Australian Government
Attorney-General's Department

# Senate Economics References Committee Inquiry into the unlawful underpayment of employees' remuneration

## Submission of the Attorney-General's Department

**March 2020**

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# I. Introduction

The Attorney-General's Department welcomes the opportunity to make a submission to the Senate Economics References Committee (the Committee) Inquiry into the unlawful underpayment of employees' remuneration.

The Government considers any denial of workers' legal entitlements to be unacceptable. Wage underpayment and employee exploitation deny employees their legal entitlements. They have the further effect that there is not a level playing field for employers, such that those who are trying to do the right thing are competing against a small portion of unscrupulous employers that deliberately underpay or exploit workers.

The *Fair Work Act 2009* (Fair Work Act) underpins Australia's current national industrial relations system. While it seeks to protect workers and their rights, the problem of wage underpayment has persisted.

Given the current framework was introduced over 10 years ago, the Government considers there is a strong case that the current penalty, compliance, and enforcement framework for breaches of the Fair Work Act needs to be improved. As such, the Government has committed to introducing measures to send a strong and unambiguous message to employers that they cannot get away with exploiting vulnerable workers, including by introducing criminal penalties for the most serious forms of exploitative conduct.

This submission is structured in three parts, providing an overview of:

- the scope of the submission, and ways of defining underpayment;
- the existing framework under the Fair Work Act; and
- Government commitments to continue to address unlawful underpayments.

## Scope of the submission

Portfolio responsibility for industrial relations matters is held by the Attorney-General's Department (the department), which supports the Minister for Industrial Relations to ensure safe, fair and productive workplaces. The department's submission addresses the terms of reference that fall within its responsibilities.

The Fair Work Ombudsman (FWO) is the primary Government agency that regulates compliance with the Fair Work Act. The Australian Building and Construction Commission (ABCC) regulates the building and construction industry.

Employer superannuation policy is positioned within the superannuation system jointly administered by the Treasury and the Australian Taxation Office (ATO) through the Superannuation Guarantee (SG). The Department understands each of these agencies will be providing a separate submission to the inquiry.

## Defining underpayment

While the term 'wage theft' has been used publicly as an umbrella term to describe underpayments, employers who fail to comply with workplace laws generally fall into one of two distinct groups:

- employers that have made genuinely unintentional mistakes, for instance, due to the complexity of the wages and entitlements framework, which have led to miscalculations and underpayments, but are rectified once identified; and

- employers that knowingly and intentionally underpay, or otherwise exploit, employees.

Underpayments may include any failure to pay amounts payable to the employee in relation to the performance of work, including wages, monetary allowances, incentive-based payments and bonuses, loadings, overtime or penalty rates or leave payments. Underpayment may also include unpaid training, sham contracting arrangements, employers requiring the up-front payment of a 'deposit' for the job, 'cash-back' arrangements or unlawful deductions.

Many of these issues were highlighted in the Migrant Workers' Taskforce Report[1], released in March 2019. The Government established the Migrant Workers' Taskforce in 2016 to identify proposals for improvements in law, law enforcement and investigation, and other practical measures to more quickly identify and rectify any cases of migrant worker exploitation. The report made 22 recommendations, with the majority directed at reducing employee exploitation through changes to elements of the Fair Work Act. In broad terms, those recommendations focused on:

(i) the adequacy of the existing penalty framework;
(ii) the introduction of criminal sanctions for the most serious forms of exploitative workplace conduct;
(iii) the adequacy of compliance and enforcement tools available to workplace regulators and the courts; and
(iv) mechanisms to recover unpaid wages.

The Government agreed in principle to all recommendations in the Taskforce Report[2], including introducing criminal penalties for the most serious forms of workplace exploitation. Implementation of the recommendations (see Attachment A) is being progressed by Government.

## II. Existing framework under the *Fair Work Act (2009)*

National Employment Standards, minimum wage, modern awards

The National Employment Standards (NES) are 10 minimum standards of employment that apply to employees covered by Australia's national workplace relations system. These include entitlements to annual leave, personal/carer's leave, unpaid parental leave, notice of termination, redundancy, and maximum weekly hours of work.

There are also 121 industry and occupation based modern awards that provide minimum terms and conditions of employment on top of the NES. These include entitlements like minimum wages, hours of work, rosters, breaks, allowances, penalty rates and overtime.

