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Response to the Attorney-General’s Discussion Paper on Improving protections of employees’ wages and entitlements: strengthening penalties for non-compliance Body conducting inquiry

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Authorisation

This submission has been authorised by the NFAW Board

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NFAW Response to the Attorney-General’s Discussion Paper on Improving protections of employees’ wages and entitlements: strengthening penalties for non-compliance

This submission is being made by the National Foundation for Australian Women (NFAW).

NFAW is dedicated to promoting and protecting the interests of Australian women, including intellectual, cultural, political, social, economic, legal, industrial and domestic spheres, and ensuring that the aims and ideals of the women’s movement and its collective wisdom are handed on to new generations of women. NFAW is a feminist organisation, independent of party politics and working in partnership with other women’s organisations.

Wage theft is endemic in Australia and a contributor to the persistent low wage growth undermining the national economy (McKenzie, 2018). It has a massive direct impact on employees who lose entitlements (on average $10,789 for each affected employee) and costs taxpayers over $600m annually (PwC, 2012, iii).

The bundle of behaviours called wage theft refers to employer non-compliance with minimum standards in base wages, loadings, overtime or superannuation. While widespread, wage theft is not gender neutral. The behaviour involved most commonly and most significantly affects low paid employees in part-time and casual work—all groups in which women predominate. It is also commonplace in industries in which women predominate such as hospitality and retail (NFAW, 2017, 1). While it disproportionately affects migrant workers, among migrant workers it disproportionately affects women (Berg and Farbenblum, 2017, 32).

Recommendations

In our view neither the discussion paper nor the proposed remedies come to terms with the extent and implications of non-compliance with legal wage and entitlements requirements. For this reason, our analysis and recommendations go beyond the limited proposals in the discussion paper.

We recommend that in addition to reviewing penalties for non-compliance, the government address the need to improve mechanisms for detecting wage theft, bringing cases, recovering unpaid entitlements and enforcement of penalties.

The government must also complement increased enforcement activities with a properly resourced education campaign to ensure employers and employees know their rights and obligations. Finally, forms of work must be reconsidered to ensure that vulnerable groups of workers are not pushed into insecure forms of work as contractors, sitting outside the realm of enforcement as contemplated by this Inquiry.

Recommendation 1: NFAW recommends that, in order to measure the effectiveness of measures taken by government to address wage theft, independent researchers be commissioned to analyse all available data, including annual HILDA, data to provide a benchmark report of its extent and its contribution to persistent low wage growth. We also recommend that independent analysts, drawing on FWO and other data, provide the FWO with a report of progress against this benchmark to be tabled in Parliament as part of its annual report.

Recommendation 2: NFAW recommends that, in addition to simply reviewing penalties for non-compliance, the government

• address the need to improve mechanisms for detecting wage theft, for bringing cases, for recovering unpaid entitlements and for enforcement of penalties.

• complement increased enforcement activities with a properly resourced education campaign to ensure employers and employees know their rights and obligations

• review forms of work to ensure that vulnerable groups of workers are not pushed into insecure forms of work as contractors and thus outside the realm of enforcement contemplated by this Inquiry.

Recommendation 3: NFAW recommends that the government significantly increase the resources available to the FWO to conduct industry audits and investigations in response to the human and economic costs of wage theft.

Recommendation 4: NFAW recommends that the government increase the resources of the FWO to bring court cases

• while any new legislation including in relation to penalties is being tested in courts, and

• until the government has established an accessible, quick and low-cost small claims tribunal to enable victims to recover money taken through wage theft.

Recommendation 5: In order to broaden its strategy for addressing endemic wage theft, NFAW recommends that the government draw on the suite of detection and case management measures being developed by the Victorian government to address wage theft in its jurisdiction. These include:

• new laws to make it faster, cheaper and easier for workers to get the money they are owed by their employer through the courts. Claims of up to $50,000 will be heard before a special small claims tribunal where filing fees will be lowered, claims will be heard within 30 days and court processes will be simplified.

