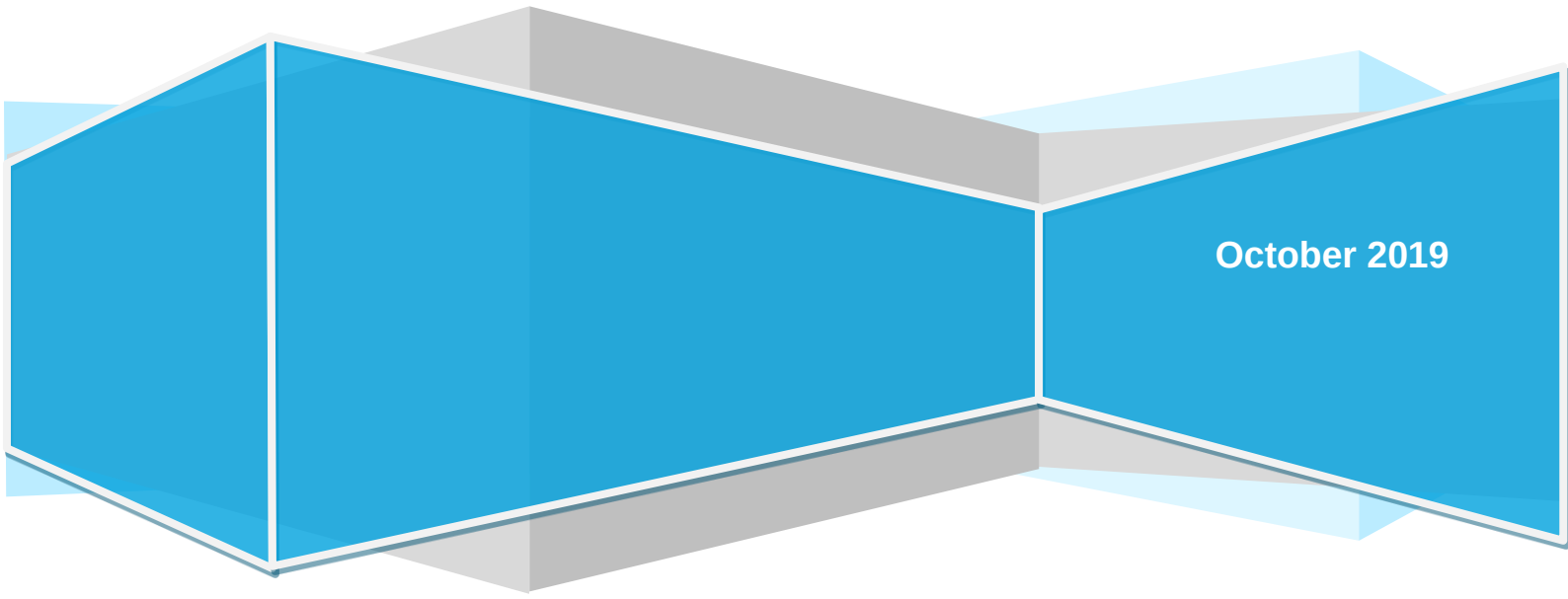
ELC Employment Law Centre of WA (Inc)

Working for WA Workers

ABN 36 365 876 841

Submission

Industrial Relations Consultation: Inquiry into Improving protections of employee's wages and entitlements: Strengthening penalties for non-compliance



October 2019

ELC Employment Law Centre of WA (Inc)
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ABN 36 365 876 841

Inquiry into Improving Protections of Employee's Wages and Entitlements: Strengthening Penalties for Non-Compliance
Australian Government
Attorney-General's Department

Lodged via email: IRconsultation@ag.gov.au

25 October 2019

Improving protections of employees' wages and entitlements: Strengthening penalties for non-compliance

The Employment Law Centre of Western Australia (Inc) (**ELC**) welcomes the opportunity to make a submission to the Industrial Relations' Inquiry into Improving Protections of Employee's Wages and Entitlements: Strengthening Penalties for Non-Compliance (the **Inquiry**).

ELC is a community legal centre that specialises in employment law. It is the only not-for-profit legal service in Western Australia offering free - employment law advice, assistance, education and representation. Each year ELC assists thousands of callers through our Advice Line service and provides numerous workers with further assistance from a solicitor.

Please see our submission below. Due to the short time frame to provide submissions to the Inquiry, we have responded at a high level to some of the Discussion Questions and issues raised that appear to be relevant to our client base of vulnerable Western Australian workers.

We would be happy to provide additional information to the Inquiry and participate in further consultation should there be an opportunity to do so, or should the Inquiry want us to expand on any of our submissions and recommendations.

Yours sincerely

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Glossary

ELC means the Employment Law Centre of WA (Inc).

Fair Work Act means the *Fair Work Act 2009* (Cth).

FEG means the Fair Entitlements Guarantee.

FWC means the Fair Work Commission.

FWO means the Fair Work Ombudsman.

Harvest Trail Inquiry Report means the Fair Work Ombudsman, *Harvest Trail Inquiry* (2018).[1]

Migrant Workers' Taskforce Report means the *Report of the Migrant Workers' Taskforce* (2019).[2]

NES means the National Employment Standards under the Fair Work Act.

NESB means Non-English Speaking Background.

Phua & Foo Case means *Fair Work Ombudsman v Phua & Foo Pty Ltd* [2018] FCA 137.

Protecting Vulnerable Workers Act means the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth), which amended the Fair Work Act on 15 September 2017.

[1] Available at https://www.fairwork.gov.au/about-us/access-accountability-and-reporting/inquiry-reports#harvest-trail-inquiry-report.
[2] Available at https://www.jobs.gov.au/migrant-workers-taskforce.

Summary of ELC's Submissions

The outcomes achieved by the current Federal regulatory framework in dealing with underpayment of wages and entitlements generally demonstrates that the framework is not and cannot be effective in combating this issue.

- In ELC's experience, underpayment of wages and entitlements is occurring and is a significant issue for vulnerable workers.
- In ELC's experience, the most vulnerable workers are often the most exploited in relation to underpayment of wages and entitlements.
- ELC's experience is reflected by the empirical evidence in other research, studies and inquiries.

While a further increase to the existing civil penalty regime will likely assist in generating compliance, ELC is not in a position where it can categorically state what level of increase could best generate compliance.

A key element of a penalty is that it have specific and general deterrence. This requires the Court to have the flexibility in alternative penalties and for the ability to more precisely link those penalties to the gravity and impact of the offence, as well as the nature of the business. This should include:

- an increase in the general penalty;
- making the imposition of a penalty mandatory (rather than on application);
- higher penalties that are associated with the financial means of the offender; and
- an additional mandatory penalty based on a multiplier of the underpayment.

ELC considers that the amendments effected by the Protecting Vulnerable Workers Act and FWO's increased education, compliance and enforcement activities, are likely to influence behaviour. However, ELC is unable to directly comment on whether it is currently influencing employer behaviour or has had a sufficient deterrent effect.

In addition to examining the nature and level of penalties, the Inquiry should also review and consider improving the regime for enforcing and recovering any penalties or compensation ordered.

While ELC acknowledges the improvements resulting from the amendments to the Protecting Vulnerable Workers Act, there is more that can be done to improve worker exploitation.

The accessorial liability provisions should be strengthened by:

- extending the definition of knowledge to where a person has knowledge of circumstances which would put an honest and reasonable person on inquiry;
- applying the accessorial liability provisions to all other contractual supply chains; and
- imposing a positive due diligence duty on entities within a contractual supply chain, such that they will be held liable unless they can demonstrate they have taken proper and reasonable steps to ensure compliance by entities lower down the supply chain with employment laws.

There should be a separate contravention for serious or systemic cases of sham contracting, that attracts a higher penalty.

Wage theft should be a criminal offence, provided that:

- there is a mechanism for a worker to separately pursue their underpayment claim at the same time (without prejudicing any criminal prosecution);
- there is an express mitigating factor in sentencing where the employer has promptly and fully rectified the underpayment at an early stage; and
- the regulator responsible for prosecuting a wage theft criminal claim:

(a) has relevant and specialist expertise in employment matters and is dedicated for that purpose;

(b) is the same regulator for the purpose of pursing any civil underpayment claims (and must take into account and give precedence to the expeditious recovery of the underpayment of wages and entitlements on behalf of the worker); and

(c) has the same powers of investigation for both the civil and criminal claims.

The definition of wage theft be more than one intentional instance of underpayment of wages and entitlements.

The number of instances of underpayment of wages and entitlements be a mitigating or aggravating factor in sentencing.

Further funding and resources be provided to the community legal sector for the purpose of providing employment law related further assistance and community legal education to vulnerable workers.

Further funding and resources be provided to third parties, including the community legal sector, for the specific purpose of subsidising the cost of employment law related enforcement action. For example, funding could be provided for the specific purpose of representation in underpayment disputes.

Further funding and resources be provided to FWO for the purpose of providing education and information, investigating and enforcing the regulatory framework (with priority given to vulnerable workers).

ELC supports any submissions by other parties or recommendations by the Inquiry which provide trade unions greater scope to assist vulnerable workers.

The requirements in the *Fair Entitlements Guarantee Act 2012* (Cth) that an employee be an Australian citizen or the holder of a certain visa type should be removed.

In relation to the gig economy, the Federal Government should:

- modernise and simplify the definition of employee to capture gig economy workers; and
- require gig economy platforms to ensure gig economy workers are provided with at least the minimum wage and other minimum entitlements.

The employment enforcement framework be reviewed with the specific objective of enabling self-represented individuals to more easily access justice, looking at issues of:

- simplification;
- procedural formality;
- evidentiary requirements; and
- the powers of the court or tribunal to be actively involved in investigating the facts of the case.

The Federal employment law framework should provide the same employment law protections to unlawful non-citizens as lawful citizens.

That:

- there be an expedited process for courts and tribunals to deal with employment law claims relating to underpayment, where there is a prospect the worker may be leaving the jurisdiction to return overseas; and
- where it is not possible for a claim to be dealt with on an expedited basis, the various courts and tribunals processes should be flexible enough to allow claimants to pursue a claim easily, even if they are not in Australia.

Courts and Tribunals be granted greater scope to set aside deeds of release which are entered pre-litigation, and which merely relate to payment of lawful entitlements.

