Senate Education and Employment Legislation Committee

Inquiry into the

Fair Work Amendment (Protecting Australian Workers) Bill 2016

Submission by the

Construction, Forestry, Mining and Energy Union

7 April 2016

1. The *Fair Work Amendment (Protecting Australian Workers) Bill* 2016 (the Bill) has been referred to the Education and Employment Legislation Committee for inquiry and report by 10 May 2016. In broad terms, the Bill proposes a number of amendments to the *Fair Work Act* 2009 (Cth) (FW Act) to strengthen protections for various categories of particularly vulnerable employees and to give the courts additional powers to make orders to deter certain forms of poor industrial behaviour by employers.

2. Save for introduction of the proposed Part 4-1A (Item 22 of the Bill), the CFMEU supports each of the measures contained in the Bill. These amendments are a much needed legislative response to a number of practical problems that commonly arise in the Australian workplace. In some instances, such as in the case of phoenix companies, those problems have been allowed to continue over many years. In the case of 'phoenixing', existing laws have failed to curtail this practice and new measures are urgently needed.

Application of the *Fair Work Act* to all Employees and Interaction with the *Migration Act* 1958 (Cth)

3. Item 3 of the Bill is a clarifying provision which is intended to ensure that all employees working in Australia retain their status as employees for the purposes of the FW Act irrespective of their visa or citizenship status. Employers should not be relieved of their responsibilities as employers under the FW Act on the basis of what would essentially be a technical objection to the status of their employees under the Migration Act. A series of recent cases has highlighted the vulnerability of migrant workers to underpayment or non-payment and other forms of exploitation. All employers of temporary overseas workers are acutely aware of the state of dependency that these workers are in and the centrality of employment to their migration status. Even apart from the injustice to the employees, it is clear that employers engaging in these practices would gain an unfair competitive over employers who do not take unconscionable advantage of the vulnerable status of their employees if they were permitted to escape liability by taking issue with visa/citizenship status.

4. We support the ACTU's submission relating to a possible equivalent amendment to ensure the *Independent Contractors Act* 2006 applies with equal force to migrant workers engaged as bona fide independent contractors.

5. The proposed inclusion of information concerning the interaction of the FW Act and the Migration Act and options for temporary overseas workers to seek redress for industrial contraventions in the Fair Work Ombudman's (FWO) Information Statement is a sensible and cost efficient measure which is also supported.

Adverse Action

6. Item 9 provides explicit protection against adverse action for those who question whether a particular workplace right provided for in the legislation exists or not. That is an important component in the legislative scheme of protection against adverse action. If a person is not at liberty to raise a question about the existence of rights without being exposed to adverse consequences, then the value of the rights themselves and the capacity to rely on them where they do exist, is undermined.

7. It is also important for the protection to be extended to those who question the existence of a workplace right on behalf of or in relation to another person. For example a workplace union delegate might make a legitimate inquiry of that kind in respect of another person in the workplace. Because that delegate is in the same workplace, without the proposed protection, they are susceptible to adverse action by an employer in that workplace. It is consistent with the principle of freedom of association that they be able to raise inquiries of this kind without fear of retribution.

8. The proposed section appears to protect against adverse action for raising the question of the existence of workplace rights irrespective of whether those rights exist for the person in question or not. For example, under the proposed amendments an independent contractor who was unsure of their legal status as either independent contractor or employee would be entitled to raise an issue or concern as to whether they had the workplace right provided for in s. 341(1)(c)(ii) even though that right is ultimately confined to employees. The issue could be raised directly with the employer, or with a trade union or the FWO – who would then make the relevant inquiry on behalf of that person. In any of those circumstances, the section allows the person to raise the inquiry without being penalised for doing so. That is a valuable and appropriate protection, particularly given the prevalence and uncertainty surrounding the issue of sham contracting.

Sham Contracting – The 'Reasonable Person' Test.

9. There are a number of major shortcomings in the current (and only) section[1] of the FW Act which deals directly with the issue of with sham contracting. Firstly, the section is engaged only in circumstances where there has been a misrepresentation relating to employment status. Without evidence of a misrepresentation, a court proceeding under this section will not succeed even in circumstances where a person who is unarguably an employee at law is being

[1] Section 357.