• the introduction of an automatic enforcement model that puts the onus on the employer to demonstrate they have complied with court orders and paid the entitlements owed to workers.

Recommendation 6: NFAW recommends that the government take action to enable temporary migrant workers and victims of sham contracting practices to have access to the FEG scheme to recover their unpaid entitlements.

Recommendation 7: NFAW recommends making those receiving a criminal conviction for wage theft automatically disqualified from managing corporations for five years in accordance with section 206B of the Corporations Act 2001.

Recommendation 8: NFAW endorses criminalisation of long term and systemic wage theft, and recommends that the threshold for criminal conviction be set at a level to operate as a practical deterrent including a reverse onus of proof for re-offending businesses. In order to establish the effectiveness of the final legislative package, we also recommend that Parliament review its impact after three years drawing on the benchmark and research data set out in recommendation 1.

Recommendation 9: NFAW recommends that government complement aggressive enforcement activities with a properly funded multi-lingual education campaign targeting both employers and employees.

Recommendation 10: NFAW rejects the proposition in the discussion paper that wage theft by employers occurs ‘because of the complexity of the industrial relations system’. The award system has been simplified and is industry specific. This inquiry must not be used as a smokescreen to further cut minimum wage workers conditions under the guise of ‘simplification’.

Recommendation 11: NFAW recommends that forms of employment be reconsidered to ensure that vulnerable groups of workers are not pushed into insecure forms of work, sitting outside the realm of enforcement as contemplated by this Inquiry.

Discussion

• In our view neither the discussion paper nor the proposed remedies come to terms with the extent and implications of non-compliance with legal wage and entitlements requirements.

Wage theft is shorthand for employer practices which include

• paying a base hourly rate that is below the relevant award or minimum wage base rate

• ignoring obligations to pay penalty rates for hours worked in the evenings, on weekends or on public holidays

• failing to comply with obligations to pay overtime rates or other incentive-based payments, bonuses or loadings

• failing to provide or pay out leave entitlements or failing to pay superannuation entitlements

• ‘cash back schemes’ whereby workers receive bank transfers of correct legal wages and are then forced to give back a proportion of their pay to the employer in cash

• ‘off-the-clock violations’ where staff are required to work beyond their scheduled or clocked-off finishing time, or to complete training relating to their employment without pay.

The Attorney-General’s discussion paper presents a partial picture of the extent of the problem of wage theft. It recurs to the ‘bad apple’ view of non-compliance among ‘a small number of employers’, which treats wage theft as aberrant and non-systemic. This view ignores available research: as the data below indicates, wage theft is endemic to the point of contributing to the national problem of chronic low wage growth (see also McKenzie, 2018).

The ‘bad apple’ view is then used in the discussion paper to underwrite a narrow set of options which are non-systemic and which offer no effective strategic response to the increasing erosion of national employment standards.

The proposals in the discussion paper are penalty focussed. Penalties alone are unlikely to have an impact on the problem in the absence of increased and coordinated detection, enforcement and prosecution measures. The Fair Work Ombudsman’s (FWO) research into its own practice in its October 2018 Report into National compliance showed that almost 40% of businesses caught breaking workplace laws, including underpaying employees, were still doing it when they were re-audited later, and that just two of 184 businesses still breaching the Fair Work Act had been prosecuted (Hannan, 2018). Without increased detection activity, coordinated with meaningful enforcement and prosecution measures, penalties alone will neither identify more non-compliant businesses nor increase compliance.

For this reason our analysis and recommendations go beyond the proposals in the discussion paper. We recommend that in addition to reviewing penalties for non-compliance, the government address the need to improve mechanisms for detecting wage theft, bringing cases, recovering unpaid entitlements and enforcement of penalties, along with a complementary education campaign for workers and employers.

• The discussion paper significantly understates the size of the problem.