1. Introduction

1.1 The need for regulatory change

The wage-work bargain fundamentally underpins the employment relationship: an employee agrees to perform work and the employer agrees to pay for the work performed.

The simple and undeniable concept of a worker's right to be paid for the work they perform - promptly and fully - is enshrined in Australian culture, and the Federal employment law regulatory framework.[3]

However, it is undeniable that workers are often underpaid their wages and entitlements.

In ELC's experience, underpayment of wages and entitlements is frequently directed at the most vulnerable workers. These workers often have poor and limited knowledge of their workplace rights and entitlements and are unable to understand the regulatory framework to protect themselves.

In recent years, there have also been increasing number of cases where the employer's failure to pay Australian workers their minimum wages and entitlements were found to be the product of deliberate and systematic actions by the employer.[4]

There is also evidence to suggest that there is an environment where underpayment of wages and entitlements has become (or has been for a significant period) a 'business model' for some companies operating throughout Australia.

In theory, the existing Federal legislative framework should protect vulnerable workers from harm. However, in practice, it is not and worker exploitation is continuing to occur. It is clear that the current regulatory framework needs to be improved to better protect vulnerable workers.

As part of improving the regulatory framework, it is necessary and appropriate to improve specifically the current compliance, enforcement and penalty aspects of this framework.

In so doing, this must not lose sight of the fundamental need for vulnerable workers to be able to fully (not having to compromise a claim in order to ensure payment), easily and promptly recover any underpayment of wages and entitlements.

The principle that underlines ELC's submission and recommendations to this Inquiry, is that the regulatory framework needs to be reviewed and enhanced with the primary objectives of:

- preventing exploitation from occurring;

[3] The entitlement to be paid in money, from which only certain deductions are permitted, are long recognised legal principles dating back to the 15th century in Britain with the Truck Acts. In *Bristow v City Petroleum* [1987] 1 WLR 529, at 523, Lord Ackner in the House of Lords gave a short history of the previous regime of Truck Acts and held [ELC emphasis]:

> *The old Truck enactments were very numerous and date from about the year 1464. The **particular evil** intended to be remedied was the truck system, or payment by masters of their men's wages wholly or in part with goods -- a system open to various abuse -- when workmen were forced to take goods at their master's valuation … They established the obligation, and produced, or at least fortified the custom, of uniformly paying the whole wages of artificers in the current coin of the realm.*

[4] See for example: *Fair Work Ombudsman v Tac Pham Pty Ltd* [2018] FCA 120 at [100]; Phua & Foo Case at [54]; and, *Fair Work Ombudsman v Commercial and Residential Cleaning Group Pty Ltd & Ors* [2017] FCCA 2838 at [75] – [79].

- having a regulatory framework where unscrupulous employers do not consider the likely consequences of unlawful exploitation "*as simply a cost of doing business whilst continuing to exploit vulnerable employees*"; [5]

- ensuring that where unlawful exploitation does occur, vulnerable workers have access to justice as well as a system which allows them (as laypeople) to easily and promptly recover what has been denied them.

ELC submits that reform to the Fair Work Act is necessary, if significant progress in Australia is to be made toward improving protections of employees' wages and entitlements.

1.2 Other Government Inquiries and Reports

It is also important to note that there have been several other Australian government and regulator inquiries and reports relevant to the issue of protecting vulnerable workers from exploitation, including underpayment of wages and entitlements.

There are common issues and common themes across these inquiries and reports, addressing:

(a) **liability**: broadening the scope of holding individuals and other accessories to account;

(b) **penalties**: increasing penalties and broadening of penalty options;

(c) **protections**: increasing protections for vulnerable workers;

(d) **resourcing**: Increasing funding to various stakeholders; and

(e) **understanding**: training, education and information, as well as simplifying some of the laws;

However, undertaking legislative reform in this area can be slow. This is why it is important to look at other strategies beyond merely legislative reform, with a main objective being to ensure vulnerable workers have access to justice in the existing employment law framework.

[5] Phua & Foo Case at [63].

2. Effectiveness of the Current Federal Regulatory Framework for Dealing with Underpayment of Wages and Entitlements

2.1 ELC's Submission

The outcomes achieved by the current Federal regulatory framework in dealing with underpayment of wages and entitlements generally demonstrates that the framework is not and cannot be effective in combating this issue.

- In ELC's experience, underpayment of wages and entitlements is occurring and is a significant issue for vulnerable workers.
- In ELC's experience, the most vulnerable workers are often the most exploited in relation to underpayment of wages and entitlements.
- ELC's experience is reflected by the empirical evidence in other research, studies and inquiries.

2.2 The difference between a strong regulatory framework and an effective regulatory framework

In theory, the existing Federal employment law regulatory framework should protect vulnerable workers from harm. This is because the framework provides a regime for:

- minimum conditions of employment that cannot be contracted out of;[6]
- time and wages record keeping requirements to ensure a worker's wage can be correctly calculated;
- measures to ensure employees are paid in cash – regularly and promptly - and limiting the basis on which deductions can be lawfully made;
- protections from unfair and unlawful conduct;
- the establishment of a regulatory framework that enables unpaid wages to be recovered by the employee; and
- regulators who can separately investigate and take enforcement action in relation to contraventions.

However, a **strong** employment law regulatory framework does not in itself mean an **effective** regulatory framework.

[6] For example, minimum entitlements prescribed under the NES under the Fair Work Act, industrial awards, and other entitlements prescribed by employment laws.

Firstly, for a workplace protection to be truly effective it must also be easy to understand and easy to enforce. In contrast, ELC's experience in assisting vulnerable workers is that the Federal regulatory framework is complex and difficult for vulnerable workers to:

- understand; and
- seek to enforce their rights under those laws.

This is in an environment where:

- the more vulnerable a worker is, the greater potential there is for the worker to be exploited;
- exploitation of this nature has a more profound impact on low-paid workers;[7]
- there are numerous barriers to vulnerable workers enforcing their rights, for example where they do not speak English as a first language, they do not know where to go for assistance, they are not familiar with Australian workplace laws and institutions, and are concerned about speaking up about their rights for fear of being dismissed, and in some cases, deported (since their employment is tied to their right to remain in the country);
- frequently workers are unable to pay for expert advice, support and representation;
- those workers unable to pay for expert advice, support and representation may have limited opportunities to obtain free third-party assistance from organisations such as community legal centres; and
- agencies such as the Australian Taxation Office, and FWO have finite resources and may be limited in the assistance they can provide.

Second, a strong employment law regulatory framework must necessarily evolve to accommodate changing workplace patterns as employers look for ways to reduce costs and improve productivity, from outsourcing to an increased use of casual employees to the emergence of the gig economy.

In ELC's view, the current Federal regulatory framework for dealing with underpayment of wages and entitlements is ineffective.

[7] Phua & Foo Case, where Siopis J held at [47] that:

> *That sum [the underpayment] must be considered in the context that this represented the underpayment over a nine month period and that the employees were low paid employees and the underpayment would have had a more profound impact upon persons whose base rate of pay was low.*

3. Civil penalties in the Fair Work Act: Current approach to determining penalties

3.1 Overview

This submission part addresses the following Discussion Questions:

- **Discussion Question 1:** What level of further increase to the existing civil penalty regime in the Fair Work Act could best generate compliance with workplace laws?
- **Discussion Question 2:** What are some alternative ways to calculate maximum penalties? For example, by reference to business size or the size of the underpayment or some measure of culpability or fault.
- **Discussion Question 3:** Should penalties for multiple instances of underpayment across a workforce and over time continue to be 'grouped' by 'civil penalty provision', rather than by reference to the number of affected employees, period of the underpayments, or some other measure?

3.2 ELC's Submission

While a further increase to the existing civil penalty regime will likely assist in generating compliance, ELC is not in a position where it can categorically state what level of increase could best generate compliance.

A key element of a penalty is that it have specific and general deterrence. This requires the Court to have the flexibility in alternative penalties and for the ability to more precisely link those penalties to the gravity and impact of the offence, as well as the nature of the business. This should include:

- an increase in the general penalty;
- making the imposition of a penalty mandatory (rather than on application);
- higher penalties that are associated with the financial means of the offender; and
- an additional mandatory penalty based on a multiplier of the underpayment.

3.3 Prevention, Recovery and Punishment

In the context of underpayment of wages and entitlements, and other breaches of workplace laws, vulnerable workers' interests are best served in two aspects:

- (**Prevention**) The regulatory framework must minimise as much as possible instances of wage theft or other breaches of workplace laws.
- (**Recovery**) Where wage theft or other breaches of workplace laws have occurred, the regulatory framework must facilitate employees easily and expeditiously recovering the underpayment of wages and entitlements.

These aspects do not necessarily point in the same direction as strengthening one aspect can detract from the other.

In addition to Prevention and Recovery, there is the third aspect where the offender is penalised for their offending conduct (**Punishment**). Punishment is inextricably linked to Prevention, as effective Punishment (or threat of Punishment) can enhance Prevention.

In ELC's experience, our clients' primary objective is typically Recovery (i.e. to recover as much as possible of the wages and other entitlements they have been underpaid as soon as possible). While our clients may want to separately punish the employer for their conduct, this is only a secondary objective.

The risk of Punishment can also enhance Recovery.

Where an employer has engaged in breaches of civil penalty provisions under the Fair Work Act, whether a civil penalty is issued by a Court is dependent on whether a claim proceeds to final determination (either by consent or contested hearing).

Where a matter then settles prior to hearing, an employer can effectively avoid a civil penalty being issued. The prospect of a civil penalty may therefore be a relevant consideration in the employer agreeing to settle. However, this can create an incongruous situation where employees agree to settle claims for less than their full claimed entitlement and an employer escapes penalty in so doing.

For these reasons, the current civil penalty regime may be lacking in its deterrent effect (in relation to both Prevention and Recovery). Additionally, uncertainty regarding if a civil penalty will be imposed and if so, how much that civil penalty order will be, effectively allows employers to determine if the **risk** of civil penalties being imposed upon them is simply a cost of doing business.

