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AUSTRALIAN GOVERNMENT
Senate Standing Committees on Economics

Unlawful Underpayment of Employees' Remuneration

Submission

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SCOPE OF SUBMISSION

1. The Terms of Reference of the current inquiry are broad. This is valuable in that it is difficult to address issues relating to compliance and enforcement of employees' remuneration in isolation.¹ The approach of the inquiry is also relatively novel insofar as it is one of the first federal inquiries to consider unlawful underpayment of wages *and* superannuation in a holistic way.²
2. However, in various other respects, this inquiry touches on many issues which have been canvassed and considered as part of previous inquiries, reviews and taskforces concerned with employer non-compliance with workplace regulation.³ This wave of inquiries, along with other research,⁴ has generated a swathe of recommendations designed to reform and improve the regulatory system operating at both state and federal levels. Recommendations include addressing problems associated with misclassification of employees by narrowing the current defence available under the sham contracting provisions of the *Fair Work Act 2009* (Cth) ('FW Act'),⁵ introducing criminal sanctions for so-called 'wage theft',⁶ establishing a labour hire licensing or registration scheme,⁷ mandating the payment of salaries and wages into bank accounts to improve transparency,⁸ providing courts with specific powers to make

¹ Cf Attorney-General's Department, 'Improving protections of employees' wages and entitlements: Strengthening penalties for non-compliance', ('AG Discussion Paper No 1'); and Attorney-General's Department, 'Improving protections of employees' wages and entitlements: Further strengthening the civil compliance and enforcement framework' ('AG Discussion Paper No 2'). This consultation – which is ongoing – seeks to quarantine issues relating to penalties and deterrence from a range of other matters which are inherently linked, including detection and the use of other compliance and enforcement mechanisms.

² For further discussion of the parallels and divergences between the regulation of wages and superannuation and suggestions of reform, see Helen Anderson and Tess Hardy, 'Superannuation Guarantee Contributions as a Tax: The Case for Reincarnation over Reform' (2018) 33 *Australian Tax Forum* 497; and Helen Anderson and Tess Hardy, 'Who Should Be the Super Police? Detection and Recovery of Unremitted Superannuation' (2014) 37(1) *UNSW Law Journal* 162. See also Tess Hardy, Submission to Senate Economics Standing Committee Inquiry into the Impact of the Superannuation Guarantee (February 2017).

³ Senate Education and Employment References Committee, *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, Parliament of Australia (2016); Anthony Forsyth, *Victorian Inquiry into Labour Hire and Insecure Work – Final Report* (2016); Senate Economics References Committee, *Superbad – Wage Theft and Noncompliance of the Superannuation Guarantee*, Parliament of Australia (2017); Senate Education and Employment References Committee, *Corporate Avoidance of the Fair Work Act 2009*, September 2017; Australian Government, *Black Economy Taskforce*, Final Report, October 2017; Queensland Parliamentary Committee, Education, Employment and Small Business Committee, 'A Fair Day's Pay for a Fair Day's Work? Exposing the True Cost of Wage Theft in Queensland' (Report No 9, November 2018); Senate Education and Employment References Committee, Parliament of Australia, *Wage Theft? What Wage Theft?! The Exploitation of General and Specialist Cleaners Working in Retail Chains for Contracting or Subcontracting Cleaning Companies* (2018); Allan Fels and David Cousins, *Report of the Migrant Workers' Taskforce*, Australian Government (March 2019) ('Migrant Workers' Taskforce Report'); Tony Beech, 'Inquiry into Wage Theft in Western Australia – Final Report' (June 2019).

⁴ See, eg, McKell Institute Victoria, *Ending Wage Theft: Eradicating Underpayment in the Australian Workplace* (Report, March 2019); Bassina Farbenblum and Laurie Berg, *Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia* (October 2018).

⁵ In particular, the 2012 FW Act Review, the Productivity Commission Inquiry, the Black Economy Taskforce, the Senate Inquiry into Corporate Avoidance of the Fair Work Act 2009 and the Queensland Wage Theft Inquiry have all recommended strengthening the sham contracting provisions by removing the 'recklessness defence' and replacing with a narrower test of 'reasonableness'. See also Andrew Stewart and Tess Hardy, Submission to the Senate Inquiry into the Exploitation of General and Specialist Cleaners Working in Retail Chains for Contracting or Subcontracting Cleaning Companies (2018).

⁶ See, eg, Migrant Workers' Taskforce Report, above n 3, Recommendation 14.

⁷ Migrant Workers' Taskforce Report, above n 3, Recommendation 14. See also Queensland Wage Theft Report, above n 3, Recommendation 14.

⁸ Black Economy Taskforce, above n 3, 58

adverse publicity orders and banning orders,⁹ expanding the scope and application of infringement notices and compliance notices¹⁰ and reviewing and streamlining forums for redress – either by enhancing the small claims process¹¹ or directing claims to the Fair Work Commission.¹²

3. In this submission, I intend to focus on a discrete number of policy areas which merit either renewed consideration and/or further endorsement. These areas include:
 - a) Reviewing detection mechanisms;
 - b) Enhancing sanctions and deterrence;
 - c) Extending liability;
 - d) Expanding compliance notices;
 - e) Changing costs rules;
 - f) Reconsidering the institutional framework.
4. While the bulk of this submission will be directed towards improving enforcement of the FW Act, I will briefly consider some critical issues which are raised by an employer's failure to remit superannuation in accordance with their legal obligations (which may arise under the contract of employment, an industrial instrument or the *Superannuation Administration (Guarantee) Act 1992* (Cth)).¹³
5. Before addressing these various strands, it is also necessary to deal with an issue of definition. The Terms of Reference adopt the terms 'wage theft'¹⁴ or 'superannuation theft', which have been commonly used in the media and by the public to refer to underpayment or non-payment of employment-related entitlements. There is no definition of wage or superannuation theft in the Terms of Reference and no sense of whether the inquiry is directed at all forms of employer non-compliance, regardless of whether the unlawful conduct arose on a deliberate or intentional basis.
6. The definition of 'wage and superannuation theft' is important, however, as it has implications for analysis of the extent and breadth of the problem, as well as the subsequent assessment of which regulatory responses are most appropriate and effective. For example, enhanced information and educational initiatives directed towards employers are likely to be somewhat futile in relation to firms who are systematically seeking to avoid their legal obligations and evade enforcement efforts.
7. For the purposes of this submission, I adopt a broad definition of 'wage and superannuation theft' which captures all forms of underpayment (or non-payment) of amounts which are legally owed (or owing) to employees under the FW Act, the SGA Act, any applicable industrial instruments and any relevant safety net contractual term.

⁹ Migrant Workers' Taskforce Report, above n 3, Recommendation 7.

¹⁰ Ibid, Recommendation 10.

¹¹ Ibid, Recommendation 12.

¹² Sally McManus, 'Change the Rules for More Secure Jobs and Fair Pay' (Speech delivered to the Press Club, 21 March 2018).

¹³ For more detailed recommendations, see Anderson and Hardy (2019), above n 2.