Terms in modern awards, enterprise agreements (or other registered agreements), or contracts of employment cannot exclude or provide for an entitlement less than the NES. All national system employees must be paid no less than the minimum wage set out in the relevant industrial instrument. The 121 modern awards set minimum wages by industry and occupation, while for employees covered by an enterprise agreement, pay

[1] Australian Government, *Report of the Migrant Workers' Taskforce*, March 2019.
[2] Australian Government, *Government Response to the Migrant Workers' Taskforce Report*, March 2019.

rates are set out in the agreement. However, it is important to note that the base rates of pay in agreements cannot fall below the base rate of pay provided for in the relevant modern award or minimum wage order.

## Protecting Vulnerable Workers legislation

On 5 September 2017, the Parliament passed *the Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Protecting Vulnerable Workers Act). The legislation introduced a higher scale of penalties for 'serious contraventions' of prescribed workplace laws. Deliberate and systematic contraventions of these workplace laws now carry a penalty of up to $630,000 per contravention for companies and $126,000 per contravention for individuals – a ten-fold increase on the previous maximum penalty. Additional measures introduced through the Protecting Vulnerable Workers Act include:

- doubling of penalties for record-keeping and pay slip breaches;
- extending liability to franchisors and holding companies for breaches by their networks where they knew or could reasonably be expected to have known of contraventions, and failed to take reasonable steps to address them;
- additional evidence gathering powers for the FWO, including the power to compel witnesses to provide evidence or attend an interview;
- outlawing cashback arrangements — making it unlawful for an employer to require an employee to unreasonably spend all of their money or give it to their employer;
- new provisions and penalties for hindering an investigation, or providing false or misleading information, documents or employment records; and
- a reverse onus of proof, so employers that do not meet records or pay slip requirements have to disprove an allegation of underpayment in court.[3]

These legislative changes recognised that there were deficiencies in the regime, and sought to provide a broader range of penalties to address the spectrum of non-compliance, including higher penalties for 'serious misconduct'. It also sought to address concerns that the previous civil penalties available under the Fair Work Act were too low to effectively deter unscrupulous employers who exploited vulnerable workers.

Since the Protecting Vulnerable Workers legislation commenced in September 2017, the FWO has commenced 13 court matters involving the new provisions.[4] On 21 August 2019, the first court decision was handed down under the Protecting Vulnerable Workers legislation.[5] The case was brought by the FWO against operators of two sushi outlets in Queensland for failing to keep proper time and wages records and failing to issue pay slips, securing penalties of $125,000. In November 2019, two further penalty judgements were handed down. In one case, the FWO secured $151,200 in court-ordered penalties against a Melbourne plumbing business and its sole director who underpaid a worker and kept false records under section 535 of the Fair Work Act.[6] In another

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[3] *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017.*
[4] Ms Sandra Parker PSM, Fair Work Ombudsman, *Supplementary Estimates Hansard*, 23 October 2019, p. 87.
[5] Fair Work Ombudsman, *Sushi operators penalised $125,000*, 21 August 2019, <https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/august-2019/20190821-sushi-79-penalty-media-release>.
[6] Fair Work Ombudsman, *Plumber penalised over $150,000*, 19 November 2019, <https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/november-2019/20191119-pulis-plumbing-penalty>.

case, the FWO secured $75,400 in court-ordered penalties against a pizza store and its director for underpaying visa holders and a young worker, including a penalty for providing false or misleading documents and information to a Fair Work Inspector under section 718A of the Fair Work Act.[7]

The Government has recognised the need to review the ongoing effectiveness of these changes and has recently sought feedback on their operation through the release of a discussion paper on the penalties framework under the Fair Work Act (see below for information on the 'strengthening penalties' discussion paper). This paper forms part of the Government's consultation on industrial relations reform. Further details on the industrial relations consultation is in Part III of this submission.

### Civil penalties

The courts have access to a range of civil penalties to deter non-compliance with industrial relations laws. The Fair Work Act prescribes the maximum penalty a court can award for each contravention of a civil remedy provision, which can range from a $420 fine for some record keeping failures, through to monetary penalties of $630,000 for serious contraventions committed by body corporates. The *Building and Construction Industry (Improving Productivity) Act 2016* (BCIIP Act) also sets out the maximum penalties a court can award for particular contraventions relating to investigations in the building and construction industry. These penalties range from $4,200 for failing to comply with a notice to produce records or documents, through to $210,000 for a body corporate that hinders or obstructs an Australian Building and Construction Commission (ABCC) inspector exercising compliance powers. A list of civil penalties for breaches of wage related provisions under the Fair Work Act and BCIIP Act is at Attachment B.