3.4 The importance of deterrence

When it comes to the imposition of penalties, a primary consideration is the principle of deterrence. As a penalty increases, it has a greater deterrent effect both on the offender (specific deterrence) and the broader community (general deterrence). For a penalty to act effectively as a deterrent it should not be seen merely as the cost of doing business.[8] It is important to recognise in this that the impact of the same penalty on different businesses can widely vary, depending on the size of those businesses.

[8] Phua & Foo Case, where Siopis J held at [61], [62] and [63] that:

> *As I have said, the primary purpose of the imposition of a civil penalty is deterrence.*
>
> *In this case, in my view, notwithstanding Mr Phua's evidence that he will ensure that the respondent does not breach the law again, and the training course he has undertaken, it is, nevertheless, necessary that the penalty reflect an element of specific deterrence. This is because of the deliberate disregard which the respondent has previously shown to compliance with the Restaurant Award conditions in an environment where the affected employees are casual and vulnerable employees. This is to remind the respondent of the continuing need to comply with its statutory obligations.*
>
> *Further, the penalty should also act as a deterrent to others in the restaurant/café industry who may be minded to flout the law with a view to increasing profit at the expense of vulnerable employees. As mentioned, there is in evidence a FWO report which shows that the failure to meet minimum employment obligations is widespread within the restaurant/café industry which employs a large number of vulnerable employees. The penalty should be at a level such that the payment of a penalty is not regarded as simply a cost of doing business whilst continuing to exploit vulnerable employees.*

A primary criminal sentencing principle is that the sentence imposed on an offender must be commensurate with the seriousness of the offence.

A Court is then typically required to consider the following objectives in achieving that principle:[9]

- punishment of the offender;
- denunciation of the offending conduct;
- vindication of the victim;
- specific deterrence of the offender;
- general deterrence of other prospective offenders;
- prevention (incapacitation); and
- rehabilitation of the offender (thereby protecting the community).

As outlined below, ELC considers that there is value in increasing or modifying the existing civil penalty regime in the Fair Work Act to better generate compliance with workplace laws.

3.5 Effect of increasing or modifying the existing civil penalty regime

3.5.1 Increasing existing penalties

Increasing existing civil penalties may have the effect of producing a higher deterrent effect. However, it is difficult to say what is the best level.

This is because necessarily what may be a significant deterrent to one entity may be of limited detrimental consequence to another entity.

3.5.2 Penalties imposed on natural persons

In ELC's opinion, penalties imposed on a natural person can have a significant deterrent effect, often more than if a penalty was to be imposed on a non-natural person who that natural person is involved in.

This matter is dealt with in greater detail in the section dealing with accessorial liability and holding relevant parties to account for underpayment of wages and entitlements.

3.5.3 Alternative means of calculating penalties

If a critical element of a penalty is Punishment and specific deterrence, it is obvious to say that the quantum of the penalty should be sufficient to achieve this aim. This requires a penalty to take into consideration (among other sentencing principles) the nature and resources of the offender and to have the flexibility to tailor more specifically the penalty to that information.

[9] The Honourable Wayne Martin AC, *The Art of Sentencing – an appellate court perspective* (2014) available at https://www.supremecourt.wa.gov.au/_files/The%20Art%20of%20Sentencing%20-%20an%20Appellate%20Court%20Perspective%20Martin%20CJ%2014%20Oct%202014.pdf.

ELC sees value in:

- calculating a maximum penalty by reference to an offender's financial means; and

- giving consideration to a mandatory requirement to award an additional penalty, which: is based on a multiplier of the quantum of the underpayment. For example, section 222 of the *Fish Resources Management Act 1994* (WA) provides that if a person is convicted of certain offences, in addition to the penalty imposed under the relevant provision:

> the court must impose on the person an additional penalty that … is equal to 10 times the prescribed value of any fish the subject of the offence.

However, this is predicated on there being no decrease in the current penalties.

3.5.4 Making the imposition of a penalty mandatory

Currently, the Federal Court, Federal Circuit Court or an eligible State or Territory court *may* make a pecuniary penalty order where:[10]

- an application seeking pecuniary penalties has been made; and

- the court is satisfied that a person has contravened a civil remedy provision.

The quantum of any pecuniary penalty order is determined by what "*the court considers is appropriate*".[11]

ELC recommends that where a civil remedy provision has been breached, a court should, by default, consider the imposition of pecuniary penalties regardless of whether there has been an application for a pecuniary penalty.

In then assessing any penalty to be made, the Court can examine and take into account such issues as to where on the spectrum of underpayment of wages and entitlements the employer's action sits – was it an innocent once off breach done under a honest belief (and quickly remedied) or was it a deliberate and systemic breach.

[10] *Fair Work Act 2009* (Cth) s 546(1).
[11] *Fair Work Act 2009* (Cth) s 546(1).

4. Civil penalties in the Fair Work Act: analysis of the Fair Work Amendment (Protecting Vulnerable Workers) Act 2017

4.1 Overview

This submission part addresses the following discussion questions:

- **Discussion Question 4:** Have the amendments effected by the Protecting Vulnerable Workers Act, coupled with the FWO's education, compliance and enforcement activities, influenced employer behaviour? In what way?
- **Discussion Question 5:** Has the new 'serious contravention' category in the Fair Work Act had, or is it likely to have, a sufficient deterrent effect?

4.2 ELC's position

ELC considers that the amendments effected by the Protecting Vulnerable Workers Act and FWO's increased education, compliance and enforcement activities, are likely to influence behaviour. However, ELC is unable to directly comment on whether it is currently influencing employer behaviour or has had a sufficient deterrent effect.

In addition to examining the nature and level of penalties, the Inquiry should also review and consider improving the regime for enforcing and recovering any penalties or compensation ordered.

While ELC acknowledges the improvements resulting from the amendments to the Protecting Vulnerable Workers Act, there is more that can be done to improve worker exploitation.

4.3 Amendments effected by the Protecting Vulnerable Workers Act

The amendments to the Fair Work Act that were introduced by the Protecting Vulnerable Workers Act in 2017 were in response to community concern about the exploitation of vulnerable workers, in particular migrant workers, and many of those who work in the franchise sector.[12]

The Protecting Vulnerable Workers Act in 2017 made the following amendments:

- an increase in penalties up to ten-fold for 'serious contraventions' of workplace laws;
- increase in penalties for breaches of record-keeping and pay slip obligations;
- an increase in investigative powers for the FWO, including the ability to compel witnesses to provide evidence; and
- new obligations for franchisors to take accountability for entitlements of the employees of their franchisees.

[12] Explanatory Memorandum to the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (Cth), at page i.

A contravention is a 'serious contravention' if:

(a) the person knowingly contravened the provision; and

(b) the person's conduct consisting a contravention was part of a systematic pattern of conduct relating to one or more people.[13]

This regime applies to breaches of:

- the NES
- a modern award
- an enterprise agreement or a workplace determination
- a national minimum wage order or an equal remuneration wage order
- method and frequency of paying wages
- record-keeping requirements and pay slip requirements.

The maximum penalty for a 'serious contravention' increased tenfold to $630,000 for a corporate entity and $126,000 for an individual. Relevantly, in determining whether a serious contravention has occurred a court may have regard to the failure to make or keep certain employment records and a failure to give pay slips.[14]

These changes were particularly important for franchisors and holding companies, vulnerable employees, and people / companies who do not voluntarily cooperate with FWO's investigations.[15]

4.4 Have the amendments to the Fair Work Act, coupled with FWO's increased actions / activities, influenced employer behaviour?

It is difficult for ELC to assess whether these amendments together with FWO's increased activities have influenced employer behaviour.

However, in ELC's view, these amendments and increased activity have value. This is not to so that more does not need to be done to provide a more comprehensive solution to the exploitation of vulnerable workers in Australia.[16]

One of the changes made by the Protecting Vulnerable Workers Act was to create a reverse onus of proof in certain civil remedy proceedings.[17]

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[13] Fair Work Act s 557A(1).
[14] Ibid. Sections 557A(2)(d) and (e) in relation to whether a person's conduct was part of a systematic pattern of conduct.
[15] See Fair Work Ombudsman, *Changes to help protect vulnerable workers*, (2017) available at https://www.fairwork.gov.au/about-us/news-and-media-releases/website-news/changes-to-help-protect-vulnerable-workers.
[16] Senate Education and Employment References Committee, *Wage theft? What wage theft?! The exploitation of general and specialist cleaners working in retail chains for contracting or subcontracting cleaning companies*, (Report, November 2018) available at https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024233/toc_pdf/WagetheftWhatwagetheft!.pdf;fileType=application%2Fpdf.
[17] Fair Work Act s 557C(1) and (3).

Where a worker makes an allegation in such civil remedy proceedings, and:

(a) the employer was required to make, keep, make available or give certain employment records; and

(b) the employer has failed to comply with that requirement,

the employer has the burden of disproving the allegation.[18] This is subject to an exception where the employer has a reasonable excuse for non-compliance.[19]

In ELC's view, this reverse onus will:

(a) strengthen the Federal regulatory framework;

(b) make it easier for vulnerable workers to identify if they have been underpaid their wages and entitlements; and

(c) make it easier for the worker to then recover those underpaid wages and entitlements.

Further, as identified in the Discussion Paper, although the FWO has commenced court action alleging contraventions of some of these new provisions, the provisions remain relatively untested. It is therefore difficult to accurately assess whether the FWO's increased activity in the area has significantly influenced employer behaviour.

4.5 Has the new 'serious contravention' category in the Fair Work Act had, or is it likely to have, a sufficient deterrent effect?

ELC submits that in theory, the 'serious contravention' category in the Fair Work Act is likely to have a greater deterrent effect. Heavier penalties should, on the face of it, provide greater encouragement for employers to act in accordance with the requirements of the Fair Work Act.

However, as the provisions remain relatively untested, it is difficult for ELC to definitively assess whether these changes will have a **sufficient** deterrent effect.

4.6 Additional points

- There is a risk that employers may adopt strategies to avoid paying the full penalty imposed by a court (as well as any order for compensation). Therefore, effective enforcement and recovery of the penalties and compensation is also critically important.

- While ELC acknowledges the improvements resulting from the amendments to the Protecting Vulnerable Workers Act, there is more that can be done to improve worker exploitation and wage theft.

[18] Ibid s 557C(1).
[19] Ibid s 557C(2).

