to a premises. They permit holder must demonstrate, in relation to an entry to investigate a suspected contravention, that there is reasonable basis to suspect the contravention.[6] The must outlined in the entry notice and, in a recent decision of the Fair Work Commission, a failure to provide sufficient particulars can constitute a basis for refusing entry.[7] Once these preliminary requirements have been satisfied, the power of permit holders to request access to documents is limited to documents that are directly relevant to the suspected contravention.

21. The pattern of imposing regulatory and legislative requirements on union officials has continued unabated, with amendments to the *Fair Work Commission Rules 2013* being proposed in late 2018.

22. The first of these proposals concerned access to non-members records, an important tool for union officials investigating wage theft. The proposal considered, amongst other changes, a requirement that an application to access non-member records must be served on each occupier and employer as soon as practicable after lodging of the document with the Commission and notified to workers at the workplace in writing.

23. Such applications have typically been determined on an ex parte basis, however, the existing provisions already confer a discretion on the Commission to determine whether the employer and/or any employees should be served and given an opportunity to be heard in relation to the application, having regard to the broad consideration of the "nature of the application".[8]

24. The proposed amendment foreseeably opens the door for employers to challenge applications, which would have the effect of delaying union's ability access to documents that could uncover wage theft. Further, applications under s.483AA are likely to involve employees who are either unwilling or unable to identify themselves as union members to a hostile employer. This is a critical consideration in circumstances where, for example, suspected adverse action by the differential treatment of members and non-members has been found to justify s.483AA orders, and where the records sought may involve the intermingling of member and non-member records. This is precisely why the current approach takes into account broad consideration of the "nature of the application". A departure from this position would result in additional hurdles to union officials accessing records vital to the proper investigation of wage theft cases.

25. Further proposed amendments concern right of entry permits and would risk adding a further layer of bureaucracy to an already onerous process by compelling union officials to submit a police check for the purpose of the 'fit and proper person' test. Not only is this unduly invasive but officials are already required to make a statutory declaration as to their criminal history, in addition to unions also being required to undertake inquiries as to the same for the purpose of the application.

26. The requirement that prospective permit holders obtain a police check is in addition to a proposed amendment that would seek to allow the Commission to publish on its website, information regarding an application for a right of entry permit for the apparent purpose of inviting submissions from the general public as to whether the relevant person is a 'fit a proper person' within the meaning of s. 513(1) of the FW Act.

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[6] *Fair Work Act* (Cth) s.481

[7] *Australian Licensed Aircraft Engineers Association v Qantas Airways Ltd* [2018] FCA 1065

[8] *Butler v Qantas Airways Ltd* [2011] FWA 1579 at [7]

27. It is our experience that the processing time for permit applications is already quite lengthy. The introduction of such a rule would only serve to exacerbate processing times as it will require other persons seeking to make submissions reasonable time to do so, and an appropriate period for reply. These amendments would further hinder and delay the ability of union officials to undertake important work with regards to investigating suspected underpayment claims

28. The preceding paragraphs serve to illustrate how the decisions by successive governments to disempower unions have had seriously impeded the ability of officials to enter worksites to properly investigate and resolve underpayments without recourse to litigation. Accordingly, any genuine attempt to address the increasingly prevalent issue of wage theft *must* involve a government response that reinstates proper powers of entry and inspection for union officials.

Enforcement – the role of the regulators

29. Notwithstanding the concerted efforts of successive governments to disempower unions, they still play a vital role in recovering unpaid wages and entitlements on behalf of workers. Encouraging and supporting the union movement's efforts in this space is vital to tackling the wage theft epidemic in Australia.

30. Turning to the building and construction industry, the primary regulators tasked with recovering unpaid and other monetary entitlements are the Fair Work Ombudsman and the Australian Building and Construction Commission.

31. In terms of the effectiveness of these regulators in tackling wage theft, the Australian Building and Construction Commission (**ABCC**) declared in its annual report for 2018 – 2019 that it recovered $823,724 in wages and entitlements, bringing total recoveries to more than $1 million since the agency's establishment on 2 December 2016.

