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Submission of the Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia to Senate Education and Employment Committees inquiry into the *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017*

6 April 2017

The Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia, welcomes the opportunity to provide a submission on the *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017.* The Unit commends the Government for bringing this Bill to the Parliament and requests that the Committee recommend the Parliament pass the Bill.

The Unit is very concerned about cases of human trafficking, forced labour and other criminal exploitation on Australian farms, in shops and on other workplaces.

The Australian Institute of Criminology has assessed that exploitation of migrant workers can be "characterised as low-risk, high-profit activities".[1] Workers on temporary work visas often only report issues as a last resort, when "they literally could not remain in that situation either because of serious injury or fear about their personal safety"[2], a state of affairs that underlines not only the huge importance of support services but also how to inform temporary work visa holders of their availability.

The Unit supports the definition of a serious contravention of civil remedy provisions at Section 557A of the Bill.

The Unit strongly supports the increase in maximum civil penalties for certain 'serious contraventions' of the *Fair Work Act.* As noted in the Explanatory Memorandum the "civil penalties under the fair Work Act are currently too low to effectively deter unscrupulous employers who exploit vulnerable workers because the costs associated with being caught are seen as an acceptable cost of doing business" (p. ii).

However, the Unit remains concerned that deliberate theft of wages from employees continues to be treated as a civil matter, unlike other forms of theft which are treated as criminal matters. Theft of wages can cause more harm to a person compared to other more minor forms of theft that are treated as criminal matters. Further, the fraud that is often used to conceal wage theft is

[1] Fiona David, *Labour trafficking*, AIC Reports Research and Public Policy Series 108, 2010, p. xiii
[2] Fiona David, *Labour trafficking*, AIC Reports Research and Public Policy Series 108, 2010, p. xiii

treated far more leniently than fraud related to cheating social security payments despite the fact the payments may be much larger.

The Unit would support a greater obligation being imposed on employers to have to keep employee records, which would assist in cases where people have been subjected to wage theft. Section 535 of the *Fair Work Act 2009* requires employers to make and keep employee records for seven years. Further, under *Fair Work Regulation* 3.42 employers are required to make a copy of the employee record available for inspection at the request of the employee. Under Section 536 of the Act employers are required to produce a pay slip for employees within one working day of payment being made. Failing to meet these requirements carries a civil penalty of up to 30 penalty units for an individual and 150 penalty units for a body corporate. However, the Unit is aware that many employers fail to comply with these requirements, with the penalty simply being a small cost to much larger rewards that flow from wage theft. Without employment records and pay slips, it is extremely difficult for employees to prove what hours they worked and how much was stolen from them through wage theft. Currently, the evidentiary burden rests with the employees to prove the level of wage theft they were subjected to. Further, the experience of bodies that represent employees subjected to wage theft is that the Fair Work Ombudsman will rarely assist employees to pursue a claim of wage theft without significant written documentation to prove their case.

The Unit would therefore support a reverse onus of proof on employers that have failed to keep employee records and provide payslips. The employer should be liable to pay a claim of wage theft unless they can provide evidence they paid the required wages. Employers will often have access to evidence to prove their case that employees do not, such as rosters, records of employees 'badging' in and out of a workplace or security camera footage.

The Unit supports the new Section 557B that allows determination if a body corporate's conduct 'deliberately' contravened the law and not allow the body corporate to immediately claim the misconduct was the result of a 'rogue' manager.

The Unit supports Part 2 to hold franchisor entities and holding companies to account for exploitation of employees where the franchisor or holding company or an officer of the franchisor or holding company knew, or could have reasonably been expected to have known, of the exploitation. The Unit agrees that the liability should not apply if the franchisor or the holding company took reasonable steps to prevent the exploitation.

However, the Unit is disappointed the Bill does not appear to make franchisors or holding companies liable for illegal acts carried out by franchisees or subsidiaries. It does introduce a new civil remedy provision for failing to take reasonable steps to prevent the illegal acts. Thus, in the current drafting, it would appear the head office could not be held liable to wage theft by a franchisee or subsidiary. The people subjected to the wage theft could only seek that the head office pay a penalty for a breach of Section 558B. The Unit would prefer to see the Bill amended so that the responsible franchisor or holding company that breaches Section 558B would also be taken to have breached the relevant provisions contravened by the franchisee or subsidiary.