¹⁴ The term 'wage theft' was first coined in the United States, where wilful breach of wage and hours regulation constitutes a criminal offence. See Kim Bobo, *Wage Theft in America: Why Millions of Working Americans Are Not Getting Paid – And What We Can Do About It* (The New Press, 2008). However, it is a term which continues to be contested. See Daniel Schwartz, "'Wage Theft': The Trendy Phrase that May Not Mean What You Think it Means" *Connecticut Employment Law Blog*, 23 April 2014 < <https://www.ctemploymentlawblog.com/2014/04/articles/wage-theft-the-trendy-phrase-that-runs-amok/>>.

THE SCALE OF UNLAWFUL UNDERPAYMENT OF EMPLOYEES' REMUNERATION AND THE COST TO THE NATIONAL ECONOMY

8. While there is limited concrete data on the scale and gravity of underpayment of employees' remuneration, previous estimates suggest that wage underpayment may be around \$1.35 billion per annum. In particular, a PwC report published last year estimated that the construction sector is at most risk of underpayment of wages at \$320 million each year, followed by the healthcare and social assistance sector at \$220 million, accommodation and food services at \$190 million and retail at \$180 million.¹⁵ In light of recent revelations that many workers on annualised salaries in the retail sector may have also been unlawfully deprived of minimum entitlements, it is likely that the scale of wage underpayment is likely to far exceed this earlier estimate. Woolworths alone has admitted to underpaying up to \$300 million over a 10 year period.¹⁶ The supermarket giant has joined a long list of large corporate firms that have admitted to underpaying their direct workforce.¹⁷ The scale and incidence of superannuation underpayment (or non-payment) appears to be even more pervasive and pernicious.¹⁸
9. The widespread underpayment of wages and superannuation entitlements has implications far beyond the individual worker given that the government also misses out on tax revenue that would otherwise be paid on this income. Moreover, where superannuation is not paid in full, the government not only receives less in taxes levied on superannuation contributions and investment income, and must ultimately pay more by way of the aged pension as superannuation incomes will not be sufficient to ensure financial security in retirement.¹⁹

¹⁵ PwC, 'Worker Underpayments and Digital Skills Deficit among Top Five Sleeper Issues for Business in 2020' (News Release, 20 November 2019) <<https://www.pwc.com.au/press-room/2019/australia-matters-analysis.html>>. See Farbenblum and Berg (2018), above n 4; Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Worker Survey* (November 2017); Fiona Macdonald, Eleanor Bentham and Jenny Malone, 'Wage Theft, Underpayment and Unpaid Work in Marketised Social Care' (2018) 29(1) *Economic and Labour Relations Review* 80; Stephen Clibborn and Chris Wright, 'Employer Theft of Temporary Migrant Workers' Wages in Australia: Why has the State Failed to Act?' (2018) 29(2) *The Economic and Labour Relations Review* 207.

¹⁶ Peter Ryan and David Chau, 'Woolworths investigated after admitting it underpaid 5,700 staff up to \$300 million', *ABC News*, 30 October 2019 <<https://www.abc.net.au/news/2019-10-30/woolworths-underpays-5700-staff-up-to-300-million-dollars/11652656>>. The amount of the underpayment – which has been calculated by Woolworths – is currently in dispute. In particular, there is at least one law firm which believes that the underpayments disclosed by Woolworths 'substantially understate the wages owed', which they estimate to be in the order of \$620 million. See 'Woolworths vows to defend class action', *Workplace Express*, 2 December 2019.

¹⁷ For example, in the past 12 months alone, Super Retail Group has reported that it had underpaid workers \$32 million, Michael Hill Jewellers conceded that it underpaid its workforce \$25 million, Australian Broadcasting Commission believes it has underpaid employees a total of \$23 million, Wesfarmers has revealed that it has underpaid staff by \$15 million, Thales has admitted to a total underpayment of \$7.4 million and Sunglass Hut has identified underpayments worth \$2.3 million. See generally Anna Patty, 'Worker underpayment at Woolworths sparks calls for company payroll audits', *The Sydney Morning Herald*, 31 October 2019 <<https://www.smh.com.au/business/workplace/worker-underpayment-at-woolworths-sparks-calls-for-company-payroll-audits-20191030-p535nu.html>>. The most recent firms to join this ignominious list include Coles, Target and Super Retail Group. See Matthew Elmas, 'Why Coles and Target Won't be the Last Big Businesses with Wage Theft Scandals', *SmartCompany*, 21 February 2020 <<https://www.smartcompany.com.au/business-advice/legal/wage-theft-royal-commission/>>.

¹⁸ Senate Economics References Committee, *Superbad – Wage Theft and Noncompliance of the Superannuation Guarantee*, Parliament of Australia (2017); Peter Ryan, 'ATO warns bosses who underpay or keep superannuation from staff to face steep fines', *ABC News*, 17 October 2019 <<https://www.abc.net.au/news/2019-10-17/superannuation-underpayment-withholding-told-stop-ato-fines/11612866>>; Adele Ferguson, 'The worst 19 postcodes for unpaid super', *Australian Financial Review*, 2 March 2020 <<https://www.afr.com/work-and-careers/workplace/the-worst-10-postcodes-for-unpaid-super-20200301-p545p2>>.

¹⁹ Jim Stanford, 'The Consequences of Wage Suppression for Australia's Superannuation System', Centre for Future Work, September 2017, 10. Stanford maintains that a one-time reduction in superannuation balance (against a starting balance of \$100,000) invested at 6% annual return would result in a loss of \$57,000 in superannuation upon retirement (assuming a 30 year accumulation period).

10. Systemic underpayment of wages and superannuation is not just costly for the national economy, it takes a heavy toll on those individuals who are directly affected.²⁰ For example, research undertaken in other jurisdictions, such as the US, have found that ‘wage theft is a serious and largely overlooked problem with important public health implications.’²¹ It also creates an unfair playing field for other employers in the sector who are fully complying with their legal obligations and have higher labour costs as a result.²² More generally, systemic and sustained underpayment places downward pressure on wages at other businesses. This exacerbates the problem of stagnant wage growth, which continues to persist in Australia.²³
11. In many respects, these problems are not new. Indeed, the enforcement provisions of the FW Act were subject to significant reform in 2017 in a bid to address these issues.²⁴ The flow-on effects of these reforms are yet to be fully realised or measured.²⁵ Cases brought under the new provisions are only now filtering through the courts. However, as these latest scandals emerge, it seems that the problem of employer non-compliance has reached ‘epidemic’²⁶ proportions and further steps are urgently required.

Identifying and Uncovering Wage and Superannuation Underpayment

12. Historically, the underpayment of wages and superannuation have largely been identified via individual complaints. While those who have been underpaid arguably have the greatest stake in recovering lost wages and entitlements, complaint-based detection methods are weak in several respects.²⁷
13. In practical terms, it is generally accepted that many vulnerable employees, particularly those in low-wage industries and engaged under precarious or unlawful arrangements, may be reluctant to raise a complaint about their working conditions or pursue their rights when they

²⁰ Richard Robinson and Matthew Brenner, ‘All these Celebrity Restaurant Wage-Theft Scandals Point to an Industry Norm’, *The Conversation*, 10 February 2020, <https://theconversation.com/all-these-celebrity-restaurant-wage-theft-scandals-point-to-an-industry-norm-131286>.