32. The ABCC should not be proud of this trifling achievement. Industry bodies estimate that there is $6 billion in unpaid wages across the construction sector.[9]

33. Turning to the Fair Work Ombudsman, its annual report published on 22 October 2019 revealed that it recovered a total of $40 million of unpaid wages and entitlements for the 2018/2019 financial year. Whilst this figure appears impressive when compared to the outcomes achieved by the ABCC, it is a modest sum considering its status as the primary regulator across all sectors.

34. In light of the publication of the abovementioned figures, the Construction and General Division of the CFMMEU made internal inquiries regarding its own efforts in recovering unpaid wages and entitlements on behalf of its members. Turning to the period referred to in the ABCC's report, between 2016 and 2019 the Construction and General Division of our union *alone* has recovered (conservatively) approximately $60 million.

35. Notwithstanding the significant reduction in the powers of unions to enter workplaces and investigate underpayment claims, the abovementioned figures serve to illustrate what the union

[9]Figures cited by Senator Sheldon in Senate Estimates, 23 October 2019

movement could achieve in the area of wage theft if not encumbered by the current restrictive legislative framework.

The civil penalty framework

Increased civil penalties

36. The Attorney-General seeks comment on the effectiveness of the civil penalty regime and whether the introduction of higher scale penalties could improve compliance with workplace laws and more specifically, curb wage theft.

37. This proposal appears to have been inspired by the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (**PVW Act**), which introduced increased penalties for 'serious contraventions' of prescribed workplace laws. Under the PVW Act, deliberate and systemic contraventions of workplaces laws attract a maximum penalty of $630,000 per contravention for a corporation, and $126,000 per contravention for individuals. These penalties are ten times greater the maximum penalties currently available under the FW Act and appear to have been specifically directed at addressing concerns that existing penalties are of insufficient deterrent value who 'exploit vulnerable workers because the costs associated with being caught are seen as an acceptable cost of doing business'.[10]

38. The PVW Act was introduced following revelations of the systemic underpayment and exploitation of workers by companies adopting a franchise model, such as 7-Eleven. In addition to increases in maximum penalties for 'serious contraventions', a range of additional measures were introduced, including double penalties for a failure to maintain proper records.

39. It is important to note the acknowledgement in the discussion paper that 'although the FWO has commenced court action alleging contraventions of some of these provisions, the provisions remain relatively untested', save for successful litigation being brought against two sushi outlets in Queensland.

40. This is of significance as it goes to a heart of a concern of the CFMMEU - that the potential deterrent effect of increased penalties is undermined when not coupled with active monitoring and enforcement. This is can be better achieved by returning a meaningful compliance and enforcement role to unions.

41. The need stronger enforcement was emphasised by Dr Tess Hardy, Melissa Kennedy and Professor John Howe in their submission to the Inquiry into Wage Theft in Queensland[11] who, when discussing the deterrence value of higher sanctions, commented that:

    'The underlying premise of these new provisions reflects a common assumption shared by policy makers and regulators: that higher sanctions will means greater deterrence and, in turn, improved

[10] Dr Tess Hardy, Melissa Kennedy & Professor John Howe, *Submission to Queensland Education, Employment and Small Business Committee: Inquiry into Wage Theft in Queensland*, paragraph 3.4
[11] Dr Tess Hardy, Melissa Kennedy & Professor John Howe, *Submission to Queensland Education, Employment and Small Business Committee: Inquiry into Wage Theft in Queensland*

compliance. However, recent survey research undertaken to explore the deterrence-effects of the FWO's enforcement activities, including civil remedy litigation, reveals that the relationship between higher penalties and perceptions of deterrence is not clear-cut."[12]

42. General deterrence theory was also discussed in the context of the proposed criminalisation of wage theft, but has application to debate surrounding the likely effectiveness of increased civil penalties:

    'Classic deterrence theory recognises that individuals are deterred from breaking the law if they perceive a likelihood of detection is high and calculate that the potential gains are not worth the risk of being sanctioned..

    As such, a model of criminalisation focusing on deterrence may not be adequate to bring about the necessary changes in business behaviour to prevent wage theft from occurring, particularly if this is not accompanied by an increase in inspectorate and prosecution resources'[13]

43. The FWO is recognised by statute as being the primary actor responsible for enforcing workplace laws across all Australian industries, and the discussion paper acknowledges the need for a capable and resourced regulator. However, the scope of the FWO regulatory role is such that it is unable to undertake the monitoring and enforcement activities necessary to ensure any increase to civil penalties have their desired deterrent effect.