5. Civil Penalties in the Fair Work Act: Extending Liability

5.1 Overview

This submission part addresses the following Discussion Questions:

- **Discussion Question 6:** Do the existing arrangements adequately regulate the behaviour of lead firms / head contractors in relation to employees in their immediate supply chains?

- **Discussion Question 7:** Should actual knowledge of, or knowing involvement in, a contravention of a workplace law be the decisive factor in determining whether to extend liability to another person or company? If not, what level of knowledge or involvement would be appropriate? Would recklessness constitute a fair element to an offence of this type?

- **Discussion Question 8:** What degree of control over which aspects of a business is required before a business owner should be expected to check the compliance of contractors further down the supply chain?

- **Discussion Question 9:** What are the risks and/or benefits of further extending the accessorial liability provisions to a broader range of business models, including where businesses contract out services?

5.2 ELC's position

The accessorial liability provisions should be strengthened by:

- extending the definition of knowledge to where a person has knowledge of circumstances which would put an honest and reasonable person on inquiry;

- applying the accessorial liability provisions to all other contractual supply chains; and

- imposing a positive due diligence duty on entities within a contractual supply chain, such that they will be held liable unless they can demonstrate they have taken proper and reasonable steps to ensure compliance by entities lower down the supply chain with employment laws.

5.3 The existing arrangements under the Fair Work Act and operation of accessorial liability provisions in the Federal regulatory framework

Under the Fair Work Act, a person or company may be held responsible if they:

- were 'involved in' an employer's contravention (accessorial liability)

- are a franchisor and their franchise did not comply with workplace laws (franchisor liability)

- are a holding company and their subsidiary didn't follow workplace laws (holding company liability)

5.3.1 Accessorial liability

Section 550 of the Fair Work Act provides:

> (1) A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.
> (2) A person is involved in a contravention of a civil remedy provision if, and only if, the person:
>
> (a) has aided, abetted, counselled or procured the contravention; or
>
> (b) has induced the contravention, whether by threats or promises or otherwise; or
>
> (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
>
> (d) has conspired with others to effect the contravention.

5.3.2 Franchisor and holding company liability

One of the changes arising from the Protecting Vulnerable Workers Act was to extend liability for franchisors and holding companies.

Section 558B of the Fair Work Act applies to franchisor entities and holding companies. Provided that certain conditions are met, franchisors and holding companies can be held responsible for a breach by a franchisee or subsidiary. The standard to be satisfied is that the person knew or could reasonably be expected to have known that the contravention would occur, or could have reasonably expected that a similar breach would be likely to occur.

The franchisor or holding company can avoid liability if it can prove that it took reasonable steps to prevent such breaches.

5.3.3 FWO priorities for 2019-20

In 2019-20, the FWO's priority industries and issues will also include supply chain risks and franchisors.

5.4 Accessorial liability of managers and directors

In *Fair Work Ombudsman v Commercial and Residential Cleaning Group Pty Ltd & Ors* [2017] FCCA 2838, penalties were issued against two managers and directors of the first respondent, Commercial and Residential Cleaning Group Pty Ltd, for (among other things) failing to meet a broad range of minimum entitlements due to be paid to employees of the first respondent and failing to keep and maintain adequate or correct records to issue payslips.

One of the factors the Court considered in assessing a penalty was that in another similar Court action against a different cleaning company, the two managers and directors also operating that company – and compensation and penalties ordered in that action had not been paid.

> By reason of the fact that the first respondent in these proceedings and ACN 146 435 118 Pty Ltd had common directors, including the second respondent and the third respondent in these proceedings, and that the third respondent in ACN 146 435 118 (No.2) is the second respondent in these proceedings, the Court considers that appropriate weight must be given

to the previous contravention by the third respondent and the previous similar conduct by a corporation in which both the second and third respondents were involved.[20]

5.5 Accessorial liability of another entity

In *Fair Work Ombudsman v Blue Impression Pty Ltd & Ors* [2017] FCCA 810 a declaration was made that and accounting firm, Ezy Accounting 123 Pty Ltd, was accessorily liable for knowingly helping one of its clients exploit a vulnerable worker.

The underpayments occurred despite the FWO having previously put Ezy Accounting 123 on notice of their obligations under workplace laws. It was found that Ezy Accounting 123 had "*deliberately shut its eyes to what was going on in a manner that amounted to connivance in the contraventions by the first respondent*".[21]

In a supply chain environment, while an employer may be directly responsible for the payment of wages, it is important to push liability for non-compliance with employment laws up the contractual supply chain to the ultimate beneficiary. The head entity in these supply chains are typically well-resourced sophisticated companies and it must be made clear to them that there is a business case for having strong governance arrangements in this area and direct consequences to them if non-compliance occurs.

5.6 The level of knowledge required to trigger accessorial liability

As raised in the Discussion Paper, numerous cases have highlighted that the accessorial liability provisions in the Fair Work Act set a very high bar to prove accessory involvement. The courts have interpreted the current provisions as requiring a person to have engaged in conduct that involves them in the contravention and (among other things) have ***actual knowledge*** of the essential elements of the contravention before accessorial liability will be extended.

The need to establish 'actual knowledge' of the contravention makes it difficult to pursue lead firms / head contractors.

In ELC's view, consideration should be given as to whether sufficient knowledge can include knowledge of circumstances which would put an honest and reasonable person on inquiry.[22]

5.7 Extending the reach of the accessorial, franchisor and holding company liability provisions in the contractual supply chain

The accessorial liability provisions of the Fair Work Act provide an effective mechanism of holding people accountable if they are ***knowingly*** involved in breaches of the Fair Work Act. The issue is that it remains difficult establish that these types of employers knowingly contravened the Fair Work Act.

It is important that the accessorial liability provisions are not only used to make individuals within the contravening entity accountable but are also strong enough to make other entities (and individuals inside those entities) within the contractual supply chain accountable.

This is because in ELC's experience, a common strategy often used to defeat workplace protections is distancing the entity from whom the work is performed from the entity that employs or engages the worker.

[20] At paragraph [57].
[21] At paragraph [102].
[22] *Barnes v Addy* (1874) LR 9 Ch App 244.

Further, in ELC's opinion, the concepts contained in the extended liability for franchisors and holding companies, together as to what factors a court may have regard when determining whether reasonable steps have been taken to prevent a contravention, could similarly be applied to other contractual supply chains.

ELC considers that the accessorial, franchisor and holding company liability legislation should go further and a stronger positive obligation be placed on contractual supply chains to prevent a contravention; rather than parts of the supply chain seeking to abrogate their legal risk of being accessorily liable for non-compliance by limiting their involvement in the conduct of entities further down the contractual supply chain.

ELC submits that the Inquiry should consider whether a positive due diligence duty should be placed on a principal or head contractor, such that they will be held liable unless they can demonstrate they have taken ***due diligence / proper and reasonable steps*** to ensure compliance by entities lower down the supply chain with employment laws.

ELC also sees value in the accessorial liability provisions in addressing issues where employers enter into liquidation or bankruptcy owing wages and entitlements to workers.

6. Civil Penalties in the Fair Work Act: Sham contracting

6.1 Overview

This submission part addresses the following Discussion Questions:

- **Discussion Question 10:** Should there be a separate contravention for more serious or systemic cases of sham contracting that attracts higher penalties? If so, what should this look like?

- **Discussion Question 11:** Should the recklessness defence in subsection 357(2) of the Fair Work Act be amended? If so, how?

6.2 ELC's submission

There should be a separate contravention for serious or systemic cases of sham contracting, that attracts a higher penalty.

6.3 Sham contracting arrangements and current penalties

Aside from the legitimate engagement of workers as independent contractors, some employers have sought to exploit the characterisation of employees as contractors in order to avoid their obligations and provide employee entitlements. This misclassification of a worker is known as 'sham contracting'.

In ELC's experience, it is not uncommon for employers to attempt to characterise what is an employment relationship as an independent contracting arrangement as a way of avoiding their obligations to pay certain minimum rates of pay and other minimum conditions of employment.

On 12 June 2018, the FWO commenced legal proceedings in the Federal Court of Australia against Foodora Australia Pty Ltd, alleging it had engaged in sham contracting activity that resulted in the underpayment of workers. Fair Work Ombudsman, Natalie James, was quoted as saying:[23]

> sham contracting is a priority for her Agency, not just because of the direct impact of these arrangements on individual workers but because those adopting sham contracting as a business model are availing themselves of an unfair competitive advantage by depriving workers of their lawful minimum employment conditions and protections.

The FWO alleged that Foodora breached sham contracting laws by mispresenting the workers as independent contractors; when they were in fact employees.[24] However, proceedings were discontinued as Foodora ceased operations in Australia in August 2018 and entered voluntary administration.[25]

[23] Fair Work Ombudsman, *Fair Work Ombudsman commences legal action against Foodora,* (2018), available at https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/june-2018/20180612-foodora-litigation.
[24] Ibid.
[25] Fair Work Ombudsman, *FWO discontinues legal action against Foodora*, (2019), available at https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/june-2019/20190621-foodora-media-release.

The Fair Work Act provides for a contravention for misrepresenting employment as an independent contracting arrangement. Under the sham contracting provisions of the Fair Work Act, an employer cannot:

- misrepresent an employment relationship or a proposed employment arrangement as an independent contracting arrangement;[26]
- dismiss or threaten to dismiss an employee for the purpose of engaging them as an independent contractor;[27]
- make a knowingly false statement to persuade or influence an employee to become an independent contractor.[28]

Contravening any of the above provisions may attract a civil penalty, and civil remedies may be sought.[29] Currently, the maximum penalty available is 60 penalty units. This is equivalent to $63,000 for a corporate entity and $12,600 for an individual.

An individual can prosecute an employer who engages in sham contracting. To do so, it must first be proved, having regard to the relevant indicia when applying the 'multi-factorial test', that a worker is an employee, and not an independent contractor.[30] Once proven, the court can make orders with declaratory effect and penalise the employer. Injunctions may also be sought to prevent dismissal occurring or remedy the effects.

6.4 Should there be a separate contravention for more serious or systematic cases of sham contracting?

ELC submits that there should be a separate contravention for more serious or systematic cases of sham contracting.