Civil penalties for contraventions of the Fair Work Act are determined at the court's discretion, within the maximum penalties prescribed in the Act. The court may take into account a very broad range of factors, including the wrongdoer's capacity to pay the penalty.

It is important to note that orders relating to employee entitlements will typically take priority over penalty orders. This means that any civil penalty order would usually be imposed in addition to an order relating to employee entitlements (for example, paying any unpaid wages).

Orders relating to employee entitlements are also determined at the court's discretion. The court may account for factors including taxation when determining a compensation order. For example, a court may 'gross up' a lump sum amount to be paid in compensation, to account for the higher tax that would apply than if the amount had been paid out in increments as income over a period of time.[8]

The Migrant Workers' Taskforce Report recommended that the general level of penalties for breaches of wage exploitation related provisions in the Fair Work Act be increased. To progress this commitment, the Government released a discussion paper '*Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance*' ('strengthening penalties' paper) in September 2019. The

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[7] Fair Work Ombudsman, *Former Crust pizza franchisee penalised*, 19 November 2019, <https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/november-2019/20191119-desire-food-penalty-media-release>.

[8] See *Smith v SBP Employment Solutions Pty Ltd & Ors (No.3),* [2019] FCCA 3516.

Government is currently considering the feedback received during this consultation. Further detail on the discussion paper process is in Part III of this submission.

### Accessorial liability

The Fair Work Act extends accessorial liability for contraventions of workplace laws in circumstances where a person or company is involved in that contravention but is not the principal person or company responsible for the contravention. This might occur in circumstances where they have aided, abetted, counselled or procured the contravention; induced the contravention; were knowingly concerned in the contravention; or conspired with others to effect the contravention. An 'involved' person can be liable for penalties for their involvement in the contravention and, in some circumstances, for any unpaid employment entitlements.

Since the introduction of the Protecting Vulnerable Workers legislation, franchisors or holding companies can also be held liable for contraventions by their franchisees or subsidiaries where they were reasonably expected to know that the breach would occur, and did not take reasonable steps to prevent the contravention from occurring.

The Migrant Workers' Taskforce Report recommended extending accessorial liability provisions of the Fair Work Act to also cover situations where businesses contract out services to persons.[9] The Government accepted this recommendation in principle and recently sought views on the issue in the 'strengthening penalties' discussion paper. The Government is currently considering the feedback received during this consultation.

### Sham contracting arrangements

Sham contracting generally refers to the practice of an employer wrongly treating someone whose relationship with the employer should properly be characterised as an employee (whether full- or part-time) as an independent contractor. The motivation for such conduct would usually be to avoid paying employee entitlements such as minimum wage, paid leave, and superannuation contributions. Employers found to have engaged in sham contracting arrangements may be penalised separately for sham contracting and underpayment contraventions.

The sham contracting provisions of the Fair Work Act provide civil penalties for conduct including:

- misrepresenting an employment relationship as an independent contracting arrangement, with a defence for those who can show that they did not know, and were not reckless about whether, the individual was an employee;
- dismissing or threatening to dismiss an employee to engage them as an independent contractor; or

[9] Recommendation 11a of the Migrant Workers' Taskforce Report – 'It is recommended that the Government consider additional avenues to hold individuals and businesses to account for their involvement in breaches of workplace laws, with specific reference to: extending accessorial liability provisions of the *Fair Work Act 2009* to also cover situations where businesses contract out services to persons, building on existing provisions relating to franchisors and holding companies'.

- knowingly making a false statement to influence an employee to become an independent contractor.

Contraventions of each of these provisions attract a maximum civil penalty of $12,600 (60 penalty units) for an individual and $63,000 (300 penalty units) for a body corporate.

The 2017 Black Economy Taskforce Final Report[10] noted that sham contracting arrangements are not only unfair to employees, but they also penalise employers who abide by the law (through the persistence of uneven commercial playing fields).

To help address sham contracting, the Government provided an additional $9.2m in the 2019–20 Budget for the FWO to establish a dedicated sham contracting unit to help educate individuals about their rights and crackdown on the practice. The Government also announced a commitment to introduce tougher penalties for sham contracting contraventions. The Government has consulted with the public on this commitment, requesting public feedback on the penalties that apply to the sham contracting arrangements in its 'strengthening penalties' paper. The Government is currently considering the feedback received during this consultation.