44. Accordingly, whilst the CFMMEU supports an increase in civil penalties for employers that contravene remuneration related obligations under the FW Act, a Government response to the issue of wage theft must address the current absence of effective monitoring and enforcement by the FWO and – in our sector – the ABCC. Further reforms are likely to be ineffective without reinstating the powers of unions to monitor and enforce the law on behalf of their members.

Section 557 and the totality principle

45. A further discussion point is the operation of section 557 of the FW Act and how this provision may be harnessed for the purpose of addressing wage theft.

46. Broadly speaking, section 557 provides that multiple contraventions are taken to be a single contravention in circumstances where they have been committed by the same person and have arisen out of a single course of conduct. This diverges from the common law principle of totality that allows a court to, when sentencing an offender for more than one offence, consider the aggregate or overall sentence to ensure that it is just and appropriate to the totality of the offending behaviour.[14] The appeal of the totality principle is that it allows a court to take a flexible and nuanced approach, ensuring that a sentence is neither too harsh, nor too lenient.

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[12] Dr Tess Hardy, Melissa Kennedy & Professor John Howe, *Submission to Queensland Education, Employment and Small Business Committee: Inquiry into Wage Theft in Queensland,* paragraph 3.5

[13] Dr Tess Hardy, Melissa Kennedy & Professor John Howe, *Submission to Queensland Education, Employment and Small Business Committee: Inquiry into Wage Theft in Queensland,* paragraph 5.4 & 5.6

[14] See Judicial College of Victoria, "6.4 – Totality Principle", available at http://www.judicialcollege.vic.edu.au/eManuals/VSM/14959.htm

47. The effect of section 557 in the context of underpayments is that it can, and has been, criticised for producing a 'significant degree of built in leniency' in circumstances where an employer has knowingly and systematically underpaid employees.

48. Whilst section 557 has been applied in the context of underpayments claims to ensure that even the most unscrupulous employers can escape a civil penalty capable of any genuine financial impact, workers in the construction industry do not benefit from a similar approach under the BCIIP Act

49. For instance, in 2013 the CFMEU was found to have contravened the BCIIP Act 605 times as a result of a single court proceeding.[15] That matter involved unlawful industrial action taken by workers at three Brisbane construction sites, taken over a three-day period in 2011. The number of contraventions reflect the fact that the Court determined that the word 'person' in the BCIIP Act is read in the singular, meaning that when a group of persons engage in industrial action – even if it is collective industrial action – each of those persons commit a separate offence. Because the union was found to have been 'knowingly concerned' in the taking of the action by each of the individual workers, it was subsequently taken as having itself contravened the act in respect of each individual worker.

50. Based on the foregoing, the CFMMEU submits that an effective means of addressing concerns that s.557 results in excessive lenient penalties for even the most egregious examples of wage theft, is to exclude operation of s.557 in relation to remuneration-related contraventions of the FW Act.

Establishing liability for head contractors/lead firms

51. The discussion paper raises the question of whether the existing provisions regarding accessorial liability sufficiently regulate the conduct of lead firms/head contractors with regards to wage theft.

52. As previously discussed in these submissions, the construction industry is characterised by complex systems of contracting and subcontracting, with head contractors being responsible for pricing projects. Intensive competitive pressures amongst employers to win contracts has resulted in a practice of driving down wages and entitlements.

53. Section 550 of the FW Act could foreseeably establish liability of a head contractor for unpaid wages and entitlements further down the chain of subcontractors, however there are significant evidentiary difficulties in establishing the requisite level of involvement in the contravention, as required by section 550(2).

54. Instead, the CFMMEU strongly supports the adoption of recommendations arising from the Murray Review of Security of Payment Laws in Australia, particularly the establishment of a statutory cascading trust scheme that applies to all parts of the contractual payment chain. The introduction of such a scheme would do far more than any other action to reduce and manage the wage exploitation of construction workers. It is recommendation that was arrived at following an extensive, independent review and there is no good reason which explains the government's failure to act to immediately to implement the recommendation.