²¹ Meredith Minkler et al, ‘Wage Theft as a Neglected Public Health Problem: An Overview and Case Study from San Francisco’s Chinatown District’ (2014) 104 *American Journal of Public Health* 1011, 1017. See also Fabiola Santiago et al, ‘Health Impact Assessment of the Proposed Los Angeles Wage Theft Ordinance’ (Report, August 2014) <https://www.labor.ucla.edu/wp-content/uploads/2018/06/wage_theft_report_082514_KF.pdf>; Carlos Siqueira et al, ‘Effects of Social, Economic and Labor Policies on Occupational Health Disparities’ (2014) 57 *American Journal of Industrial Medicine* 557; and Rajiv Bhatia et al, ‘Protecting Labor Rights: Roles for Public Health’ (2013) 128 *Public Health Reports* 39.

²² Lauren Dasse, ‘Wage Theft in New York: The Wage Theft Prevention Act as a Counter an Endemic Problem’ (2012) 16 *City University of New York Law Review* 97, 103.

²³ See generally Tess Hardy and Andrew Stewart, ‘What’s Causing the Wages Slowdown?’ in Andrew Stewart, Jim Stanford and Tess Hardy (eds), *The Wages Crisis in Australia: What it is and what to do about it* (University of Adelaide Press, 2018). See also David Weil, ‘Income Inequality, Wage Determination, and the Fissured Workplace’ in Heather Boushey, J Bradford Delong and Marshall Steinbaum (eds), *After Piketty: The Agenda for Economics and Inequality* (Harvard University Press, 2017) 209-231.

²⁴ *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth).

²⁵ But see the special issue on ‘Emerging Business Models and the Evolving Regulatory Response: Perspectives from Australia and Beyond’ (2019) 32 *Australian Journal of Labour Law*.

²⁶ Elizabeth Knight, ‘Woolworths the latest perpetrator in the wage underpayment epidemic’, *The Sydney Morning Herald*, 30 October 2019 < <https://www.smh.com.au/business/companies/woolworths-the-latest-perpetrator-in-the-wage-underpayment-epidemic-20191030-p535sk.html>>.

²⁷ David Weil, ‘Individual Rights and Collective Agents: The Role of Old and New Workplace Institutions in the Regulation of Labor Markets’ in Richard Freeman, Joni Hersch and Lawrence Mishel (eds), *Emerging Labor Market Institutions for the Twenty-First Century* (University of Chicago Press, 2005).

are contravened.²⁸ There are good reasons for this reticence.²⁹ For example, some workers have been threatened with violence or other retaliatory behaviour. In other circumstances, employers have sought to intimidate workers by threatening to alert immigration authorities of their irregular migration status if they complain.³⁰ More recent research suggests that many workers do not pursue underpayment claims due to a range of factors, including knowledge barriers,³¹ social norms,³² and the low prospect of fully recovering their backpayment.³³ These challenges are likely to be magnified in relation to underpayment of superannuation entitlements,³⁴ or where employee misclassification is potentially at play.³⁵

14. More generally, detection methods which rely on harmed individuals to ‘name, blame and claim’³⁶ against their employers is viewed as problematic from a regulatory perspective.³⁷ Sociolegal research has found that whether an individual files a complaint often depends ‘on the individual’s location in the social hierarchy,’³⁸ with those from marginalised groups the least likely to pursue redress through the formal legal system. Having access to a legal or experienced advocate, such as a community legal centre or trade union, is essential in breaking down some of these barriers.³⁹ But these organisations do not have limitless resources – which is one of the reasons why the current costs rules need review.
15. While it is important to ensure that individual complainants can raise legitimate concerns with the regulator and pursue a level of redress, it also seems that the high settlement rate and confidential nature of these claims means that general deterrence is severely limited. In addition, it seems that even if each claim was fully investigated with the assistance of the regulator, a community legal centre and/or a union, there is no guarantee that backpay will be recovered (especially where the employer is in administration, insolvent or otherwise judgment proof). It is also not clear that responding to individual complaints will effectively

²⁸ See Stephen Clibborn, ‘Why Undocumented Workers Should Have Workplace Rights’ (2015) 26(3) *Economic and Labour Relations Review* 1.

²⁹ See Janice Fine, ‘Solving the Problem from Hell: Tripartism as a Strategy for Addressing Labour Standards Non-Compliance in the United States’ (2013) 50 *Osgoode Hall Law Journal* 813; David Weil, ‘A Strategic Approach to Labour Inspection’ (2008) 147 *International Labour Review* 349.

³⁰ Joanna Howe, ‘A Legally Constructed Underclass of Workers? The Deportability and Limited Work Rights of International Students in Australia and the United Kingdom’ (2019) 48 *Industrial Law Journal* 426.

³¹ The National Temporary Migrant Worker Survey found that that 42% of respondents did not seek to recover unpaid wages because they were unsure about how to do so. See Farbenblum and Berg, above n 15, 7.

³² In the same survey, it was found that 28% of survey participants were reluctant to try to recover unpaid wages because they had agreed to be paid below the legal minimum. In addition, around 26% of participants were reticent to complain because ‘many people around them were being paid similarly and not doing anything about it.’ *Ibid*.

³³ The National Temporary Migrant Worker Survey found that among 194 survey respondents who had tried to recover unpaid wages through any channel, 67% recovered nothing and only 16% received the full amount they were owed. *Ibid*.

³⁴ See generally Anderson and Hardy, above n 2.

³⁵ See, eg, Andrew Stewart and Shae McCrystal, ‘Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker?’ (2019) 32 *Australian Journal of Labour Law* 4; Andrew Stewart and Jim Stanford, ‘Regulating Work in the Gig Economy: What are the Options?’ (2017) 28(3) *The Economic and Labour Relations Review* 420.

³⁶ William Felstiner et al, ‘The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .’ (1980) 15 *Law & Society Review* 631, 636.

³⁷ See Charlotte S. Alexander & Arthi Prasad, ‘Bottom-Up Workplace Law Enforcement: An Empirical Analysis’ (2014) 89 *Indiana Law Journal* 1069; Janice Fine and Jennifer Gordon, ‘Strengthening Labor Standards Enforcement Through Partnership with Workers’ Organizations’ (2010) 38 *Politics and Society* 552; David Weil and Amanda Pyles, ‘Why Complain? Complaints, Compliance, and the Problem of Enforcement in the US Workplace’ (2006) 60 *Comparative Labour Law and Policy Journal* 59.

³⁸ See, eg, Claire Wofford, ‘The Effect of Gender and Relational Distance on Plaintiff Decision-Making in the Litigation Process’ (2017) *Law and Society Review* 966.