### Industrial relations regulators

As outlined above, the FWO is the primary Government agency that regulates compliance with the Fair Work Act, with the ABCC regulating the building and construction industry.

In 2018–19, the FWO recovered over $40.2 million in unpaid wages for more than 17,000 workers. In the same year, the FWO also commenced 23 proceedings in court and secured over $4.4 million in court-ordered penalties.[11]

As an independent statutory agency, the FWO performs a range of compliance and enforcement functions under section 682 of the Fair Work Act. The FWO's Compliance and Enforcement Policy provides guidance for how the FWO performs these statutory functions.[12] The policy states that the FWO will assess each matter before deciding how to respond by drawing on the range of tools and powers at its disposal which are most appropriate for the particular situation, including:

- providing education, advice, and dispute resolution services;
- commencing an investigation or inquiry into the potential non-compliance;
- exercising compliance powers to enter premises or require production of information or documents; and
- exercising enforcement tools, including issuing a compliance notice or an infringement notice, entering into an enforceable undertaking, or commencing legal proceedings.

In 2019, the FWO's *Compliance and Enforcement Policy* was reviewed, simplified and updated in response to changing community expectations about how regulators use their statutory enforcement tools. The FWO has

[10] Australian Government, *Black Economy Taskforce Final Report*, October 2017.
[11] Fair Work Ombudsman, *Annual Report 2018-19,* September 2019.
[12] Fair Work Ombudsman, *Compliance and Enforcement Policy*, July 2019.

announced its intention to send a strong message of deterrence to would-be lawbreakers by striking the right balance between using enforcement tools, and getting a timely outcome for those employees who have been underpaid[13]. This entails a significant increase in its use of Compliance Notices[14], and court enforceable undertakings being the minimum requirement for companies that self-disclose workplace contraventions.

The FWO litigates strategically, reserving court action for matters that act as general or specific deterrence or provide clarification of the law, including cases involving serious and deliberate non-compliance, exploitation of vulnerable workers, and failure to cooperate with the regulator. The FWO has also stated that self-disclosure alone does not absolve companies that have contravened workplace law, and that companies found to have broken the law should expect a public enforcement outcome.[15]

The role of the FWO in regard to superannuation under the Fair Work Act is generally confined to providing advice about, and enforcing compliance with, terms of modern awards and enterprise agreements (or other registered agreements) which require employers to make superannuation contributions.

The ATO and the FWO work collaboratively within their legislative frameworks to share information where appropriate in order to monitor compliance under their respective jurisdictions. For example, under a Memorandum of Understanding, the FWO provides the ATO with reports with details of employers who appear to have not paid SG contributions. The FWO does not have statutory access to payment information from employers to superannuation funds in the same way as the ATO.

Similarly, the ABCC is the independent industrial relations regulator for the building and construction industry. The ABCC has similar powers to the FWO, which includes enforcing compliance with the Fair Work Act in relation to the building and construction industry, as well as the *Building and Construction Industry (Improving Productivity) Act 2016*. Since the ABCC was re-established in December 2016, around $1.7 million worth of unpaid wages and entitlements for workers has been recovered.

The ABCC undertakes a combination of proactive and reactive audits and investigations to recover and ensure workers' remuneration has been paid in accordance with legislative requirements. The ABCC has established a dedicated, stand-alone team responsible for wages and entitlements audits and recoveries. In the 2018-19 financial year, of the $823,724 in workers' wages and entitlements recovered by the ABCC, $722,211 was a result of proactive audit activity. Reactive investigations accounted for $101,512. On this basis, the vast majority of the money recovered by the ABCC during that year was because of proactive action taken by the ABCC.

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[13] Fair Work Ombudsman, *FWO launches 2019–20 priorities*, 3 June 2019, <https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/june-2019/20190603-aig-pir-media-release>.

[14] Between 1 July 2019 and 30 September 2019, the FWO had already issued 294 compliance notices, compared to 57 compliance notices issued during the same period the previous year.

[15] Fair Work Ombudsman, *FWO responds to Woolworths' self-disclosure,* 31 October 2019, <https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/october-2019/20191030-ww-mr>.

The ABCC engages with workers and employers on a regular basis to ensure compliance with industrial laws in the industry. The ABCC undertakes educational campaigns, including presentations to industry. The ABCC publishes information on its website to ensure workers, employers and other building industry participants understand their rights and obligations.