We note the Franchise Council of Australia opposes the Bill because of this part and part of their argument is that other employers engage in wage theft and other illegal exploitation of their workforce, so why should franchise businesses be singled out.[3] One reason this part of the Bill is needed is the sheer volume of cases that have been emerging where there is systemic wage theft and illegal exploitive practices in franchise arrangements. Secondly, franchise arrangements need greater liability placed on them as the model can allow a franchisor that is orchestrating wage theft and other illegal activities to claim plausible deniability blaming all the illegal activity on franchisees, with a high bar for regulatory authorities to establish the

[3] https://www.franchise.org.au/articles/fair-work-act--why-there-s-still-more-work-to-be-done.html

orchestration of the criminal activity. Even the current drafting of the Bill can perversely encourage the criminally minded to set up franchise arrangements that allow the franchisor to make efforts to try and avoid the test that they have significant control or influence over franchisees. Thirdly, there appears to be a serious cultural problem in relation to franchise arrangements being willing to fully co-operate with law enforcement agencies when it comes to employment law. For example, in late 2016 it was reported that the Fair Work Ombudsman invited eight franchisor chief executives to enter into compliance partnerships with the FWO, underpinned by proactive compliance deeds. The initiative was supported by the Franchise Council of Australia, but only one franchisor engaged in the process. One refused to participate and the remaining six simply ignored the FWO invitation.[4]

The Unit supports Part 3 to prevent an employer being able to take unreasonable payments or deductions from employees, which would include arrangements where employees are subject to extortion (sometimes with violence to compel the payment) from their employer to have to hand over part of their pay to the employer after they have been paid. Again the Unit would prefer to see cases of such extortion treated as criminal extortion would be, rather than as a civil matter.

The Unit supports Part 4 of Schedule 1 that will increase the powers of the Fair Work Ombudsman to gather evidence in ways that match the powers already available to other corporate regulators like ASIC and the ACCC.

The Unit supports Sections 712A and 712B which allows the Fair Work Ombudsman to be able to compel the provision of information or documents related to a suspected contravention of the *Fair Work Act 2009.*

The Unit strongly supports Part 5 relating to making it an offence for a person to hinder or obstruct the Fair Work Ombudsman or an inspector. An example of hindering an investigation by the Fair Work Ombudsman was reported by FWO in their report into the investigation of the labour procurement arrangements of the Baiada Group, where inspectors from the FWO were sent to a false address:[5]

> *DMY Trading Pty Ltd and Yu Lin Trading Pty Ltd, operated by husband and wife directors, provided Fair Work Inspectors with records for their six subcontractors at the Hanwood site. When Fair Work Inspectors attempted to serve a Notice to Produce on one subcontractor they found an automotive workshop. The director of that business advised he had been at the registered address for 25 years and had never heard of the subcontractor named in the Notice.*

The FWO did not report taking any enforcement action against those responsible for the hindering of their investigation, suggesting the need for a greater range of penalties in relation to hindering or obstructing an investigation.

The Unit strongly supports Part 6 to address employers that create false and misleading documents and pay slips to try and hide violations of the *Fair Work Act 2009.* However, the Unit would support the offence including a lower bar of the employer being reckless as to if the documents or pay slips are false or misleading, so the Fair Work Ombudsman does not have to prove the higher bar of knowingly creating false or misleading documents or pay slips.

In Section 718A the Unit does not believe there should be a defence that in providing a false or misleading document to the Fair Work Ombudsman, the official did not inform the employer that they may be subject to a civil remedy for knowingly or recklessly providing false or misleading

[4] 'Franchisors spurning partnership proposals, says FWO', *Workplace Express*, 2 September 2016, https://www.workplaceexpress.com.au

[5] *The Fair Work Ombudsman's Inquiry into the labour procurement arrangements of the Baiada Group in New South Wales,* June 2015, p. 23.

documents to the Fair Work Ombudsman. It should be common sense that knowingly or recklessly providing a false or misleading document to a law enforcement body would be a breach of the law. It is disturbing that the drafters of the legislation believe that there are employers who believe that it would be acceptable to provide false and misleading documents to law enforcement officials, showing how normative disregard for employment law is in Australia.

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