³⁹ Matthew Amengual and Janice Fine, ‘Co-enforcing Labour Standards: The Unique Contributions of State and Worker Organisations in Argentina and the United States’ (2016) 11(2) *Regulation & Governance* 129.

address the systemic issue leading to the non-compliance.⁴⁰ Furthermore, trying to resolve all complaints in full is also likely to deprive the regulator of the necessary resources to undertake proactive and strategic activities aimed at preventing the contravention in the first place.⁴¹

16. In any event, the latest set of large-scale underpayments have been uncovered not through complaints, but via corporate self-disclosures. In these instances, external auditors have played a central role. On the surface, this new method of detection is a welcome development. It not only relieves the state of having to rely on whistleblowers or undertake forensic investigations, it seems to show that Coles and Woolworths are honouring stated commitments to take 'ethical and moral responsibility' to ensure employment compliance across their respective networks.⁴² It also shifts the huge burden and cost of underpayment calculation from the regulator (and the taxpayer) to the lead firm (i.e. the firm at the apex of a business network or the top of an industry structure). However, the tsunami of self-disclosures and the growing reliance on private auditors raises new challenges and risks. How rigorous, independent and transparent are the audits which are taking place? Can the regulator confidently rely on these audits – when it is the firm which has directly engaged the auditor and set the audit parameters? Should these audits (and any ensuing backpayments) be considered relevant in determining the appropriate penalty? And will these audits ultimately lead to sustained workplace relations compliance, or are they really designed to save face and shore up the firm's bottom line?⁴³

Improving Deterrence and Enhancing Recovery Unpaid Wages and Superannuation

17. Deterrence is a long-standing pillar of sentencing regimes in Australia, and remains a key feature of idealised regulatory models, such as responsive regulation and strategic enforcement.⁴⁴ In the recent past, there have been substantial efforts to enhance deterrence under the FW Act. In particular, the maximum penalties for 'serious contraventions' have increased tenfold as a result of the PVW Act.⁴⁵ However, the penalty amounts available under the FW Act still pale in comparison to the penalty levels applicable in other statutory schemes. They also appear to be trifling when set against the enormity of the underpayments that have recently come to light, and the annual turnover of many of these larger firms. Strengthening the penalties that are available under the FW Act is currently under consideration by the federal Attorney-General's Department as part of its consultation on the industrial relations framework.⁴⁶ Criminal sanctions, as well as higher civil penalties, are both on the agenda.

⁴⁰ See Tess Hardy, 'Trivial to Troubling: The Evolution of Enforcement under the Fair Work Act' (2020) *Australian Journal of Labour Law* (forthcoming). See also Weil and Pyles, above n 37.

⁴¹ Tess Hardy and John Howe, 'Out of the Shadows and into the Spotlight: The Sweeping Evolution of Employment Standards Enforcement in Australia' in Leah Vosko et al (eds), *Closing the Enforcement Gap: Improving Employment Protections for People in Precarious Jobs* (University of Toronto Press, forthcoming).

⁴² Both Coles and Woolworths have entered into voluntary agreements with the FWO which include commitments to this effect. See, eg, (<https://www.fairwork.gov.au/about-us/our-role/enforcing-the-legislation/compliance-partnerships/list-of-proactive-compliance-deeds>).

⁴³ See generally Michael Power, 'Evaluating the Audit Explosion' (2003) 25 *Law and Policy* 185; Genevieve LeBaron, Jane Lister & Peter Dauvergne, 'Governing Global Supply Chain Sustainability through the Ethical Audit Regime' (2017) 14(6) *Globalizations* 958; Christine Parker, 'Regulator-Required Corporate Compliance Program Audits' (2003) 25 *Law and Policy* 221.

⁴⁴ For a summary of these theories, amongst others, see Tess Hardy and Sayomi Ariyawansa, *Literature Review on the Governance of Work* (ILO Working Paper Series, October 2019) <https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_731477.pdf>

⁴⁵ Each 'serious contravention' attracts a maximum penalty of \$630,000 for a corporation and \$126,000 for an individual.

⁴⁶ AG Discussion Paper No 1, above n 1.

18. In the abstract, the idea that the threat of incarceration will deter other potential offenders from engaging in similar conduct appears reasonable.⁴⁷ The idea that underpayment of wages and superannuation is ‘inherently criminal’ in that it is analogous in many respects with other dishonesty-based, financially motivated offences such as theft and fraud is also appealing.⁴⁸ Similar claims are routinely made by advocates for criminal enforcement of exploitation more generally.⁴⁹ However, the notion that criminal sanctions will ‘super-charge’ deterrence is not supported by the weight of empirical evidence.⁵⁰ This is especially so where the law is directed at corporations, rather than individuals.⁵¹ In its review of corporate criminal responsibility, the Australian Law Reform Commission recently observed that there ‘is a strong preference among investigative agencies and prosecutors for applying the criminal law to individuals, instead of corporations, from both principled and pragmatic perspectives.’⁵²
19. While heavier sanctions are certainly overdue, we must be careful not to fall for the myth that harsher civil or criminal penalties will, on their own, automatically lead to enhanced deterrence and, in turn, greater employer compliance.⁵³ As Lee and Smith observe:
- Creating or enhancing penalties on the books will also do little to deter wage theft if agencies lack the resources or political will to engage in enforcement or if employers fail to understand how to comply.⁵⁴
20. Indeed, in many jurisdictions where underpayment contraventions already constitute a criminal offence,⁵⁵ the data suggests that prosecutions of non-compliant employers are ‘extremely rare’⁵⁶ and only used when employers and other duty holders defy the authority of state inspectors by disobeying compliance orders. For example, in Ontario, Canada, recent research has confirmed that there have been no criminal prosecutions in response to an employer or director violating an employee’s rights to be paid in a minimum wage.⁵⁷ Similarly, in the United Kingdom, criminal prosecution is available in respect of a range of offences under

⁴⁷ Mirko Bagaric and Theo Alexander, ‘(Marginal) General Deterrence Doesn’t Work – and What it Means for Sentencing’ (2011) 35 *Criminal Law Journal* 269.

⁴⁸ Caron Beaton-Wells and Christine Parker, ‘Justifying Criminal Sanctions for Cartel Conduct: A Hard Case’ (2013) 1(1) *Journal of Antitrust Enforcement* 198, 199.

⁴⁹ Jennifer Collins, ‘Exploitation of Persons and the Limits of the Criminal Law’ (2017) 3 *Criminal Law Review* 167. See generally Alan Bogg et al (eds), *Criminality at Work* (Hart, forthcoming).

⁵⁰ Beaton-Wells and Parker, above n 48, 215. Bagaric and Alexander, above n 47; and Christine Parker, ‘Criminal Cartel Sanctions and Compliance: The Gap between Rhetoric and Reality’ in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart, 2011) 239. But see Daniel Galvin, ‘Deterring Wage Theft: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance’ (2016) 14(2) *Perspectives on Politics* 324.

⁵¹ Pamela Hanrahan, ‘Deterring White-Collar Crime: Insights from Australia’s Insider Trading Penalties Regime’ (2017) 11 *Law and Financial Markets Review* 61, 66-7.

⁵² Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, November 2019) 26.

⁵³ Christine Parker and Vibeke Lehmann Nielsen, ‘Deterrence and Calculative Thinking on Business Compliance with Competition and Consumer Regulation’ (2011) 56(2) *The Antitrust Bulletin* 377.

⁵⁴ Jennifer Lee and Annie Smith, ‘Regulating Wage Theft’ (2019) 94 *Washington Law Review* 759, 762.