[15] see [2017] FCAFC 113

Sham contracting

55. These current provisions in the *Fair Work Act 2009* (Cth) (**FW Act**) relating to sham contracting are insufficient and have proven ineffective. If the government is serious about eradicating the problem of sham contracting, then significant reform is needed.

56. Firstly, none of the current FW Act provisions actually prohibit sham contracting *per se*; they are confined to circumstances involving misrepresentation, dismissal and inducement[16]. This is not enough. The FW Act needs to be amended to recognise the fact that sham contracting itself warrant serious sanction. It is a practice which wholly undermines not only the provisions of the FW Act itself, but also the superannuation and taxation regimes at large. As we noted in the *Race to the Bottom* report, "[t]he absence of this type of provision allows the entire regulatory regime established by the *Fair Work Act* to be subverted by the since device of sham contracting"[17].

57. To be truly effective, there needs to be a specific and strict liability offence associated with sham contracting which applies not only to a person (or employer), but also to any interposed entity (including corporations, partnerships and trusts) used to engage the worker.

58. Secondly, the "reckless" standard in s357 – which takes its common law meaning – is too high. It requires established knowledge of a substantial risk, harm or illegality, and that a person was aware of the substantial risk[18]. An employer should not be able to successfully defend a contravention by proving that they simply did not turn their minds to the legal distinction between a contractor and employee. Such an approach significantly undermines the value of the FW Act provisions, and contributes to the low prosecution rate.

59. For example, *CFMEU v Nubrick Pty Ltd*[19] a Plant Manager of a large and well-resourced corporation successfully defended a proceeding under the equivalent provision to s.537 of the FW Act in the predecessor *Workplace Relations Act* by giving evidence to the effect that he was not aware of the risk that the relevant workers could be employees; his evidence was that it was only during cross-examination that he became aware of the risk that workers would, or could, be entitled to employer contributions to superannuation.

60. Thirdly, lowering the existing "reckless" threshold to a test of "reasonableness" is not enough. The provisions should be strict liability offences. An employers' state of mind should not be a critical fact in determining whether a breach of the FW Act provisions has occurred. It encourages a scenario whereby the less knowledge of the law an employer has, and the less attention they give to the issue, the more likely they will be able to successfully raise a defence. Rather, the emphasis should be on the accuracy of the representation. We also note that comparable provisions, for example in the *Competition and Consumer Act 2010*, prohibit false representations in relation to the supply of good and services without regard to the intent of the party making the relevant representation[20].

61. In the context of the construction industry, it is worth noting that the ABCC has entirely failed to address the problem of sham contracting. In the face of its statutory mandate to enforce laws

[16] Sections 357-359
[17] At 49
[18] E.g. see *Hann v Commonwealth DPP* [2004] SAC 86
[19] (2009) 190 IR 175
[20] E.g. ss29 and 151 of Schedule 2 of the CC Act

applying to *all* building industry participants, the ABCC adopted the view that enforcing wages and entitlements obligations and investigating sham contracting was not its 'core business', and that it would only investigate such matters if they arose in conjunction with freedom of association issues and the like.[21]

62. Indeed, over the last 16 years the ABCC and its predecessor bodies have prosecuted only 7 cases (3% of all cases pursued) relating to sham contracting. Given the widespread nature of sham contracting in the construction industry, this is nothing short of shocking.

63. In the government is serious about reducing sham-contracting, then it ought to also consider the fact that the current multi-factor test applied by the courts in relation to sham contracting is a complex and fact-intensive inquiry that contributes to the growth of sham contracting. The Report recommended that there should be a "uniform bright-line test" that may be difficult to put into place, but is necessary[22]. It is not clear than any steps have been taken in this regard;

The Introduction of Criminal Sanctions

Deterrence value of criminal penalties

64. The discussion paper seeks comment on a reform option to introduce criminal sanctions to complement the existing civil penalty regime, with criminal liability being reserved for the most serious and culpable instances of wage theft. The purported justification for limiting the application of criminal penalties to only the most serious instances of wage theft is that such a reform *'would not be designed to capture employers who have made inadvertent mistakes leading to underpayment'*

65. The FW Act currently contains a small number of offences that attract criminal sanctions, they include contempt of court and the act of receiving or soliciting a corrupting benefit. The limited number of provisions attracting criminal sanctions in the FW Act is reflective of the long-standing principle that the criminal law has no place in industrial relations.[23]

66. The justification for the introduction of criminal penalties for the most serious and systemic instances of wage theft is said to relate to the expectation that it will enhance specific and general deterrence.