The maximum penalty that may be awarded for contravening the sham contracting provisions in the Fair Work Act is 60 penalty units. A number of other contraventions of the Fair Work Act attract a penalty of up to 600 penalty units, for a 'serious contravention'.

A contravention is a 'serious contravention' if:

(a) the person knowingly contravened the provision; and

(b) the person's conduct consisting the contravention was part of a systematic pattern of conduct relating to one or more persons.[31]

The penalty for a serious contravention is $630,000 for a corporate entity and $126,000 for an individual.

There are a number of criteria the court may have regard to when determining whether a contravention is part of a systematic pattern of conduct, including the number of contraventions, the period over which the relevant contraventions occurred, and the person's response, or failure to respond, to any complaints made about the relevant contraventions.[32]

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[26] Fair Work Act s 357.
[27] Fair Work Act s 358.
[28] Fair Work Act s 359.
[29] Fair Work Act Part 4-1.
[30] See generally *Kaseris v Rasier Pacific V.O.F.* [2017] FWC 6610 where the FWC, in applying the multi-factorial test, rejected a Victorian Uber driver's argument that he was an 'employee' protected by unfair dismissal laws.
[31] Fair Work Act s 557A(1).
[32] Fair Work Act s 557A(2).

ELC is of the view that there ought to be a separate contravention for more serious or systematic cases to protect workers from sham contracting arrangements. Increasing penalties will result in greater general deterrence. This is particularly important for large commercial employers or franchisees.

7. Criminal sanctions: current approach and Issues to criminal sanctions as part of the enforcement framework

7.1 Overview

This submission part addresses the following discussion questions:

- **Discussion Question 12:** In what circumstances should underpayment of wages attract criminal penalties?
- **Discussion Question 13:** What consideration/weight should be given to the whether an underpayment was part of a systematic pattern of conduct and whether it was dishonest?
- **Discussion Question 14:** What kind of fault elements should apply?
- **Discussion Question 15:** Should the Criminal Code [see the Schedule to the Criminal Code Act 1995 (Cth)] be applied in relation to accessorial liability and corporate criminal responsibility?
- **Discussion Question 16:** What should the maximum penalty be for an individual and for a body corporate?
- **Discussion Question 17:** Are there potential unintended consequences of introducing criminal sanctions for wage underpayment? If so, how might these be avoided?
- **Discussion Question 18:** Are there other serious types of exploitation that should also attract criminal penalties? If so, what are these and how should they be delivered?

7.2 ELC's Position

Wage theft should be a criminal offence, provided that:

- there is a mechanism for a worker to separately pursue their underpayment claim at the same time (without prejudicing any criminal prosecution);

- there is an express mitigating factor in sentencing where the employer has promptly and fully rectified the underpayment at an early stage; and

- the regulator responsible for prosecuting a wage theft criminal claim:

(a) has relevant and specialist expertise in employment matters and is dedicated for that purpose;

(b) is the same regulator for the purpose of pursing any civil underpayment claims (and must take into account and give precedence to the expeditious recovery of the underpayment of wages and entitlements on behalf of the worker); and

(c) has the same powers of investigation for both the civil and criminal claims.

The definition of wage theft be more than one intentional instance of underpayment of wages and entitlements.

The number of instances of underpayment of wages and entitlements be a mitigating or aggravating factor in sentencing.

7.3 Introduction

The question of whether underpayment of wages should attract criminal penalties is a complex question to answer. ELC is not a criminal law firm and does not have specific criminal expertise. More particularly, as mentioned above, ELC's clients are primarily focussed on recovery of underpayments, and punitive action is secondary to this.

However, on balance, ELC considers that underpayment of wages should attract criminal penalties where the underpayment amounts to wage theft. This is subject to one important qualification. That is, in making wage theft a criminal offence, this does not detract from a workers' ability to recover the underpayment of wages and entitlements in a timely and easy manner.

On balance, ELC would support criminalisation of wage theft in circumstances where:

- a vulnerable worker can still effectively and expeditiously pursue an underpayment claim at the same time or prior to any criminal prosecution;
- a criminal prosecution facilitates rectification of the underpayment, such as there being an express mitigating factor in sentencing being the **prompt and full** rectification of the underpayment (this may then encourage employers to remedy any underpayment claim, even if pleading not guilty, to reduce the size of any potential penalty should they subsequently be found guilty of the charge);
- the regulator for both a criminal and civil wage theft claim is appropriately empowered and resourced, and has as an objective supporting workers in expeditiously pursuing underpayment claims; and
- the civil penalties and enforcement options are also strengthened and increased, providing the option to either bring a criminal prosecution or a civil penalty claim.

7.4 Education and information cannot minimise wage theft

Inherent in the definition of wage theft is that the underpayment is not occurring due a lack of understanding of employment laws or an innocent mistake. Rather, it is an intentional act to circumvent the law. The nature of wage theft means it is typically directed at vulnerable workers, who are most at risk of exploitation, and least able to challenge the exploitation.

Because wage theft is an intentional act, some tools (such as education and information) will not have any, or only minimal, impact on an employer's behaviour in minimising instances of wage theft. The focus instead needs to be on deterring an employer from this conduct subject to one important qualification – that any deterrence means does not overly detract from workers' ability to recover the underpayment of wages and entitlements in a timely and easy manner.

7.5 Defining wage theft

A deliberate act is an act "*characterised by or resulting from careful and thorough consideration*"[33] – it is an intentional decision. An intentional act is broad enough to include "*wilful blindness*", but not necessarily "*recklessness, negligence or foresight of the probable consequences of conduct"*.[34]

In a case dealing with accessorial liability, the Federal Circuit Court of Australia examined the interplay between 'wilful blindness' and 'actual knowledge'. [35] Judge Driver held:

> actual knowledge can be inferred from the combination of a respondent's knowledge of suspicious circumstances and the decision by the respondent not to make enquiries to remove those suspicions, but not every deliberate failure to make enquiries will support the inference of actual knowledge. Where a person does not know because he does not want to know, where "the substance of the thing is borne in upon his mind with a conviction that full details or precise proofs may be dangerous, because they may embarrass his denials or compromise his protests", he has that knowledge, but deliberately refrains from asking questions or seeking further information in order to maintain a state of apparent ignorance. That is wilful blindness.

Judge Driver then held: [36]

> This principle has been applied in the context of the Fair Work Act by the Federal Court, finding that where an alleged accessory is aware of a system producing certain outcomes, and those outcomes constitute contraventions of the Fair Work Act, it is unnecessary to show that the alleged accessory knew the details of each particular instance of those outcomes in order to prove the requisite knowledge.
>
> The situation here was not so much a system as a fait accompli. The Corporate Respondents ran out of money to pay their staff but they permitted those staff who remained to stay on in the hope that the Directors would ultimately be able to pay the staff their entitlements. That proved not to be possible within the contravention periods. Mr Silverbrook and Ms Lee undoubtedly knew that the staff were not being paid and it necessarily followed that the staff were not receiving whatever their employment entitlements were. To the extent that Mr Silverbrook and Ms Lee did not know the detail of the entitlements of individual employees, that was because they chose not to enquire and were wilfully blind to those details.
>
> The circumstances of the plight the Directors found themselves in tend to evoke some sympathy. These were hardworking and apparently honest people caught up in adverse events beyond their control. However, they made conscious choices which led to the contraventions by the Corporate Respondents and they were knowingly concerned in those contraventions.

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[33] Merriam-Webster online dictionary.

[34] *Fair Work Ombudsman v Priority Matters Pty Ltd & Anor and Fair Work Ombudsman v Superlattice Solar Pty Ltd & Anor and Fair Work Ombudsman v Geneasys Pty Ltd (in liq) & Anor and Fair Work Ombudsman v Silverbrook & Anor and Fair Work Ombudsman v Mpowa Pty Ltd & Anor (No 4)* [2019] FCCA 56 (22 February 2019) at [31] where it was held:

> *with regard to wilful blindness, intention may be proved by showing an intention by some act or conduct which contributes to the commission of the offence, or by proving "wilful blindness" or a "deliberate shutting of one's eyes to what is going on", which includes "deliberately abstain[ing] from asking questions or making enquiries." It does not include recklessness, negligence or foresight of the probable consequences of conduct.*

[35] *Fair Work Ombudsman v Priority Matters Pty Ltd & Anor and Fair Work Ombudsman v Superlattice Solar Pty Ltd & Anor and Fair Work Ombudsman v Geneasys Pty Ltd (in liq) & Anor and Fair Work Ombudsman v Silverbrook & Anor and Fair Work Ombudsman v Mpowa Pty Ltd & Anor (No 4)* [2019] FCCA 56 (22 February 2019) at [31] and [32].

[36] Ibid at [112] – [114].

Section 557A of the Fair Work Act also refers to a "*systematic pattern of conduct relating to one or more other persons*" and includes a number of factors a court may have regard to in determining whether a person's conduct was part of a systematic pattern of conduct.

In ELC's experience, where a deliberate underpayment of wages and entitlements has occurred it is usually not limited to one instance. Given the ongoing nature of the employment relationship it is typically repeated over multiple pay periods.

In ELC's view then, rather than having a qualitative definition – such as the definition of 'systematic' – wage theft should be defined 'quantitatively' as being more than one (either in relation to the number of people or the number of pay periods) instances of intentional underpayment of wages and entitlements.

The extent of that pattern of behaviour of underpayment can then be a mitigating or aggravating factor in sentencing, rather than a defence to the charge.

7.6 Penalising wage theft: deterrence

The theory associated with deterrence is that as a penalty increases, it has a greater deterrent effect both on the offender (specific deterrence) and the broader community (general deterrence). For a penalty to act effectively as a deterrent it should not be seen merely as the cost of doing business.[37]

In considering this issue of criminalising wage theft, ELC has assumed that a criminal offence (with the threat of imprisonment) will have a greater deterrent effect than merely a higher civil monetary penalty.

ELC supports that wage theft should be a criminal offence. Consideration also needs to be given to the range of penalty options available for a separate civil claim for underpayment (which has been set out earlier in this Submission).