⁵⁵ For example, the Employment Standards Act (2000), which prescribes minimum wages and hours regulation in Ontario, Canada, makes it offence to contravene the act or its regulations, or to fail to comply with an order or direction issues by an inspector. Individuals are liable to be fined up to CAD 50,000 or imprisoned up to 12 months. Corporations are liable to be fined up to CAD 100,000 for a first offence, CAD 250,000 for a second offence and CAD 500,000 for a third or subsequent offence. Offences under the ESA are prosecuted under Part III of the *Provincial Offences Act*. In addition, under the federal *Criminal Code of Canada* (1985), it is a criminal offence to intentionally falsify an employment record by any means. See Eric Tucker, ‘When Wage Theft Was a Crime in Canada, 1935-1955: The Challenge of Using the Master’s Tools Against the Master’ (2017) 54 *Osgoode Hall Law Journal* 933. Similarly, the Fair Labor Standards Act of 1938 29 U.S.C. § 203 provides for criminal prosecution for willful violations of federal wage and hour laws. A conviction can result in a fine of not more than \$10,000, imprisonment of up to six months, or both (albeit imprisonment is only available upon the second conviction).

⁵⁶ Eric Tucker et al, ‘Carrying Little Sticks: Is There a “Deterrence Gap” in Employment Standards Enforcement in Ontario Canada’ (2019) 35(1) *International Journal of Comparative Labour Law* 1, 26.

⁵⁷ *Ibid.*

various employment-related statutes, but remains ‘an underutilised intervention in the enforcement arena’.⁵⁸ For example, since the introduction of the *National Minimum Wage Act 1998* (which came into force in April 1999), there have only been 14 NMW prosecutions.⁵⁹

21. In light of this, it seems highly unlikely that criminalisation of ‘wage theft’ will alone act as a regulatory panacea, particularly if the enforcement apparatus is not sufficiently resourced to pursue criminal proceedings on a frequent and sophisticated basis.⁶⁰
22. In a recent submission, I confirmed my support for increasing civil penalties under the FW Act. I also called for a reconsideration of the way in which civil penalties are determined by the courts where the contraventions have arisen in the same course of conduct.⁶¹ In addition, I support the express inclusion of banning orders and director disqualification orders in the FW Act, as these are powerful devices for holding repeat offenders accountable.⁶²
23. However, even with a substantial uplift in the maximum penalties and additional remedial options, it is not entirely clear that this alone will ‘send a strong message of deterrence to would-be lawbreakers’.⁶³ In previous research undertaken with Professor John Howe, we found that firms’ recollection of the quantum of civil penalties imposed against other employer businesses was ‘generally imprecise and inaccurate.’⁶⁴ Most employers were not aware of the cases that the FWO had previously brought in their industry and had even less knowledge of the amount or target of the penalty orders. These findings suggest that businesses are not necessarily rational and calculative: a critical assumption of classical deterrence theory.⁶⁵ Instead, our findings confirmed conclusions drawn in previous studies relating to environmental violations,⁶⁶ tax evasion⁶⁷ and cartel conduct:⁶⁸ it is the perceived risk of detection, not the severity of the sanction, that is most likely to enhance deterrence and encourage compliance.
24. As this study was undertaken prior to the PVW reforms, we acknowledge the possibility that higher penalty amounts, or criminal sanctions, may ‘penetrate the corporate consciousness in a way that other penalties do not’.⁶⁹ However, ultimately our research confirms that the frequency of inspection, combined with strategic use of media and publicity, may be more powerful in fuelling a firm’s perception of risk and foster a greater willingness to commit to compliance in the longer term.

⁵⁸ David Metcalf, Director of Labour Market Enforcement, ‘United Kingdom Labour Market Enforcement Annual Report 2017/18’ (March 2019) 19.

⁵⁹ *Ibid.*

⁶⁰ Collins, above n 49, 168.

⁶¹ Tess Hardy, Submission, Attorney-General’s Department, ‘Improving protections of employees’ wages and entitlements: Strengthening penalties for non-compliance’ <<https://www.ag.gov.au/Consultations/Documents/industrial-relations-consultation-strengthening-penalties-for-non-compliance/submissions/dr-tess-hardy-submission.pdf>>.

⁶² These orders are expressly being reviewed as part of the current AG review. See Discussion Paper No 2, above n ?.

⁶³ Sandra Parker, ‘Address by the Fair Work Ombudsman’ (Speech delivered to the 2019 AiG Annual National Policy-Influence-Reform Conference, 3 June 2019) 3.

⁶⁴ Tess Hardy and John Howe, ‘Creating Ripples, Making Waves? Assessing the General Deterrence Effects of Enforcement Activities of the Fair Work Ombudsman’ (2017) 39 *Sydney Law Review* 471.

⁶⁵ Beaton-Wells and Parker (2013), above n 48, 204.

⁶⁶ Dorothy Thornton, Neil A Gunningham and Robert A Kagan, ‘General Deterrence and Corporate Environmental Behavior’ (2005) 27(2) *Law & Policy* 262.

⁶⁷ Mirko Bagaric, Theo Alexander and Athula Pathinayake, ‘The Fallacy of General Deterrence and the Futility of Imprisoning Offenders for Tax Fraud’ (2011) 26 *Australian Tax Forum* 511, 511.

⁶⁸ Beaton-Wells and Parker, above n 48, 205-6.

⁶⁹ *Ibid* (citing Robert A Kagan, Neil Gunningham and Dorothy Thornton, ‘Explaining Corporate Environmental Performance: How Does Regulation Matter?’ (2003) 37(1) *Law & Society Review* 51, 40).

25. If it is the perception of being caught which is critical, it is concerning that various commitments to boost the FWO's funding has not resulted in any discernible increase in the number of staff or Fair Work Inspectors. As at October 2018, there was a total of 717 staff engaged by the FWO. Of those, only 188 were Fair Work Inspectors.⁷⁰ The remainder of the staff were engaged in a range of other operational roles relating to policy, mediation, management, legal etc. Assuming around 80% of all employed persons⁷¹ and employing businesses⁷² are covered by the core provisions of the FW Act and within FWO's remit,⁷³ then on current data there is roughly 1 FW Inspector for every 54,000 employed persons and 1 FW Inspector for every 3,700 employing business. Even with additional resourcing,⁷⁴ the ratio of inspectors to workers is set to remain highly disproportionate.⁷⁵ Obviously, increased and sustained funding of the FWO (and the ATO) would go some way to improving enforcement efforts and enhancing compliance outcomes. But boosting agency funding will not, in and of itself, be not enough to address the burgeoning enforcement gap.⁷⁶ It is arguable that more fundamental changes are required. In particular, we need to expand the role of actors beyond the state (including unions, employer associations, community legal centres, private practitioners and lead firms).

OTHER OPTIONS FOR REFORM

26. The following sections will explore a range of alternative options for reform that are not just concerned with delivering deterrence, but are ultimately geared towards promoting and sustaining employer compliance.⁷⁷

Extending Liability

27. The model of strategic enforcement developed by Professor David Weil hinges, to some extent, on being able to influence the 'compliance calculus' of lead firms and encourage them to take into account the social, as well as the private, benefits and costs when deciding how

⁷⁰ Evidence to Senate Estimates Committee – Education and Employment, Parliament of Australia, Canberra, 24 October 2018, 104 (Michael Campbell – Deputy FWO).

⁷¹ As at December 2018, there were 12,711,600 employed persons in Australia. While this data suggests that the person is 'employed', this is not strictly correct as it not only counts employees (in the common law sense), but also 'business owners or self-employed people'. See Australian Bureau of Statistics, *Labour Force Survey* (Cat 6202.0, Australia, December 2018).