The ABCC provides support to workers and employers, and acts on every enquiry it receives. In the 2018-19 financial year, the ABCC received 1,204 enquiries about workplace laws. Of these, around 25 per cent related to wages and entitlements. Additionally, the ABCC provides an online facility for workers and other building industry participants to anonymously report potential contraventions of industrial relations laws.

## Recovery of unpaid entitlements

### Small claims

Section 548 of the Fair Work Act makes provisions for certain proceedings to be deal with as small claims proceedings in a state or territory court of the Federal Circuit Court. The small claims process is designed to be quick, cheap and informal, and deal specifically with underpayments of $20,000 or less.[16] The aim is to settle disputes quickly and fairly, with minimum expense to the parties. Matters are usually resolved during the preliminary stage or with only one hearing, and without the involvement of lawyers. The Fair Work Act sets out that legal representation requires leave of the court, with leave only granted if no party is unfairly disadvantaged. Industrial representation also requires leave of the court and, if in a state or territory court, the law of the state must allow for the party to be represented in this way.

When dealing with small claims, the courts are not bound by the usual rules of evidence and procedure, which allow monetary claims to be dealt with more efficiently and expeditiously than regular court hearings. The legislative framework for the small claims process remains largely unchanged since it was first introduced in 2009.

Applicants can lodge a small claims application in the Federal Circuit Court or the relevant state or territory court.[17] The FWO may provide applicants with assistance to lodge small claims matters, including discussing different options, explaining the process, preparing and presenting calculations, completing court application and response forms, and filing and serving court documents.

The Migrant Workers' Taskforce found that commencing small claims proceedings can be a 'powerful incentive' to negotiate a settlement. In 2018–19, the FWO assisted over 1,000 people through the small claim process, recovering $1,123,616 in unpaid entitlements.[18] Separately, the FWO also attended small claims hearings as a 'friend of the court' in over 400 matters.

While evidence suggests that only a small number of workers utilise the small claims process, filings in the Federal Circuit Court have been increasing – there were 210 small claims applications in 2011-12, increasing to 456 applications in 2017-18, and 513 in 2018-19. The Migrant Workers' Taskforce identified a number of access

[16] See also *Fair Work Regulations 2009*, regulation 4.01.
[17] Final and compulsory determination of an underpayment claim, or the making of binding orders, requires the exercise of judicial power, which is why these matters must be dealt with by courts.
[18] Fair Work Ombudsman, *Annual Report 2018-19,* September 2019.

barriers for individuals' in relation to the small claims process, including a lack of awareness of the option to lodge a claim in this way, and challenges in navigating court rules and procedures.[19]

In response to the Migrant Workers' Taskforce report, the Government is consulting on potential changes to the small claims process. The recently published discussion paper titled '*Improving protections of employees' wages and entitlements: further strengthening the civil compliance and enforcement framework'* invited submissions on these issues.

### Fair Entitlements Guarantee

The Fair Entitlements Guarantee (FEG) is a safety net scheme of last resort which protects employees who lose their job through bankruptcy or liquidation and are left with certain unpaid employment entitlements.

The following five basic employment entitlements are covered under FEG:

i. unpaid wages capped at 13 weeks, which can include underpaid wages but is subject to a maximum weekly wage threshold;
ii. unpaid annual leave;
iii. unpaid long service leave;
iv. payment in lieu of notice (capped to 5 weeks); and
v. redundancy pay (capped to a 4 weeks per full year of service).
*Note: payments are subject to a maximum weekly wage amount, currently $2451 per week*

A range of eligibility conditions apply to FEG, including that:

i. the person's employment has ended due to the employer's insolvency;
ii. the person is an employee within the meaning of an employee at common law;
iii. the person is an Australian citizen, permanent resident or holder of a Special Category Visa (i.e. NZ citizen); and
iv. the person took reasonable steps to recover their debt before the insolvency event.

In 2018 – 19, the FEG program advanced $174.8 million in claim payments to 11,207 people.[20]

## Protection from adverse action

People who expose workplace non-compliance are protected from adverse action taken by their employer under the general protections provisions in Part 3-1 of the Fair Work Act. The general protections provide that an employer must not take any 'adverse action' against an employee (including prospective employees), because that employee has a workplace right, has exercised a workplace right or proposes to exercise that workplace right. Adverse action is taken by an employer against an employee if the employer threatens to, organises, or takes action by:

- dismissing the employee;

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[19] Australian Government, *Report of the Migrant Workers' Taskforce,* March 2019.
[20] Department of Employment, Skills, Small and Family Business, *Annual Report 2018-19*, September 2019.