7.7 Interplay between separate civil and criminal claims arising out of the same facts: the appropriate regulator

There may be potentially different regulators responsible and empowered to bring a criminal claim versus a civil penalty claim. Where there are different regulators responsible for different claims which arise out of the same set of facts, this introduces complexity in relation to investigating and enforcing those claims.

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[37] Phua & Foo Case, where Siopis J held at [61], [62] and [63] that:

> *As I have said, the primary purpose of the imposition of a civil penalty is deterrence.*
>
> *In this case, in my view, notwithstanding Mr Phua's evidence that he will ensure that the respondent does not breach the law again, and the training course he has undertaken, it is, nevertheless, necessary that the penalty reflect an element of specific deterrence. This is because of the deliberate disregard which the respondent has previously shown to compliance with the Restaurant Award conditions in an environment where the affected employees are casual and vulnerable employees. This is to remind the respondent of the continuing need to comply with its statutory obligations.*
>
> *Further, the penalty should also act as a deterrent to others in the restaurant/café industry who may be minded to flout the law with a view to increasing profit at the expense of vulnerable employees. As mentioned, there is in evidence a FWO report which shows that the failure to meet minimum employment obligations is widespread within the restaurant/café industry which employs a large number of vulnerable employees. The penalty should be at a level such that the payment of a penalty is not regarded as simply a cost of doing business whilst continuing to exploit vulnerable employees.*

It also has the potential to increase delay in resolution of the wage theft claim, as each regulator investigates the matter and determines whether there is a prima facie case to pursue.

- For example, a regulator responsible for pursuing a non-criminal claim may hold off in investigating and enforcing that claim because the charges and penalties available in respect of the criminal claim may be stronger and more appropriate.

  It is reasonable to suspect that you will get situations where the regulator responsible for prosecuting a criminal charge may determine there **is not** a prima facie case at which point the regulator responsible for pursuing a civil claim may investigate the matter and determine there **is** a prima facie case.

  The different decisions are because of the different burdens of proof for each claim, and potentially the different matters which need to be proven (intent being one of the elements to the criminal charge).

In ELC's view, a regulator prosecuting a wage theft criminal claim should:

- have relevant and specialist expertise in employment matters and be dedicated for that purpose;
- be the same regulator for the purpose of pursing any civil underpayment claims; and
- have the same powers of investigation for both the civil and criminal claims.

7.8 Potential delay of the civil claim while criminal offence is prosecuted

Presumably, if wage theft is a criminal offence it will mean that there are two potential claims that can be made from the same set of facts – the wage theft criminal prosecution and the underpayment claim.

The higher standard of proof for a criminal offence (beyond reasonable doubt) necessarily makes it a more difficult claim to prove than a civil claim (the balance of probabilities). Where both a criminal and civil claim can be made, typically the civil claim also needs to wait until resolution of the criminal offence.

If this is the case for wage theft, this means the underpayment claim could be delayed until the criminal offence is determined.

In ELC's view, a wage theft criminal prosecution should not delay a civil claim for underpayment of wages and entitlements. As mentioned above, for ELC's clients their primary objective is typically Recovery of their underpaid wages and entitlements.

8. Are there other strategies that could be implemented by the Australian Government, or industry stakeholders to combat wage theft

8.1 Overview

This submission part provides some additional recommendations on the issues presented in the Discussion Paper.

8.2 ELC's Position

Further funding and resources be provided to the community legal sector for the purpose of providing employment law related further assistance and community legal education to vulnerable workers.

Further funding and resources be provided to third parties, including the community legal sector, for the specific purpose of subsidising the cost of employment law related enforcement action. For example, funding could be provided for the specific purpose of representation in underpayment disputes.

Further funding and resources be provided to FWO for the purpose of providing education and information, investigating and enforcing the regulatory framework (with priority given to vulnerable workers).

ELC supports any submissions by other parties or recommendations by the Inquiry which provide trade unions greater scope to assist vulnerable workers.

The requirements in the *Fair Entitlements Guarantee Act 2012* (Cth) that an employee be an Australian citizen or the holder of a certain visa type should be removed.

In relation to the gig economy, the Federal Government should:

- modernise and simplify the definition of employee to capture gig economy workers; and
- require gig economy platforms to ensure gig economy workers are provided with at least the minimum wage and other minimum entitlements.

The employment enforcement framework be reviewed with the specific objective of enabling self-represented individuals to more easily access justice, looking at issues of:

- simplification;
- procedural formality;
- evidentiary requirements; and
- the powers of the court or tribunal to be actively involved in investigating the facts of the case.

The Federal employment law framework should provide the same employment law protections to unlawful non-citizens as lawful citizens.

That:

- there be an expedited process for courts and tribunals to deal with employment law claims relating to underpayment, where there is a prospect the worker may be leaving the jurisdiction to return overseas; and
- where it is not possible for a claim to be dealt with on an expedited basis, the various courts and tribunals processes should be flexible enough to allow claimants to pursue a claim easily, even if they are not in Australia.

Courts and Tribunals be granted greater scope to set aside deeds of release which are entered pre-litigation, and which merely relate to payment of lawful entitlements.

8.3 Resourcing

It is important that the focus on enforcement (and the general deterrent effect of penalties and accessorial liability provisions) does not draw attention away from measures that can be adopted to prevent underpayment in the first place.

As mentioned previously:

(a) a necessary precursor to enforcing employment rights is having a basic understanding of those rights and the ability to either self-represent or obtain third party assistance; and

(b) vulnerable workers often have a lack of basic knowledge of employment laws, minimum entitlements and enforcement mechanisms.

In ELC's view, insufficient resources are currently devoted to measures designed to ensure workers have adequate representation and knowledge of their rights.

8.3.2 Community Legal Centres

ELC is a community legal centre that specialises in employment law. It is the only not-for-profit legal service in Western Australia dedicated to offering free employment law advice, assistance, education and representation to vulnerable non-unionised workers.

Unfortunately, the demand for ELC's services greatly exceeds ELC's resources.

To provide a State-wide service that is not geographically limited, ELC primarily operates a telephone service through an Advice Line. Currently, ELC is only able to answer approximately a small proportion of calls on our Advice Line. This potentially means that many vulnerable non-unionised workers in WA, who cannot otherwise afford to pay for a lawyer, are missing out on receiving legal or employment advice on their situation.

In addition to providing one-off advices to callers on its Advice Line, ELC provides some particularly vulnerable workers with further legal assistance. In some circumstances, this includes providing some clients with further assistance by way of representation. However, ELC is unable to do this for a large number of callers due to resourcing.

In respect of the balance of callers who are unable to afford representation, if they are not members of a union and DMIRS is not in a position to bring a claim on their behalf, they must then self-represent, often against well-resourced employers.

To try and alleviate this ELC adopts a multi-faceted approach to maximise the benefit of the services it provides. For example, it also:

- conducts community legal education, information and training sessions across the State;
- offers 20 Factsheets and eight Information Kits that cover a range of employment issues and remedies on the ELC website (www.elcwa.org.au);
- provides an online InfoGuide on the ELC website (www.elcwa.org.au) to help users find the relevant referral or information they need, either within the tool itself or via links to appropriate ELC or external information;
- two videos available on the ELC website providing an overview of "Employment Law in WA" and "What to do if you lose your job";
- will refer some of these callers to State and Federal regulators (DMIRS and FWO) to obtain assistance; and
- secures pro bono representation support for a limited number of ELC's callers.

In December 2014, the Productivity Commission released its inquiry report on Access to Justice Arrangements.

In looking at legal assistance funding of community legal centres, the report noted the uncertainty of funding (under the heading of 'Getting off the funding merry-go-round'). This uncertainty of funding is something the ELC has experienced, and previously had led to a significant contraction of its services, before being able to expand its services as further funding was obtained.

The Productivity Commission considered that greater predictability of funding is required. The Productivity Commission also recommended that: [38]

> Given the dearth of data, and having regard to the pressing nature of service gaps, the Commission considers that an interim funding injection in the order of $200 million — from the Australian, state and territory governments — is required per year.

Interestingly in the inquiry report, the Productivity Commission examined the top five most accepted areas of pro bono practice and the top five most rejected pro bono practice areas. On a percentage basis, employment law was the fourth highest area under both the top five most accepted and most rejected pro bono practice areas. The Productivity Commission noted that the rate of rejection for employment law may "*simply reflect the volume of applications*".[39]

ELC regularly reviews the effectiveness and efficiency of service delivery in relation to the amount of funding received each year. As part of this, ELC attracts support from the private sector through volunteers and pro bono services. In the 2017/18 period this was to the value of almost $700,000 and in the 2018/19 period this was to the value of approximately $570,000Further, according to a social return on investment research project conducted in 2016, every dollar invested in ELC provides conservatively $1.53 of value.

8.3.3 Regulatory agencies such as FWO

Agencies such as the FWO do not have unlimited resources to enforce the relevant workplace laws.[40]

Similarly to ELC, the FWO undertakes a number of alternative measures to gain maximum benefit from its resources, including undertaking education campaigns, providing information resources[41], various types of investigation and enforcement actions to litigation (prioritising what is in the public interest to prosecute).

Additionally, the FWO uses its regulatory powers to conduct 'industry' investigations and audits, allowing it to identify and address trends of non-compliant behaviour.

The FWO also has a limited capacity to provide funding to community organisations. ELC is a recipient of a portion of this funding, an amount it is extremely grateful for, and which funding is put to great use in the community in which it serves. ELC, however, is still unable to meet demand for its services.

The reality is the FWO does not have the resources and funding to investigate and enforce every incident of non-compliance with employment laws. Nor is it feasible to envisage a situation where sufficient funding or resources could ever be provided to FWO to enable it to do so.

The FWO needs to prioritise what is in the public interest to pursue and, for those most serious instances of non-compliance, prosecute. Relevantly, one of the factors

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[38] Productivity Commission, *Access to Justice Arrangements* (Productivity Commission Inquiry Report, September 2014), at pages 738-9.
[39] Productivity Commission, *Access to Justice Arrangements* (Productivity Commission Inquiry Report, September 2014), at p. 819.
[40] See 'FWO and ROC Budget Statements', which provide the budget estimates for 2018-19 as at Budget, May 2018, and appropriate total departmental annual appropriations of $180.1 million.
[41] For example, on 26 April 2018, the FWO launched an initiative entitled 'Small Business Showcase': *a virtual hub providing a wealth of resources for small business owners seeking information about their workplace obligations*. This initiative was launched as a direct response to the FWO receiving 500,000 calls to its dedicated small business helpline since its establishment at the end of 2013.

considered in whether to litigate an issue of non-compliance is the exploitation of vulnerable workers.[42]

However, ELC also understands that the amount of underpayment which is due is also a consideration in determining whether litigation will be pursued, with a set monetary minimum threshold. This can result in particularly vulnerable workers on an individual basis having limited assistance by FWO in circumstances where their claim falls below his minimum threshold.