(mis)treated as an independent contractor.[2] Whilst misrepresentations can arise in a range of ways, including by conduct[3], we maintain the submission that we made to the Fair Work Act Review Panel, namely that the section would be more effective if it were recast as one of strict liability; if the circumstances disclose an employment relationship but the employee has nonetheless been incorrectly categorised and dealt with as an independent contractor, then the section will have been contravened.

10. The defence contained in section 357(2) is also a major weakness in the section's effectiveness against the practice of sham contracting. In *Construction,Forestry, Mining and Energy Union v Nubrick Pty Ltd*[4] the 'recklessness' element of the defence was given wide operation by the Court to absolve the defendant from liability. That has severely limited the operation of the section even for large scale and well-resourced operations that would ordinarily be expected to bring some expertise to bear on the question of employment contracts. The introduction of an objective test sets a much fairer standard and is facilitative of the legislative purpose to curtail sham contracting practices, as it allows the court to consider all the relevant circumstances and come to a view as to the state of knowledge that a reasonable employer would have in those circumstances. We support the proposed amendment.

Director Liability – Phoenix Companies

11. Phoenixing is a longstanding problem that requires urgent legislative attention.

12. The 2012 PwC Report on phoenixing put the total cost of phoenix activity at between $1.78 billion and $3.19 billion per annum. These costs are borne by employees, businesses and government. According to the Report, between 55% to 60% of the total cost to employees was borne by employees in the construction industry.

13. Recent research has shown that the use of the disqualification remedies under the *Corporations Act* 2001 for phoenix behaviour is very limited. Only 49 directors have been disqualified under section 206F for phoenix activity in the ten year period 2004 to 2014. No directors have been disqualified under section 206D, which deals with directors whose mismanagement has caused two or more corporations to have failed within a 7 year period.[5] Section 596AB of the

[2] *Barron v. Technological Resources Pty Ltd* [2012] FMCA 818 at (31).
[3] *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] HCA 45 (2 December 2015) at (9).
[4] [2009] FMCA 981
[5] *Business Set-up, Transfer and Closure:* Productivity Commission Issues Paper December 2014 ,Submission by Associate Professor Helen Anderson, Professors Ian Ramsay and Ann O'Connell, Melbourne Law School, and Associate Professor Michelle Welsh, Department of Business Law and Taxation, Monash University,11 February 2015

Corporations Act which prohibits agreements or transactions entered into with an intention to prevent the recovery of employee entitlements, has not been successfully relied upon once since it was introduced in 2000. These measures have not addressed the phoenixing problem. Personal liability provisions are urgently needed.

14. The proposed Item 14 is strongly supported. However, we believe that the requirement that the phoenix company uses some of the assets of the failed company[6] is unnecessarily restrictive and is not an essential component of the practice of phoenixing. It should be removed. The evidence shows that overwhelmingly, insolvent companies return nothing to creditors through the insolvency process. In 2013-14 in the construction industry, almost 92% of insolvent companies returned nothing to creditors. The insolvency process usually exhausts the assets of the insolvent company. This is also the case with phoenix operators who deliberately drive the corporate entity into insolvency after either never having any real asset base in the company in the first place or having stripped assets out of the company making it difficult to trace or prove that any assets have been transferred from the failed company to the new one.

Increased Maximum Penalties

15. We support increased maximum penalties for underpayments and sham contracting. These should apply to all employers equally. We support the submissions of the ACTU on this point. We would also draw the Committee's attention to Recommendation 165 of the Cole Royal Commission in 2003 which was that because legislative penalties were inadequate to deter employers from deliberately underpaying workers' lawful entitlements, those penalties should be significantly increased. That recommendation was ignored by the former Coalition Government. It should now be acted upon.

Director Disqualification

16. In its most recent annual report ASIC indicated that it had obtained disqualification orders for only forty people in the 2014-15 period. Yet the evidence of widespread unlawful behaviour by corporations, including non-payment of employees, continues to pour in.