- injuring the employee in his or her employment;
- altering the position of the employee to the employee's prejudice;
- discriminating between the employee and other employees of the employer;
- refusing to employ a prospective employee; or
- discriminating against the prospective employee in the terms of conditions on which the prospective employer offers to employ the prospective employee.

A general protections application can be made to the Fair Work Commission. There is no cap on compensation in this jurisdiction.

# III. Government commitments to address unlawful underpayments

## Industrial relations consultation

In 2019, the Prime Minister asked the Attorney-General, in his capacity as Minister for Industrial Relations, to take a fresh look at the industrial relations system. The Government is examining the system to identify how it is operating and where there are impediments to shared gains for both employers and employees that could be improved, with a view to strengthening the economy, increasing wages, jobs growth and protecting employees' rights.

As part of this consultation process, the Government is issuing discussion papers on various topics to ascertain stakeholders' views and identify specific opportunities for improvement. In September 2019, the Government released its first discussion paper, entitled '*Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance*'. The paper focused on issues raised by the Migrant Workers' Taskforce, including the adequacy of the existing civil penalty framework, the potential introduction of criminal sanctions, as well as greater deterrents for sham contracting and the suitability of employers' liability where entities in their supply network contravene employment laws.

Consultation has closed on the paper, and the Government is in the process of considering submissions.

A further discussion paper entitled '*Improving protections of employees' wages and entitlements: further strengthening the civil compliance and enforcement framework'* was published in February 2020, seeking feedback on topics including the recommendations of the Migrant Workers' Taskforce relating to faster, more efficient remedies for workers to recover unpaid wages, and empowering the Fair Work Ombudsman to pursue banning and disqualification order applications against directors.[21] The paper also asks whether the courts should be given greater powers to issue banning orders to prevent companies doing certain things such as employing workers on certain visa types, and issuing adverse publicity orders that force companies to disclose or publish their offences. Submissions to this paper close on 3 April 2020.

The Attorney-General intends to release more discussion papers in coming months.

[21] All discussion papers, including those closed for consultation, can be found on the Attorney-General's Department's website at https://www.ag.gov.au/Consultations/Pages/industrial-relations-consultation.aspx.

## Funding for the Fair Work Ombudsman

The Government has provided the FWO with an additional $60 million in funding in recent years. This includes $10.8 million over four years from 2019-20 to conduct more investigations relating to underpayments and take action to deter non-compliance. The funding will also support an education campaign to raise migrant workers' awareness and understanding of their rights under Australian workplace laws.

This followed the extra $20.1 million provided to the FWO in 2016-17 to assist the regulator to deal more effectively with employers who intentionally exploit workers, in particular, overseas workers or those belonging to ethnic communities.

## Criminalising underpayments

The Migrant Workers' Taskforce recommended that criminal sanctions be introduced for the most serious forms of exploitative conduct.[22] In response to the recommendation, the Government has commenced drafting legislation to criminalise the underpayment of employees. Adding criminal penalties to the suite of penalties available will provide regulators and the courts with the appropriate tools to address serious contraventions of the Fair Work Act. It sends a strong and unambiguous message to employers that they cannot get away with exploiting vulnerable employees, including by underpaying wages and other entitlements.

It is equally clear that such sanctions should be reserved for the most serious and culpable forms of workplace misconduct and would not be designed to capture employers who have made inadvertent mistakes leading to underpayment. The potential of criminal penalties for wage underpayment and employee exploitation is expected to enhance specific and general deterrence and reduce the harmful effects of this unlawful conduct.

As part of the 'strengthening penalties' paper, the Government sought stakeholder views on criminalising underpayments, including the potential fault element of the offence, attributing criminal liability, interaction with the civil penalty regime and with other criminal laws, and enforcement considerations. Submissions made in response have been considered in the legislative drafting process.

## National labour hire registration scheme

The Government has committed to establishing a new National Labour Hire Registration Scheme to regulate Australia's labour hire industry – a key recommendation of the Migrant Workers' Taskforce. The Scheme will help ensure workers receive their entitlements under workplace laws while ensuring businesses can compete on a fair and level playing field. The Government is consulting stakeholders to inform the details of the Scheme and ensure it is robust and fit for purpose.

[22] Recommendation 6 of the Migrant Workers' Taskforce: 'It is recommended that for the most serious forms of exploitative conduct, such as where the conduct is clear, deliberate and systemic, criminal sanctions be introduced in the most appropriate legislative vehicle.'