⁷² At the end of 2016-17, there were 868,248 (38.8%) employing businesses and 1,370,051 (61.2%) non-employing businesses. Most employing businesses (70.1% or 608,733) at the end of 2016-17 employed between 1 and 4 people whilst 0.5% (3,915) of employing businesses employed more than 200 people. Australian Bureau of Statistics, *Counts of Australian Businesses, including Entries and Exits* (Cat 8165.0, Australia, February 2018).

⁷³ The FWO generally has responsibility in relation to common law employees falling within the national system of workplace relations regulation and not employed in the building and construction sector. The numbers of employed persons and employing businesses falling within state systems is harder to estimate and varies widely between different states. Applying this assumption (of 80% coverage) means that roughly 10,169,280 employed persons and 694,400 employing businesses fall within the FWO's remit.

⁷⁴ In the pre-election budget handed down in April 2019, the Coalition Government allocated an extra \$10.8 million over four years from 2019/20 to strengthen the federal inspectorate's ability to conduct investigations into underpayment and related matters. In addition, the FWO received a further \$9.2 million over four years from 2019/20 to establish a dedicated sham contracting unit. 'Budget funds labour hire scheme, crackdown on sham contracting', *Workplace Express*, 2 April 2019.

⁷⁵ Tess Hardy, 'Trivial to Troubling: The Evolution of Enforcement under the Fair Work Act' (2020) *Australian Journal of Labour Law* (forthcoming).

⁷⁶ Andrew Stewart, Jim Stanford and Tess Hardy, 'Conclusion: Wages and Inclusive Growth' in Andrew Stewart, Jim Stanford and Tess Hardy (eds), *The Wages Crisis in Australia: What it is and what to do about it* (University of Adelaide Press, 2018).

⁷⁷ Beaton-Wells and Parker (2013), above n 48, 198, 198.

to structure and run their business.⁷⁸ However, evidence suggests that lead firms are generally unwilling to change their compliance commitments by their own initiative.⁷⁹

28. A survey of franchisors undertaken in early 2017 underlines the importance of ‘hard law’ in this regard. Prior to the passage of the PVW Act, most of the surveyed franchisors only provided information, training and advice to their franchisees. Less than one third conducted internal audits or checks. However, after the PVW Act was introduced, and franchisors were potentially liable for the misdeeds of their franchisees, it was found that almost one quarter of franchisors were putting ‘an action plan in place’ and over half of the franchisor respondents were investigating what needs to be done.⁸⁰
29. This research suggests that credible threats of liability are essential in encouraging and/or coercing lead firms to take on some of the enforcement burden, particularly the costs associated with monitoring, calculating and rectifying underpayments. Assuming this is true, the next thorny question is how to identify the most effective legal mechanism for achieving this change in compliance posture.⁸¹ In a recent article, I compared different liability mechanisms across the US, Canada and Australia. Ultimately, I concluded that while the expanded liability provisions of the PVW Act are not perfect, they are potentially more compelling than the concept of joint employment (which is the relevant touchstone in the US) and more useful than the existing accessorial liability provisions under the FW Act.⁸² More specifically, the relevant liability provisions introduced by the PVW Act:⁸³
 - i) are better placed to combat counterproductive liability avoidance – where the firm does less not more in a bid to reduce legal exposure; and
 - ii) shift the court’s attention to the relationship between the lead firm and the subordinate business (rather than focusing solely on the relationship between the lead firm and the employees).⁸⁴
30. Drawing on this research, Professor Andrew Stewart and I prepared a submission for the 2018 Senate Inquiry into the Exploitation of General and Specialist Cleaners Working in Retail Chains for Contracting or Subcontracting Cleaning Companies (**Stewart and Hardy Submission**). The Stewart and Hardy Submission set out a number of recommendations in relation to extending liability to other types of lead firms (beyond franchisors and parent companies). This proposal was ultimately adopted as a recommendation in the Final Report of the Inquiry.⁸⁵ A copy of this submission is attached for reference (see Attachment A).

⁷⁸ David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press, 2014).

⁷⁹ See Tess Hardy, ‘Good Call: Extending Liability for Employment Contraventions Beyond the Direct Employer’ in Ron Levy, Molly O’Brien, Simon Rice, Pauline Ridge and Margaret Thornton (eds) *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, 2017) 71.

⁸⁰ For further discussion of this research, and franchising regulation more generally, see Tess Hardy, ‘Shifting Risk and Shirking Responsibility? The Challenge of Upholding Employment Standards Regulation within Franchise Networks’ (2019) 32 *Australian Journal of Labour Law* 62.

⁸¹ For consideration of relevant normative and instrumental questions in this respect, see Tess Hardy, ‘Who Should be Held Liable for Workplace Contraventions and On What Basis?’ (2016) 29 *Australian Journal of Labour Law* 78.

⁸² See Tess Hardy, ‘Big Brands, Big Responsibilities? An Examination of Franchisor Accountability for Employment Contraventions in the United States, Canada and Australia’ (2018) 40 *Comparative Labor Law and Policy Journal* 285. See also Stephen Ranieri, ‘Accessories and the Fair Work Act — Section 550 and an Individual’s “Involvement” in a Contravention: Is Reform Needed?’ (2018) 31 *Australian Journal of Labour Law* 180.

⁸³ FW Act, s 558B.

⁸⁴ This issue was present in the recent case *Fair Work Ombudsman v Hu* [2019] FCA 1034.

⁸⁵ Senate Education and Employment References Committee, Parliament of Australia, *Wage Theft? What Wage Theft?! The Exploitation of General and Specialist Cleaners Working in Retail Chains for Contracting or Subcontracting Cleaning Companies* (2018), Recommendation 10.

Expanding the Scope and Use of Compliance Notices

31. An alternative way of addressing systemic underpayment, and boosting perceptions of detection and/or deterrence, may be to enhance the compliance notice regime.⁸⁶ Mirko Bagaric has previously argued that:

The empirical data conclusively shows that the only deterrent to crime is increasing the perception in people's minds that if they offend they will be caught, as opposed to the severity of the ultimate sanction. The threat of a community based order is just as effective a deterrent as a five-year prison term.⁸⁷

32. While use of compliance notices has steadily increased over the past decade, it remains somewhat underutilised by the FWO.⁸⁸ In my view, the current compliance notice scheme offers a number of regulatory benefits, including the following:

- a) Compliance notices can be issued against any person – including accessories – where there is a reasonable belief that the person has contravened an entitlement provision.
- b) There is no need for the regulator to rely on court processes (that are invariably expensive and slow). This makes compliance notices a much quicker and cheaper option than litigation proceedings.
- c) There is no requirement to reach agreement with the other side (as is the case with enforceable undertakings and proactive compliance deeds). Instead, the decision of whether to issue a compliance notice is entirely within the control of the relevant FW Inspector.
- d) Employers can seek judicial review of a compliance notice – but in doing so, the onus is on the employer to prove that the compliance notice has been issued in error and that no relevant entitlement provision has been breached.

33. There are, however, some notable limitations of the current legal framework:

- a) Compliance notices can only be issued in relation to entitlement provisions – not all civil remedy provisions.
- b) FWO arguably still has to do the heavy lifting when it comes to calculating the underpayment – as the compliance notice can only be issued in order to remedy the direct effects of the contravention.
- c) Failure to comply with a compliance notice can trigger further penalties, but ultimately requires the FWO to initiate court proceedings, which is resource intensive.