17. In situations of insolvency alone there were some 8,904 reports lodged with ASIC by administrators in the 2014–15 period. Of these, 58% said that there was evidence of possible insolvent trading, 38% of reports said there were possible

[6] Proposed s. 545A(1)(h).

breaches of the obligation to keep proper financial records and 33% of reports identified a potential breach of director's duties to act with care and diligence. ASIC's Insolvency Statistics Report 412 for 2013-14 shows that across all industries, internal administrators calculated that *at very lowest end of the range* there was in excess of $36 million in unpaid wages for employees of insolvent companies. This figure is for wages alone and takes no account of entitlements such as accrued annual leave and long service leave or unpaid superannuation contributions. The level of non-compliance with industrial instruments in cases of corporate insolvency alone is sufficient to justify the director disqualification amendments.

18. We note that the equivalent *Corporations Act* provisions do not contain a requirement to prove an intentional contravention (although conduct is a matter that can be taken into account). Nor is there a small business exemption in relation to these orders. The proposed s. 546A(1)(b) should therefore be removed. There is no principled basis for its inclusion and its inclusion has a tendency to undermine the deterrent effect of the legislative scheme by imposing an arbitrary distinction between errant defaulting directors of small businesses and those of other businesses. The content of duties of directors imposed by the common law and equity, and ss 180-184 of the *Corporations Act* do not vary on this basis. Consideration should also be given to conferring a disqualification power on the FWO along the lines provided to ASIC in s. 206F of the Corporations Act.

19. There may also need to be some clarification in relation to the standing of unions to apply for orders under the proposed sections 545A and 546A.

Offences for Serious Contraventions

20. As the ACTU submission notes, there are many examples of the exploitation of workers which warrant the imposition of a criminal sanction. Unfortunately workers who are, because of their migration status or other circumstances, in a particularly dependant, less-informed, precarious or vulnerable position can be exposed to a range of exploitative behaviour including physical or sexual abuse, restrictions on personal liberty, forced labour and dangerous working conditions. Often contraventions of basic industrial standards and laws, including underpayment or non-payment, are an added incident to these exploitative relationships.

21. Employers who not only deliberately underpay their employees but do so because they expect that the vulnerable status of those employees makes it less likely that they will take issue with their payment, fall into a particularly serious category of contravener. Downplaying the seriousness of employer underpayment

contraventions by reference to notions of 'no significant public harm' as the ACCI submission does, is disingenuous and displays a condescending attitude to workers' rights. It is clear that there is both a significant personal loss for the employees involved who mostly have no other source of income than their wages, as well as a broader public interest in adherence to the economic safety net established by the FW Act. It is also clear that the proposed measures in the Bill are intended to be directed towards the most egregious employer behaviour.

22. However the introduction of criminal contraventions into the FW Act must be approached with extreme caution. The proposed new Part 4-1A highlights the difficulties in simply transposing concepts such as 'coercion' and 'threats' from a criminal law context into industrial legislation. The latter makes provision for a bargaining system which includes the legislatively sanctioned exercise of economic power and bargaining rights, and has its own well-developed and distinctive jurisprudence associated with that terminology. The concepts of 'coercion' and 'threats' from the Criminal Code do not sit comfortably when imported into the FW Act either by themselves or when linked to the specified contraventions in the proposed sections.

23. We share the ACTU's concern that the breadth of the proposed sections may also inadvertently capture conduct which was not intended to be within the scope of the section. For example, a demand by employees which is made other than in strict accordance with the dispute settlement procedure of an industrial instrument may be caught by these sections.

24. Whilst we support the underlying principle that certain categories of employer behaviour warrant a strong legislative response, we do not support the introduction of the proposed Part 4-1A in its current form. Some further consideration should be given to this proposal to address the problem that the sections identify. This might include either adjusting the level of civil penalties for 'worst case' classes of contravening employer behaviour (Grade A and Grade B civil penalties), adding certain aggravating factors which courts are to take into account in determining penalty, or specifically including these matters amongst the adverse action provisions as suggested by the ACTU.