ELC also understands that FWO do no longer have capacity to conduct in person or workshop community education to employers or employees throughout WA and provide limited enforcement and investigation due to resource constraints.

In ELC's view, it is advantageous for regulatory agencies to have an on-the-ground presence in order to provide education, advice, compliance and enforcement services.

8.4 Trade Unions

Trade unions have traditionally played an important role as protectors and enforcers of employment legal rights.

To do so though, trade unions need to have access to workers, records and information. It is trite to say, but unless a trade union has knowledge of employer non-compliance, it is unable to assist vulnerable workers.

8.5 Fair Entitlements Guarantee scheme

The FEG scheme is a safety net scheme of last resort, providing assistance to eligible employees where their former employer has entered liquidation or insolvency. Necessarily, this means that the employer must be an Australian employer and subject to Australian employment laws.

However, one of the requirements to be an eligible employee is to be an Australian citizen or the holder of certain visas. The result of this is that even if a migrant employee is lawfully able to work in Australia and is subject to the Australian law framework, they may not be entitled to access the scheme.

In ELC's view, there should be no exclusion in the FEG scheme based on citizenship or visa status.

8.6 Definition of employee

While greater protection is being given to vulnerable workers, ELC submits that the Federal employment law regulatory framework has failed to keep pace with the way in which workers are being engaged in modern society to perform work.

For example, the gig economy has, arguably, moved from an emerging market to a developing market.

[42] Fair Work Ombudsman, "*Compliance and Enforcement Policy*", August 2017, available at https://www.fairwork.gov.au/about-us/our-vision/compliance-and-enforcement-policy .

8.6.1 Are gig economy workers employees?

The difficulty of applying the typical Australian multi-factor test to determine whether a gig economy worker is an employee, is illustrated by the different outcomes before the Fair Work Commission in relation to the transport gig economy (rideshare).

(i) *Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610 found a Uber driver was not an employee;

(ii) *Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579 found a Uber driver was not an employee;

(iii) *Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836 found a Foodora driver was an employee.

Further, and while not determinative, FWO recently concluded its investigation related solely to Uber Australia Pty Ltd and its engagement of drivers; and stated that Uber Australia drivers are not employees.[43]

There is also a claim before the Federal Circuit Court of Australia against Deliveroo Australia Pty Ltd (Jeremy Rhind v Deliveroo Australia Pty Ltd & Anor, CAG38/2019 [Canberra Registry]). It has been reported that the claim is in relation to back-pay, leave and superannuation and: [44]

> will hinge on whether Deliveroo riders are considered company employees or contractors, which dictates the pay and conditions of workers.

The differing outcomes referred to above are demonstrative of the uncertainty that surrounds the issue of whether gig economy workers are employees or not. Importantly, because each case may be approached on its own merits and facts, this enables a gig economy platform to unilaterally amend its terms and conditions of engagement from time to time to further refine their argument they are not an employer.

The FWC cases also address in some degree **both** the current definition of employee and the broader public interest issue regarding the gig economy. In *Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836, relevantly the FWC held:

Observation re Matters of Public Importance/Interest

[103] The particular circumstances that were revealed by the evidence in this matter, and the unusual circumstances in which this Decision has arisen from proceedings that were consented to in circumstances where the respondent had entered into voluntary administration, has provided an opportunity for the indulgence of an observation regarding questions of public importance and interest. The determination that the applicant was properly, an employee of Foodora and not a contractor has been made having regard for the conventional and well established approach described as the application of the multifactorial tests. In my view, there may be a need to expand and modify the orthodox contemplation for the determination of the characterisation of contracts of employment vis-à-vis, independent contractor, as the changing nature of work is impacted by new technologies.

[43] Fair Work Ombudsman, *Uber Australia investigation finalised* (Media Release, 7 June 2019).

[44] McCulloch, Daniel and Sophie Moore, 'Former rider sues Deliveroo for wage theft', *News.com.au* (online, 28 August 2019).

[104] As corporate tax rates reduce and become lower than comparable marginal rates of personal income tax, incentive is created for the creation of a contractor relationship rather than one of employment. Corporations logically recognise the many potential benefits in engaging individuals to perform work utilising the machinery of independent contractor arrangements. Individuals may also be attracted to the lower tax regime of the independent contractor arrangement, and/or, as is often the case, the individual may have no option but to accept the engagement arrangement stipulated by the corporation.

[105] As in this case, the corporation (Foodora) stipulated the requirement for individuals to obtain an Australian Business Number and to create, at least the appearance, that the individual operates a business of their own. The corporation then avoids the many responsibilities and obligations that it would normally have as an employer. The responsibility for compliance with many important regulatory obligations including but not limited to taxation, public liability insurance, workers compensation insurance, statutory superannuation, licensing and work health and safety, is transferred from the corporation to the putative contractor.

[106] Contracting and contracting out of work, are legitimate practices which are essential components of business and commercial activity in a modern industrialised economy. However, if the machinery that facilitates contracting out also provides considerable potential for the lowering, avoidance, and/or obfuscation of legal rights, responsibilities, or statutory and regulatory standards, as a matter of public interest, these arrangements should be subject to stringent scrutiny. Further, if as part of any analysis involving the correct characterisation that should be given to a particular relationship, an apparent violation of the law, or statutory or regulatory standards is identified, as a matter of public interest, any characterisation of the relationship which would avoid or minimise the likelihood of such violation should be preferred.

8.7 Flexible and informal enforcement process

For laypersons who are unable to secure support and representation, it is vital that enforcement processes be clearly set out in the legislation and appropriate for them to rely upon. They should be flexible and as informal as possible. Procedural and evidentiary formality prevents vulnerable workers from accessing justice.

In drafting a suitable enforcement process, a balancing act needs to be performed.

On one side, there is a simple concept that a worker is entitled to their wages and entitlements and where there is an underpayment this should not be a matter of negotiation – it should simply be paid. On the other side, the early resolution of a disputed claim through a conciliated outcome is beneficial to workers, although this may necessitate a worker compromising their claim.

In ELC's experience, as part of this, it is also not unusual where the quantum is disputed for an employer to withhold the entirety of the claimed underpayment (even the amount they may acknowledge is their position on what is payable) until settlement of their claim. One of the disappointing realities of the regulatory framework is that workers then often compromise their claim and their lawful entitlements to achieve a quick result.

As ELC has submitted, the majority of its clients are focused primarily on ensuring they are paid their correct entitlements (Recovery) in circumstances where underpayment has allegedly occurred, rather than Punishment. The tools available to them to do so involve:

(a) seeking to negotiate a resolution;

(b) referring the matter to an industrial inspector to investigate and enforce on their behalf; or

(c) bringing a claim.

In ELC's view, the tribunal or court (and the members of that tribunal or court) presiding over such matters should:

- have relevant and specialist expertise in employment matters;
- have low filing fees (for example, no more than $50), with a means of waiving fees for low income earners;
- have forms which are able to be easily completed by a layperson, with questions guiding the layperson as to what information is required;
- have a process for early compulsory conciliation;
- where early compulsory conciliation is unsuccessful, have a hearing process which is flexible and informal;
- empower the court or tribunal hearing the matter to take a more active role in investigating the facts of the case and drawing out the relevant evidence (akin to an inquisitorial system as opposed to an adversarial system); and
- attract no other fees for procedural and enforcement processes.

8.8 Migrant workers

One of the factors which can make a worker vulnerable to exploitation is whether they are a migrant worker.

ELC has identified several different employment law issues that migrant workers are facing. ELC's client records reveal cases where:

- migrant workers generally have reported receiving less favourable pay and conditions than Australian workers;
- migrant workers generally have been subjected to assaults, underpayment of entitlements, unreasonable working hours, sham contracting, unsafe working conditions and other forms of mistreatment – e.g. they have been required to pay for vehicle damage for which they were not responsible, or which could have been recovered on insurance;
- temporary work visa holders have been exploited on threat of deportation;
- temporary work visa holders have been selected for redundancy, and they consider that they were selected because they were temporary work visa holders;
- employers have demanded that temporary work visa holders repay visa fees and other associated costs if they leave their employment within a certain period of time; and
- migrant workers decided against enforcing their entitlements or making a claim because they were concerned about losing their job, being deported, and navigating an unfamiliar legal system without legal assistance to do so.

It is well recognised vulnerable workers:

(a) can have limited knowledge or understanding of their rights; and

(b) can be reluctant to approach government entities with an employment issue, particularly where they are migrant workers (due to fears about their visa status).

This is where community organisations, such as ELC, play an important role – in providing direct assistance to vulnerable workers, being an educator in relation to their rights and entitlements, being a voice on their behalf, and being a referral pathway to government entities.

[Refer: Australian Government, *Report of Migrant Workers' Taskforce* (Report, March 2019) at pages 41 and 49]:

> For a number of reasons, many employees on temporary visas, such as the international students who dominated the 7-Eleven franchisee workforce, were reluctant to contact government agencies about wage exploitation concerns. This was the case even after the then Department of Immigration and Border Protection responded to calls from the Panel for the Government not to take adverse action, for example in response to a breach of visa work hours restrictions, against employees who highlighted genuine claims of abuse.
>
> …
>
> Vulnerable migrant workers can be reluctant to contact government agencies for help, fearing negative consequences such as visa cancellation, detention or removal from Australia, or loss of their job.
>
> As a principle, migrant workers need to be able to know where to go, and feel comfortable coming forward, to report concerns around underpayment and exploitation. Where this is shown not be the case, Government needs to consider strategies to deal with this issue. Government needs to look at mechanisms that can be put in place to address these issues where they exist.