# Attachment A – Recommendations of the Migrant Workers' Taskforce Report

**Recommendation 1**

It is recommended that the Government establish a whole of government mechanism to further the work of the Migrant Workers' Taskforce following its completion.

**Recommendation 2**

It is recommended that a whole of government approach to the information and education needs of migrant workers be developed. It is recommended that this approach be informed by findings of the research project, The Information Needs of Vulnerable Temporary Migrant Workers about Workplace Laws, with implementation of the following measures:

- improve the delivery and accessibility of personalised, relevant information to provide the right messages at the right time to migrant workers
- use behavioural approaches to encourage and advise migrant workers how to take action if they are not being paid correctly
- enhance the promotion of products and services already available from government agencies — particularly in-language information — through search engine optimisation, expanded use of social media channels, and cross-promotion of Fair Work Ombudsman material by other agencies
- improve messaging in government information products so they are translated, simple, clear and consistent
- work with industry and community stakeholders to educate employers and address misconceptions about the rights and entitlements of migrant workers in Australian workplaces.

**Recommendation 3**

It is recommended that legislation be amended to clarify that temporary migrant workers working in Australia are entitled at all times to workplace protections under the *Fair Work Act 2009*.

**Recommendation 4**

It is recommended that legislation be amended to prohibit persons from advertising jobs with pay rates that would breach the *Fair Work Act 2009*.

**Recommendation 5**

It is recommended that the general level of penalties for breaches of wage exploitation related provisions in the *Fair Work Act 2009* be increased to be more in line with those applicable in other business laws, especially consumer laws.

**Recommendation 6**

It is recommended that for the most serious forms of exploitative conduct, such as where that conduct is clear, deliberate and systemic, criminal sanctions be introduced in the most appropriate legislative vehicle.

**Recommendation 7**

It is recommended that the Government give the courts specific power to make additional enforcement orders, including adverse publicity orders and banning orders, against employers who underpay migrant workers.

**Recommendation 8**

It is recommended that the *Fair Work Act 2009* be amended by adoption of the model provisions relating to enforceable undertakings and injunctions contained in the *Regulatory Powers (Standard Provisions) Act 2014* (Cth).

**Recommendation 9**

It is recommended that the Fair Work Ombudsman be provided with the same information gathering powers as other business regulators such as the Australian Competition and Consumer Commission.

**Recommendation 10**

It is recommended that the Government consider whether the Fair Work Ombudsman requires further resourcing, tools and powers to undertake its functions under the *Fair Work Act 2009*, with specific reference to:

- whether vulnerable workers could be encouraged to approach the Fair Work Ombudsman more than at present for assistance
- the balance between the use of the Fair Work Ombudsman's enforcement and education functions
- whether the name of the Fair Work Ombudsman should be changed to reflect its regulatory role
- getting redress for exploited workers, including the use of compliance notices and whether they are fit for purpose
- opportunities for a wider application of infringement notices
- recent allocations of additional funding.

**Recommendation 11**

It is recommended that the Government consider additional avenues to hold individuals and businesses to account for their involvement in breaches of workplace laws, with specific reference to:

- extending accessorial liability provisions of the *Fair Work Act 2009* to also cover situations where businesses contract out services to persons, building on existing provisions relating to franchisors and holding companies

- amending the *Fair Work Act 2009* to provide that the Fair Work Ombudsman can enter into compliance partnership deeds and that they are transparent to the public, subject to relevant considerations such as issues of commercial in confidence.

**Recommendation 12**

It is recommended that the Government commission a review of the *Fair Work Act 2009* small claims process to examine how it can become a more effective avenue for wage redress for migrant workers.

**Recommendation 13**

It is recommended that the Government extend access to the Fair Entitlements Guarantee program, it should be done following consultation regarding the benefits, costs and risks, and it should exclude people who have deliberately avoided their taxation obligations.

**Recommendation 14**

It is recommended that in relation to labour hire, the Government establish a National Labour Hire Registration Scheme with the following elements:

- focused on labour hire operators and hosts in four high risk industry sectors — horticulture, meat processing, cleaning and security — across Australia
- mandatory for labour hire operators in those sectors to register with the scheme
- a low regulatory burden on labour hire operators in those sectors to join the scheme, with the ability to have their registration cancelled if they contravene a relevant law
- host employers in four industry sectors are required to use registered labour hire operators.

**Recommendation 15**

It is recommended that education providers, including through their education agents, give information to international students on workplace rights prior to coming to Australia and periodically during their time studying in Australia.

