MASTER ELECTRICIANS AUSTRALIA

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Submission on Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance discussion paper

Master Electricians Australia

Introduction

Master Electricians Australia (MEA) is a trade association representing electrical contractors, recognised by industry, government and the community as the electrical industry's leading business partner, knowledge source and advocate. MEA currently has a membership base of approximately 3000 electrical contractors in Australia. MEA understands the current and potential issues facing electrical contractors today.

Master Electricians Australia has a dedicated team that provides comprehensive workplace relations advice to electrical contractors who are also employers to ensure that they are compliant with their industrial obligations.

Response

Part I: Civil penalties in the Fair Work Act

Extending liability

Master Electricians Australia have a dedicated team that provides comprehensive workplace relations advice to its members on a range of IR related areas, including award interpretation for payment of wages, allowance, overtime penalties and shift loadings.

MEA has particular concern with the extended liability definition where this creates a connection between a person and /or organisation being held accountable when providing advice. It is the opinion of MEA that further clarification is required to adequately define the phrases used.

As an employer organisation, we are regularly called upon to interpret and provide employment specific information particularly in relation to employment entitlements. It would be detrimental to organisations such as MEA and other employer associations or professional advisors, if they had the potential to be automatically culpable to contraventions by the organisations they had advised if that advice was misinterpreted by the member or in fact was reflecting Government sourced interpretation and convention. Without protections it would make it almost impossible to continue to offer meaningful advice and support to businesses. Further to this, MEA would not support a view of a reverse onus of proof.

Whilst businesses do seek out tailored information on specific sets of circumstances it is not always the case that the advice will be implemented appropriately or that all of the circumstances have not been identified that would perhaps result in a different interpretation; either in it's entirely or adjusted correctly based on a change in circumstances.

For example, advice on shift working patterns may be correct for one scenario but if applied to a different scenario and that same advice is applied it could lead to underpayments of wages. The advice would be viewed as incorrect or abetting the contravention.

In cases such as these, organisations like MEA need to be protected, from poor business decisions. Equally if incorrect information is provided unknowingly, protections need to extend to these individual situations.

A balance must be struck between situations were advice has been reasonable and cases like *Fair Work Ombudsman v Blue Impression Pty Ltd & Ors [2017] FCCA 810 (28 April 2017)* where Judge O'Sullivan agreed with the FWO's submissions that Ezy Accounting 123 Pty Ltd, which claimed it was merely a service provider and that its role was confined to entering data provided by Japanese restaurant operator Blue Impression, denied liability wasn't correct. Ezy and its principal were found to have "had at their fingertips all the necessary information that confirmed the failure to meet the award obligations by [Blue Impression] and nonetheless persisted with the maintenance of its (payroll) system with the inevitable result that the award breaches occurred". They were found accessorily liable for an employer's underpayments.

It should also be acknowledged of the role of government agencies have the provision of 'general information' that employers will rely on which is later found to be incorrect. Despite seeking to protect themselves behind disclaimers that the information provided is not legal advice, the information provide is, in practice, taken by the employer as correct and their view is that relying on it should be defendable.

There is no better example of the complexity of the industrial relations framework and ability of the government's own advisors to make errors in its general information to employers than the Fair Work Ombudsman informing Queensland employers that they should be paying their apprentices under preserved State Award conditions. The FWO advice was that there were no 'sunsetting' provisions to these arrangements.

It wasn't until 12 August 2016 when the Fair Work Commission determined in a dispute over a reference instrument to be applied in an agreement approval that these preserved conditions had in fact ceased effect from **1 January 2014**. The FWO ombudsman's information, including through their pay calculator service, contributed to underpayment of wages to young, vulnerable workers for a period of 32 months. This was despite representations from industrial organisations, through its Practitioner's Assist Service, that these sunsetting provisions existed and the information was wrong.

It is anticipated that clarity on the extended liability definition would serve many stakeholders who provide advice/information services to businesses.

Sham contracting

The electrical contrating industry has a long and legitimate history of subcontracting as does every aprt of the construction industry.

MEA submits that as a result of the overlapping and somewhat competing definitions of sub-contractor and employee, determining which arrangements are genuine sub-contract is often problematic for businesses. Currently there are very few tools available to assist businesses in making conclusive determinations as to the status of their subcontracting relationship. The tools that are currently available are difficult to use and leave businesses making decisions and/or assumptions about the weight or importance of aspects of relationships that may expose them to risks of later claims.

It is important to note that although a person may be deemed an independent or sub-contractor under The Independent Contractors Act 2006 and the Workplace Relations Legislation Amendment (Independent Contractors) Act 2006 laws, it is possible that the same person may be deemed a worker/employee under other laws such as taxation, workers compensation and superannuation laws.

Adequate tools with clearly defined processes are what employers require. These tools need to provide an accurate determination, so as to eliminate businesses engaging in inappropriate employment arrangements. One such tool currently available is through Workcover QLD. This guide has been identified as a basis to create a broader process in which a range of circumstances can be taken into consideration.

As a whole, businesses generally want to comply with employment law and the introduction of a clear and concise process to determine what kind of employment status they're about to engage in, will ensure their compliance. In these instances, the introduction of higher penalties may not create the deterrent that the Federal Government is looking for and places an ever-higher burden on employers. Protections are required to protect those employers that are doing the right thing and penalties should exist for those employers failing to comply, either through consistent patterns of improper engagement or their conduct in establishing the subcontracting arrangements.

Whilst engaging a subcontractor is not a clear matter and parties may set out with acceptable terms, it's how the relationship progresses over time that can also be problematic. Ongoing education and a range of health check tests would be beneficial to ensure businesses remain vigilant, where reclassification is required.

It should be noted, that if a business has taken reasonable steps to ensure they are engaging in a legitimate sub-contracting situation, this in turn then should create a reasonable defence that the business has taken every step to ensure they have tried to comply with the laws.

Appropriate weight should also be applied to instances where the arrangements have perhaps evolved overtime to revert to an employment relationship, but the initiation of the subcontracting arrangements were made by the worker.

Part II: Criminal Sanctions

MEA agrees that criminal sanctions should be introduced for the most serious forms of exploitative conduct. MEA supports a consistent approach across each state and territory, to create one system and set of penalties anything less than this will create confusion amongst businesses and perhaps a loop whole defence.

MEA submits criminal penalties should apply in the event of systematic instigation and demonstrated knowledge of wrong doing, in particular those repeat offenders, that are seen to be breaching awards and / or not meeting minimum standards.

What is clear is that 'wage theft' is not defined by one single element. It is not singularly the underpayment of a wage rate, it is the combined efforts of, often, intimidation of vulnerable workers, a system of deceitful practices to hide the practice, the avoidance of regulatory steps and the finding of the overall intent to underpay workers.

MEA submits that the definition of "wage theft" should be meaningful so as to not capture, excessively it would suggested, underpayment matters that arise and are able to be dealt with by the available regulators and the parties. Wage theft should be the most serious of cases of underpayment of wages, where there is a system of deceptive and/or threatening conduct designed to result in an avoidance of obligations under the relevant instrument.

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