67. For reasons already discussed in relation to civil penalties, any deterrent value associated with the introduction of criminal sanctions will be minimal is the law is not actively enforced and prosecuted. This is supported by Hardy, Kennedy & Howe submission[24] to the Queensland wage theft inquiry, which noted that:

[21] Hansard, Senate Education and Employment Legislation Committee, Estimates, 21 November 2013, 70-71.
[22] At 237 of the Final Report
[23] [23] Dr Tess Hardy, Melissa Kennedy & Professor John Howe, *Submission to Queensland Education, Employment and Small Business Committee: Inquiry into Wage Theft in Queensland,* paragraph 5.2

[24] Dr Tess Hardy, Melissa Kennedy & Professor John Howe, *Submission to Queensland Education, Employment and Small Business Committee: Inquiry into Wage Theft in Queensland*

'A review of the literature on criminalisation in the compliance context suggests that the link between criminalisation and deterrence as a compliance strategy is low. The main reason for the weak compliance effects of criminalisation is related to low prosecution rates.'[25]

68. For these reasons, the CFMMEU questions whether the criminalisation of wage theft, in the absence of strong and consistent enforcement, is an effective means of achieving greater compliance when employers are aware that the risks of being prosecuted are negligible.

Establishing liability

69. Should legislative change be introduced to make the most serious and culpable instances of wage theft a criminal offence, successful prosecutions of the new laws will likely be limited. The reason for this is that prosecuting criminal offences is a resource intensive exercise, largely due to the high standard of proof and the associated evidentiary burden.

70. With regards to the standard of proof, the current civil penalty regime enshrined in the FW Act simply requires that, on the 'balance of probabilities', the Respondent has contravened the relevant provision. However, the criminal standard of proof constitutes a significantly higher bar by requiring that the elements of an offence be proven 'beyond a reasonable doubt'.

71. The difficulty of satisfying the heightened standard of proof in the context of wage theft becomes apparent when consideration is given to modern-day departure from traditional notions of an employment relationship. For example, a typical feature of the construction industry in contemporary Australia is the existence of a contractual chain or hierarchy, whereby a head contractor engages a subcontractor(s), who in turn engages further subcontractors. The practical effect of this phenomenon is that it is not uncommon for a head contractor to have few or no direct employees working on a project.

72. As discussed earlier in this submission, the competitive nature of the construction industry results in the practice of contractors pushing down or underestimating labour costs on a project in order to get a competitive edge. This, amongst other contributing factors, can result in the delay or non-payment of subcontractors, particularly towards the base of the contractual chain. Accordingly, it may be the head contractor or higher tier subcontractors who fail to meet their obligations with respect to payments, who are ultimately responsible for employees of a subcontractor seeking unpaid wages and entitlements. In these circumstances, it would foreseeably be difficult to establish fault of the head or higher tier contractor beyond a reasonable doubt – particularly if the fault element for the offence of wage theft requires more than the demonstration of recklessness on the part of the perpetrator.

Recommendations

73. Any proposed reform should at the very least include:

    a. strengthening the power of unions to inspect time and wages records, and investigate suspected contraventions affecting former and current employees, including non-members;

[25] Dr Tess Hardy, Melissa Kennedy & Professor John Howe, *Submission to Queensland Education, Employment and Small Business Committee: Inquiry into Wage Theft in Queensland,* paragraph 5.5

b. introducing a quick, informal, no-cost jurisdiction for the recovery of wages and entitlements. Recovery of unpaid superannuation contributions is particularly cumbersome and difficult;

c. introducing a Federal Labour Hire Licensing Scheme;

d. implementing the recommendations of the Murray report including – critically – cascading statutory trusts;

e. a significantly more focused prosecution policy, including routine and high profile prosecutions;

f. civil penalties imposed should reflect the number of workers involved in the wage theft, with penalties being applied for each and every affected worker.

25 October 2019

Construction & General Division

Construction, Forestry, Maritime, Mining & Energy Union