**Recommendation 16**

It is recommended that education providers, through their overseas students support services, assist international students experiencing workplace issues, including referrals to external support services that are at minimal or no additional cost to the student and that specific reference to this obligation be made in the National Code of Practice for Providers of Education and Training to Overseas Students.

**Recommendation 17**

It is recommended that the Council for International Education develop and disseminate best practice guidelines for use by educational institutions.

**Recommendation 18**

It is recommended that the Minister write to the Prime Minister requesting that accommodation issues affecting temporary migrant workers be placed on the Council of Australian Governments (COAG) agenda. Through COAG, the Australian Government should work with state and territory governments to address accommodation issues affecting temporary migrant workers — particularly working holiday makers undertaking 'specified work' in regional Australia.

**Recommendation 19**

It is recommended that the Government consider developing legislation so that a person who knowingly unduly influences, pressures or coerces a temporary migrant worker to breach a condition of their visa is guilty of an offence.

**Recommendation 20**

It is recommended that the Government explore mechanisms to exclude employers who have been convicted by a court of underpaying temporary migrant workers from employing new temporary visa holders for a specific period.

**Recommendation 21**

It is recommended that the Fair Work Ombudsman and the Department of Home Affairs undertake a review of the Assurance Protocol within 12 months to assess its effectiveness and whether further changes are needed to encourage migrant workers to come forward with workplace complaints.

**Recommendation 22**

It is recommended that the Government give a greater priority to build an evidence base and focus its existing research capacity within the Department of Jobs and Small Business on areas affecting migrant workers. It should do this to better understand the extent, nature and causes of any underpayment and exploitation migrant workers may experience. The department should work across departments where appropriate. Separately, and in addition:

a) the Department of Education and Training should work with the Council for International Education and peak organisations to help identify mechanisms for providers to collect data about student visa holders' experiences of working in Australia
b) the Department of Education and Training should conduct regular surveys of overseas students that include workplace experience
c) the Government should support work being undertaken by ABARES, the science and economics research division of the Department of Agriculture and Water Resources to increase data collection in relation to agricultural labour.

# Attachment B – Penalties under the *Fair Work Act 2009* and *Building and Construction Industry (Improving Productivity) Act 2016*

## Fair Work Act:

| Contravention | Current maximum penalty level and 'serious contravention', if applicable ($ per individual/ body corporate) |
|---|---|
| Record keeping failure (i.e. payslip requirements, timesheet) | Infringement Notice issued by a FWO inspector of<br>• 1260/6300 for a contravention of the Fair Work Act<br>• 420 for a contravention of the Fair Work Regulations |
| | • 12,600/63,000 for a contravention<br>• 126,00/630,000 for a serious contravention |
| Underpayment (i.e. base rates, overtime, penalty rates) | • 12,600/63,000 for a contravention<br>• 126,000/630,000 for a serious contravention |
| Failure to pay an employee with correct method or frequency | • 12,600/63,000 for a contravention<br>• 126,000/630,000 for a serious contravention |
| Unreasonable requirements to spend or pay amount ('Cash-back arrangements') | • 12,600/63,000 for a contravention<br>• 126,000/630,000 for a serious contravention |
| Hindering or obstructing the FWO and inspectors etc. | 12,600/63,000 |
| Failure for a person to provide a FWO inspector with the person's name or address if requested | 6300/31,500 |
| Providing false or misleading documents to the FWO | 12,600/63,000 |
| Failure to comply with an Enforceable Undertaking | A court can make an order to:<br>• direct a person to comply with the undertaking<br>• award compensation for loss that a person has suffered because of the contravention; or<br>• any other order that the court considers appropriate. |
| Failure to comply with Compliance Notice | 6300/31,500 |

| Contravention | Current maximum penalty level and 'serious contravention', if applicable ($ per individual/ body corporate) |
|---|---|
| Failure to comply with notice to produce records or documents to a Fair Work Inspector | 12,600/63,000 |
| Failure to comply with FWO Notice (compelling a person to provide information, produce documents, or attend and answer questions) | 126,000/630,000 |

## Building and Construction Industry (Improving Productivity) Act:

| Contravention | Current maximum penalty level ($ per individual/ body corporate) |
|---|---|
| Failure to comply with a notice to produce records or documents to an authorised officer | 4200/21,000 |
| Hindering or obstructing authorised officers | 42,000/210,000 |
| Failure to comply with a compliance notice | 4200/21,000 |