[Refer: Senate Education and Employment References Committee, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (Report, March 2016), in particular at paragraph [6.91]]:

> 6.91 Access to justice under the law is a fundamental principle of a liberal democracy. Yet a body of evidence to the committee found that temporary visa workers face greater difficulties in enforcing their workplace rights and accessing justice than permanent residents and citizens. This is due in large part to a fear that their visa status and, with it, any hopes of progressing through the system towards permanent residency, may be compromised if a temporary visa worker registers a complaint against their employer.

[Refer: Fair Work Ombudsman, *Inquiry into 7-Eleven: Identifying and addressing the drivers of non-compliance in the 7-Eleven network* (Report, April 2016), in particular at pages 47 and 60]:

> Student visa holders working in 7-Eleven stores confirmed a reluctance to report underpayments or cooperate with FWO investigations for fear of being investigated by another government regulator. Some appeared to be breaching visa conditions and not paying correct tax which adds to their reluctance.
>
> …

> A number of contraventions of the FW Act may flow from employees being required to repay wages to employers (see table below), and we continue to investigate allegations of this nature. This type of behaviour creates a new set of investigative challenges for us as a regulator, including:
>
> …
> - Employee reluctance to give evidence out of friendship or loyalty to their employer, fear about visa status, or threats from the employer.

Farbenblum and Berg discussed four key factors that make migrant works reluctant to approach FWO.[45] These factors are as follows:

- migrant workers lack of knowledge of their rights and awareness of FWO;
- migrant workers' attitudes towards their rights and entitlements to make a claim;
- risks of losing employment; and
- fears of jeopardising their immigration status.

Campbell elaborates on these points and argues language and cultural barriers can also deter migrant workers from approaching FWO, as they are often from NESB and "*some have a distrust of government officials and other authorities*".[46]

In the Senate Education and Employment References Committee, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (Report, March 2016), it was found that the: [47]

> nexus between engagement by the sponsoring employer and the ability to remain in Australia creates a fear amongst visa workers that they will be sent home to their country of origin if they complain and therefore 'also explains why 457 visa workers are reluctant to complain of ill-treatment or illegal conduct'.

In the context of unpaid wages, it has been said that: [48]

> It is often assumed that migrant workers are reluctant to complain to authorities or attempt to recover unpaid wages due to their personal limitations: poor English language ability, lack of knowledge of rights and/or lack of familiarity with Western legal culture. The survey data paints a different picture. It indicates that a straightforward cost-benefit theory better explains why so few temporary migrant workers try to recover unpaid wages. That is, when the low likelihood and quantum of a successful outcome are weighed against the time, effort, costs and risks to immigration and/or employment status, it is rational that individual temporary migrant workers are not seeking remedies even if they are being significantly underpaid.

[45] Berg, Laurie and Farbenblum, Bassina, *Migrant workers' access to remedy for exploitation in Australia: the role of the national Fair Work Ombudsman* (Journal article, 2017), at page 9.
[46] Michael Campbell, 'Perspectives on Working Conditions of Temporary Migrant Workers in Australia' (2016) 18(2) *People and Place* 51, at page 52.
[47] Senate Education and Employment References Committee, *A National Disgrace: The Exploitation of Temporary Work Visa Holders (Report, March 2016)*, at paragraph [6.38].
[48] Berg, Laurie and Farbenblum, Bassina, *Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages In Australia* (Report, October 2018), at page 5.

The *Exploited and illegal: The impact of the absence of protections for unlawful migrant workers in Australia* (Report, Monash University, July 2017) also looked at the issue of unlawful migrant work in Australia. In summarising their findings, this Report stated:[49]

> This report offers preliminary findings from a large study of unlawful migrant labour in Australia. This labour force includes those who entered Australia lawfully with a visitor visa, and therefore have no work rights, and/or those who have overstayed their visa and thus no longer have a right to remain, or work, in Australia. The research privileges this group, as in law and in policy, they have the least protection of all migrant workers in Australia. They are not, however, an insignificant group: in 2011 it was estimated that between 50-100,000 non-citizens are working unlawfully in Australia (Howells 2011).
>
> Many of the situations that have arisen in this research have indicators that existing Commonwealth trafficking offences may have occurred: none have been the subject of referral to the AFP or any investigation by DIBP or other agencies. These are complex situations in which unlawful workers owe money, have passports held, are forced to work (as a result of owing money) and live in abject conditions – none of which they believe they can do anything about, other than leave that location to find alternate work. They are working for very little pay and in some cases are not paid for their work. In at least one situation recounted in this study, a man was forced to work to have his passport returned.
>
> Australia is failing to identify and adequately respond to serious offences for two dominant reasons. One, the unlawful status of workers ensures they are hidden, and very often in an encounter with authorities it is unlawfulness that is identified. Two, because there are expectations as to what 'serious' offences look like and the assumption that there is a clear distinction between serious criminal offences and less serious, employment law breaches. This research challenges this assumption.
>
> …
>
> The central argument of this research is that for as long as there remains a refusal to grant any protection or means of access to reparation for unlawful migrant workers who experience exploitation, Australia is in fact enabling unscrupulous operators to continue to operate with impunity.
>
> In order to end migrant worker exploitation, migration status must be a secondary concern.

This Report then makes four recommendations:[50]

(c) Recommendation 1: Migration status should be irrelevant in the context of labour exploitation;

(d) Recommendation 2: Recognise exploitation as fluid and part of a continuum;

(e) Recommendation 3: Create regional opportunities for increased temporary, low skilled working visas; and

(f) Recommendation 4: Make workers and exploitation, not criminalisation and regulation, the priority.

The process for dealing with claims by migrants for underpayment of wages and entitlements needs to also take into account the prospect that the worker may be leaving the jurisdiction to return overseas. An employer should not be able to use the threat of deportation or take advantage of a worker potentially having to leave the jurisdiction, to engage in wage threat.

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[49] Seagrave, Marie, *Exploited and illegal: The impact of the absence of protections for unlawful migrant workers in Australia* (Report, Monash University, July 2017), at page 7.
[50] Seagrave, Marie, *Exploited and illegal: The impact of the absence of protections for unlawful migrant workers in Australia* (Report, Monash University, July 2017), at pages 8-10.

8.9 Deeds of release

It is not unusual for an employer to seek a deed of release, as a precondition to paying a worker their lawful entitlements on termination of employment.[51] Conversely, it is not permissible to contract out of award or industrial agreements entitlements.

This then raises an issue – should a deed of release or any other form of agreement act as a release and a bar against proceedings being taken, where it involves the employer merely paying a worker their lawful entitlements?

ELC's usual advice when clients seek advice on this issue is not to sign any deed of release where the settlement sum is merely what the employer will need to pay the worker in any event. Regardless, workers still feel pressured to sign the deed of release in order to obtain that sum of money.

An example of this is found in the decision of Commissioner Matthews in *Kay Heald -v- Metlabs Australia Pty Ltd* [2019] WAIRC 12 at paragraph [69]:

> The industrial agent told Ms Heald not to sign the deed but Ms Heald told him of her need for the money the deal guaranteed, against the possibility of being terminated without payment, and the industrial agent told Ms Heald that if she did sign the deed she should make it clear that she was doing so under duress.

In this case, although Commissioner Matthews found based on the law as it currently exists that Ms Heald was stressed at the time she signed the deed[52], "*her stress falls well short of establishing special disadvantage.*"[53]

Commissioner Matthews also found that "*there is ample evidence of exquisite and sustained pressure being brought to bear on Ms Heald.*"[54] However, he found that "*this pressure was not "undue" in a relevant sense.*' :[55]

ELC notes Commissioner Matthews concluding statements:

> 143. I find that Ms Heald was put in a most unfair position by Ms Beeson and that Ms Beeson prosecuted her purpose in relation to Ms Heald, that was to get her to agree to end her employment on terms favourable to Metlabs Australia Pty Ltd, in a most unfair way but at the end of the day I consider that this matter is resolved in favour of the respondent according to the application of known principles to the facts as found by me.
>
> 144. Unfairness of the sort I have identified is not in itself enough to cause me to set aside the deed.
>
> 145. I recognise the difference in the bargaining strength of the parties.
>
> 146. I recognise that Ms Heald was stressed throughout the relevant period.
>
> 147. I recognise that Metlabs Australia Pty Ltd, through the agency of Ms Beeson, had little regard for Ms Heald's stress and the awful position she found herself in and prosecuted its purpose unremittingly and forcefully.

[51] Sometimes tied up with this 'settlement sum' is a nominal ex gratia payment together with outstanding salary, relevant leave entitlements and any payment in lieu of notice.
[52] At paragraph [96].
[53] At paragraph [97].
[54] At paragraph [124].
[55] At paragraph [125].

148. However, Ms Heald was under no special disadvantage and Ms Beeson did not, on behalf of Metlabs Australia Pty Ltd, breach or threaten to breach the contract of employment, if this was a material question to answer.

149. I recognise that the Industrial Relations Act 1979 requires me to act according to equity and good conscience and that it is necessary for me, in coming to my decision, to have regard to the public interest.

150. I have been guided by equitable principles which helpfully, in my view, flesh out the way in which the imperative under section 26(1)(a) Industrial Relations Act 1979 should operate in this case.

151. In terms of the public interest, I find, taking into account all of things considered above, that there is a public interest in the Western Australian Industrial Relations Commission enforcing deals such as that struck in this case. That is, a deal not which was not attended by the taking advantage of a special disadvantage or one achieved through actual or threatened unlawful conduct.

152. However, I hasten to add for the benefit of the interested reader that this matter turns very much on its own facts.

153. I would not wish, by my decision, to encourage a belief that entry into deeds by employees to avoid potentially negative action toward them is simply part of the rough and tumble of employment relations in this State and such an outcome may be prosecuted without regard to equity and good conscience. Meetings such as those between Ms Heald and Ms Beeson will no doubt continue to occur but employers should be careful to ensure that what is said by them, or on their behalf, at such meetings is within the law.

ELC is not suggesting any form of settlement agreement or release needs Court approval (like other jurisdictions). This would introduce unnecessary complexity and has the potential of causing delays.

Rather, ELC recommends that the Courts and Tribunals be granted greater scope to set aside deeds of release which are entered pre-litigation, and which merely relate to payment of lawful entitlements.