34. To enhance the use and ripple effects of compliance notices, policy-makers should consider:

- a) Whether to expand the scope of the compliance notice scheme so that compliance notices may require firms to do more than 'remedy the direct effects of the contravention' – e.g. allow for orders that require an employer to positively prove that

⁸⁶ Other jurisdictions – such as the UK – are starting to exploit these types of tools as an efficient way to induce compliance and provide redress. I note that 'compliance notices' are not expressly addressed in the *Regulatory Powers (Standard Provisions) Act 2014* (Cth), but may fall within the more general definition of 'infringement notices'.

⁸⁷ Mirko Bagaric, 'Abolishing the Crime that is the Incarceration of White Collar Offenders' (2017) 41 *Criminal Law Journal* 251, 251.

⁸⁸ Hardy (2020), above n 75.

all employees in the workplace have been properly paid (e.g. by way of an independent audit).

- b) Setting clear timeframes for compliance so that matters do not drag on (e.g. in the UK, employers generally have 28 days to comply or challenge the notice in court). This will speed up redress for employees and flush out those employers who are resisting compliance.
- c) Allowing for amounts (over and above to the relevant underpayment amount) to be levied against wrongdoers – this could take the form of:
 - i. aggravated damages (flowing to employee thereby providing greater incentives to persist in bringing complaint and participating in investigation etc);⁸⁹
 - ii. fixed administrative penalties – in a similar way that the ATO imposes a formulaic superannuation charge for failure to pay SG on time.
- d) Providing unions with a right to issue provisional compliance notices (in a way that mimics the rights of Health and Safety Representatives to issue provisional improvement notices in the work health and safety sphere). The power to issue compliance notices could be subject to review by inspector or court to ensure that mechanism is not abused.
- e) Publishing the names of employers/officers/brands who fail to comply with the notice within a set timeframe. This would have the benefit of enhancing the deterrence effects of intervention, boosting perceptions of risk and provide greater transparency for unions, employees, community legal centres etc.

Changing Costs Rules

- 35. Another possible option for reform would be to allow successful complainants to recover their legal costs in underpayment claims. Such an avenue is presently prevented by the general bar on costs orders in proceedings relating to the FW Act.⁹⁰
- 36. Awarding costs might encourage or enable more private legal practitioners, unions and community legal centres to actively assist workers to pursue enforcement proceedings. Increasing the frequency of enforcement litigation in this way will not only reduce the burden placed on the FWO (and the taxpayer), it may also have the added benefit of enhancing deterrence and improving redress.
- 37. It might be worth considering one-way cost shifting so that the prospect of having an adverse costs order awarded claimants does not inhibit access to justice.
- 38. It would also be desirable to provide a fast, informal and low-cost option for enforcement proceedings, especially those involving small sums of money. Review of the small claims jurisdiction is urgently required.

Reviewing the Institutional Framework

- 39. Currently, the responsibility for overseeing federal laws relating to wages and superannuation is split – somewhat unevenly – between three federal agencies, the FWO, the ATO and the ABCC. The mandate of these three agencies is very broad and their priorities and enforcement

⁸⁹ A multiplier could be applied to the underpayment amount (e.g. 200% of underpayment capped at \$20,000) or a fixed proportion of firm turnover (but this may be more difficult to assess in relation to non-compliant employers))

⁹⁰ FW Act, s 570.

strategy are highly distinct. For the ATO and the ABCC, it is not entirely clear that addressing wage and superannuation underpayment is a primary concern.⁹¹

40. In particular, the construction industry has been identified as the sector with the most serious underpayment issues.⁹² Yet, the relevant regulator in this sector, the ABCC, directs the vast bulk of its resources, efforts and activities towards curbing union wrongdoing, rather than stamping out employer non-compliance.⁹³
41. While this inquiry is directed at federal statutes and agencies, we also need to recognise that there are many activities and initiatives that are taking place at the state level which are designed to, directly or indirectly, address systemic underpayment of wages and superannuation. This includes the introduction of licensing schemes, the reinvigoration of state labour inspectorates and the promised enactment of criminal offences for wage theft.⁹⁴
42. On the one hand, this is a positive development in so far as it shows that state governments have the political will to tackle the problem of wage and superannuation underpayment. It is possible that innovations and experiments that are occurring in one jurisdiction can be expanded into other states or rolled out nationally. On the other hand, however, a lack of coordination between federal and state agencies may lead to unnecessary duplication, data dilution and other adverse effects. For example, it is arguable that it further fragments the regulatory framework, which can compound problems of complexity – both for employees seeking redress and for employers seeking to comply.
43. In short, if one is to adopt a holistic view of the need for reform in this area, it is necessary to reflect on, and potentially reconsider, the scope, role and responsibilities of federal agencies and state bodies working in this area, as well as the need to productively enrol a range of non-state actors, including lead firms, unions, community legal centres, auditors, investors and private practitioners.⁹⁵

⁹¹ See, eg, 'Code stops head contractors checking subbie wages records: ABCC', *Workplace Express*, 6 March 2020.

⁹² See PwC, above n 15.

⁹³ See generally Tess Hardy, 'The State Strikes Back: Supervision and Sanctioning of Unlawful Industrial Activity by Federal Government Agencies in Australia' in Shae McCrystal, Breen Creighton and Anthony Forsyth (eds), *Collective Bargaining under the Fair Work Act* (Federation Press, 2018).

⁹⁴ See, eg, Victorian Government, 'Wage Theft Bill 2020 – Consultation Paper' (February 2020) <https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/1915/8243/4118/WAGE_THEFT_CONSULTATION_PAPER_-_MASTER_4.16PM_21_FEB.pdf>.

⁹⁵ Tess Hardy, 'Enrolling Non-State Actors to Improve Compliance with Minimum Employment Standards' (2011) 22 *Economic and Labour Relations Review* 117; Tess Hardy, 'Watch this Space: Mapping the Actors Involved in the Implementation of Labour Standards Regulation in Australia' in John Howe, Anna Chapman and Ingrid Landau (eds), *The Evolving Project of Labour Law: Foundations, Developments and Future Research Directions* (Federation Press, 2018). See also Janice Fine 'Enforcing Labor Standards in Partnership with Civil Society: Can Co-enforcement Succeed where the State Alone has Failed?' (2017) 45(3) *Politics & Society* 359; and Stephen Clibborn, 'It Takes a Village: Civil Society Regulation of Employment Standards for Temporary Migrant Workers in Australian Horticulture' (2019) 42(1) *UNSW Law Journal* 242.

ATTACHMENT A

Senate Education and Employment References Committee Inquiry into The Exploitation of General and Specialist Cleaners Working in Retail Chains for Contracting or Subcontracting Cleaning Companies

Submission by

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This submission is made in our capacity as academic experts on labour regulation, and the views expressed are ours alone.

Our focus is on the adequacy of the existing regulatory framework in dealing with the kind of issues exposed by the February 2018 report of the Fair Work Ombudsman (FWO) on the procurement of cleaners in Tasmanian supermarkets.⁹⁶ As the UTS Centre for Business and Social Innovation points out in its submission to this inquiry, the exploitation of cleaners is a problem not just in retail stores, but in other parts of the cleaning sector. We support the various recommendations in that submission, including greater government support for, and extension of, the Cleaning Accountability Framework. But we also believe that some of the business practices in the cleaning sector that contribute to so-called ‘wage theft’ and other forms of worker exploitation (including underpayment of leave, termination and superannuation entitlements) are merely examples of a broader challenge to the labour regulation framework. Our objective in this submission is to suggest one way in which that challenge might be met, for the benefit of both cleaners, as well as vulnerable workers in other business networks in the public and private sector.⁹⁷

Australia has, by international standards, an exceptionally strong ‘safety net’ of rights and protections for employees. But the very strength of that safety net creates incentives for businesses to find ways of minimising or avoiding the costs associated with complying with the employment standards framework.

⁹⁶ Fair Work Ombudsman, *Inquiry into the Procurement of Cleaners in Tasmanian Supermarkets*, February 2018.

⁹⁷ See eg Fair Work Ombudsman, *Inquiry into the Procurement of Security Services by Local Governments*, June 2018; Fair Work Ombudsman, *Inquiry into Trolley Collection Services Procurement by Woolworths Limited*, June 2016; Fair Work Ombudsman, *Inquiry into Procurement of Housekeepers by Four or Five-Star Hotel Groups*, May 2016.

One form of avoidance involves the practice of ‘sham contracting’, or misclassifying workers as independent contractors. Previous reports suggest that this is a problem in the cleaning sector, as well as in other industries.⁹⁸ In this regard, we support implementation of the Productivity Commission’s recommendation to strengthen the provisions of the *Fair Work Act 2009* (FW Act) that seek to prohibit such arrangements.⁹⁹

For present purposes, however, we are interested in another form of avoidance. This involves the fragmentation of corporate structures and working arrangements into loosely connected networks that blur responsibility for ensuring workplace compliance. A key feature in such arrangements, whether they involve subcontracting, labour hire, franchising, the use of corporate groups or other types of ‘supply chain’, is the creation of legal distance between a worker and a ‘lead business’ that ultimately benefits from their labour.¹⁰⁰ Even if the worker is employed, and can identify underpayments or other breaches of labour standards by their employer, all too often that employer no longer exists, or otherwise does not have the assets to meet any judgment against them.

Section 550 of the FW Act does extend liability for breaches of the statute to a person ‘involved in’ someone else’s contravention. The provision applies to a person who has aided or abetted the contravention, procured or induced it, conspired with others to bring it about, or been in any way ‘knowingly concerned’. It is routinely used to attach liability to directors or senior managers of a company. But the need to establish *actual knowledge* of the contravention makes it very hard to pursue lead businesses, regardless of the extent to which their business practices may have contributed to the relevant breaches.¹⁰¹

It was precisely this limitation that led the Turnbull Government to propose, and the Parliament to authorise, the enactment of Division 4A of Part 4-1 of the FW Act, as part of the changes made by the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017*.

Under s 558B of the FW Act, a holding company may now be held responsible for a breach by one of its subsidiaries of the National Employment Standards (NES), an industrial instrument (such as an award or enterprise agreement), the rules concerning the payment of wages or the keeping of records, or the prohibitions on sham contracting. The same applies to a franchisor, in relation to a breach by one of its franchisees, but only if the franchisor has ‘a significant degree of influence or control’ over the franchisee’s affairs. In each case, the franchisor or holding company, or one of their officers, must have known about the contravention, or should reasonably have known it, or could reasonably have expected that a similar contravention would be likely to occur. Liability can be escaped if reasonable steps have been taken, on the part of the holding company or franchisor, to prevent such contraventions.

⁹⁸ See eg Fair Work Ombudsman, *Sham Contracting and the Misclassification of Workers in the Cleaning Services, Hair and Beauty and Call Centre Industries*, November 2011; Office of the Australian Building and Construction Commissioner, *Sham Contracting Inquiry Report*, November 2011. See also *Fair Work Ombudsman v Quest South Perth* (2015) 256 CLR 137.

⁹⁹ See Productivity Commission, *Workplace Relations Framework*, Inquiry Report No 76, 2015, pp 813–5.

¹⁰⁰ For just some examples from what now is a substantial body of academic literature on this trend, see Tess Hardy, ‘Who Should Be Held Liable for Workplace Contraventions and on What Basis?’ (2016) 29 *Australian Journal of Labour Law* 78; David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It*, Harvard University Press, 2014.

¹⁰¹ See eg Fair Work Ombudsman, *A Report of the Fair Work Ombudsman’s Inquiry into 7-Eleven*, April 2016.

The adoption of this new form of secondary liability has significantly strengthened the regime for ensuring compliance with the employment standards established by the FW Act – but only for two particular types of business model. In our view, the arguments for holding companies and franchisors to be held responsible for certain contraventions affecting workers who they do not directly employ apply with equal force to other business models, whether involving labour hire, subcontracting, the use of affiliated companies that are not technically subsidiaries, or more elaborate supply chains.¹⁰²

Our proposal incorporates some of the essential concepts in s 558B, but expresses them in terms that are sufficiently general to apply to any form of corporate or commercial arrangement, while retaining the safeguards in that provision to prevent regulatory overreach.

Specifically, we propose that a person (whether an individual or a corporate entity) should be liable for an employer’s contravention of the NES, an industrial instrument, the rules concerning the payment of wages or the keeping of records, or the prohibitions on sham contracting, where the person:

- (a) has a significant degree of influence or control over the employer’s affairs, or over the wages or employment conditions of the relevant employee(s);**
- (b) knew or could reasonably be expected to have known that the contravention (or a contravention of the same or a similar character) would occur; and**
- (c) cannot show that they have taken reasonable steps to prevent a contravention of the same or a similar character.**

Whether a person has significant influence or control over wages or employment conditions should be determined by reference to the substance and practical operation of arrangements for the performance of the relevant work.

A person should be deemed to have significant influence or control if it sets or accepts a price for goods or services, or for the use of property, at a level that practically constrains the capacity of the relevant employer to comply with its obligations.

In our opinion, the adoption of such a form of secondary liability, to complement the existing provision in s 550 for knowing involvement in another person’s contravention, would be an appropriate response to the type of practices in the cleaning sector being investigated by the Committee. It would not only address similar issues in other industries, but would also minimise regulatory avoidance strategies.

Importantly, it would only apply to a lead business which has influence or control over the employer or the relevant employees’ wages or working conditions, *and* has reason to believe that contraventions are likely to occur. This effectively sets the same threshold for secondary liability as that currently applied to franchisors and holding companies. The main change we recommend, in broadening its application to other types of arrangement, is the deeming provision. A business at the top of a lengthy supply chain may set a price or demand an economic return from a party with whom

¹⁰² For an elaboration of the justifications for making lead businesses liable, see Tess Hardy, ‘Good Call: Extending Liability for Employment Contraventions Beyond the Direct Employer’ in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform*, 2017, p 71.

it is directly dealing that is so low that contraventions of employment standards further down the supply chain become inevitable. So long as that should be reasonably apparent to the lead business, it should not be able to hide behind its lack of direct influence or control over the actual employer or the working conditions of those perfo