The discussion paper relies on data on recovered wages presented in the FWO’s annual reports to for its insights into the potential prevalence of the issue. This is in fact a subset of a subset of a subset of a subset of those affected. Victims tend to be in very poor bargaining positions. Only a small proportion of victims of wage theft bring a complaint against their employer; only a subset of those have their complaints accepted; in only a subset of those cases do employers actually make payments (many just phoenix or rely on the prohibitive cost of enforcing orders); and in only a subset of those cases do the payments represent all that has been lost through the original wage theft.

It also under-estimates the problem due to the rise in precarious employment – workers who are not classed as employees, but in some cases should be. These workers often earn well under the minimum wage. This is a form of theft not contemplated by this Inquiry and one which needs urgent consideration given the growth in this form of employment (Carney and Stanford 2018).

Consequently the nearly $30m reported in discussion paper (p. 4) in fact provides only a very weak—if not an actively misleading--insight into the extent of the problem.

More commonly recognised data provided to government includes:

• In 2015-16 the average rate of industry compliance with labour laws was found by the with Fair Work Ombudsman to be only 61% (FWO, 2016a).

• An audit campaign of the hospitality industry conducted by the FWO found that 46% of restaurants, cafes and catering businesses; 47% of takeaway food businesses; and 20% of accommodation, taverns and bar businesses were responsible for wage or monetary contraventions (FWO, 2015, 6; FWO, 2016b, 7; FWO 2013, 11).

These finding are all from reports tabled by the Fair Work Ombudsman. In addition:

• A report prepared by PwC on behalf of the Tax Office, the Fair Work Ombudsman and the Australian Securities and Investments Commission, estimated that phoenixing companies alone cost individual employees an average of $10,789 in lost entitlements, or between $208,466,289 and $714,170,200 annually (PwC, 2012, 24).

• A 2017 study that surveyed 4322 temporary migrants in Australia from 107 countries and found that almost a third (30%) earned A$12 per hour or less. Almost half (46%) of participants earned A$15 per hour or less (excluding 457 visa holders) –at a time when the legal hourly adult minimum wage was $17.70. This wage theft was evident across many industries, but was especially prevalent in food services, and particularly extreme in fruit and vegetable picking (Berg and Farbenblum, 2017, 5-6).

• In 2018 FWO data indicated that around 1 in 5 Queensland workers were suffering some form of wage theft regularly, with the total economic impact exceeding $1.2 billion in that state (McKell, 2019a).

• In 2019 FWO data indicated that up to 20.2 per cent of workers in South Australia were subject to wage theft, in all likelihood costing that state's workers more than half a billion dollars per annum (McKell, 2019b).

• Unpaid superannuation robs employees and increases the burden on government to fund the Age Pension. Industry Super Australia (ISA) research shows that the problem has increased by 25 per cent in 3 years since 2013-2014 with 2.85 million Australians short changed $5.9 billion in super entitlements in 2016-2017 (ISA, 2019).

• A 2015 audit of fast food sites found that 84% of fast food stores were responsible for some type of underpayment; 39% were paying incorrect base rates of pay; and 44% were not paying penalty rates or loadings (ER Strategies ,2016, 5-6).

• Other areas where widespread wage theft has been documented include the horticulture, cleaning, meat processing and security industries, and most recently the recycling industry (Berg and Farbenblum, 99; Sydney Morning Herald, October 5, 2019).

On a national basis, Professor Mark Wooden of the Melbourne Institute, drawing on data from the Household Income and Labour Dynamics in Australia (HILDA) survey, has found (Uren, 2019, 3) that:

• Almost a third of casual workers in Australia are earning less than the legally prescribed minimum wage. These are people who should in fact be receiving a 25% casual loading in addition to the minimum wage. Even allowing for measurement error, the number could still be as high as 350,000 people.

• Among the lowest paid 5 per cent of women, casual workers are earning a massive 27% less than equivalent permanent staff, while among men the shortfall is 12%. The pay gap gets bigger as incomes get smaller. Again, these are people who should be receiving a 25% casual loading in addition to the minimum wage.

• Among the lowest earning 10% of part-time workers, women were receiving only $15 an hour in a year in which the legal minimum wage was $18.30.

HILDA is an authoritative, widely recognised, government-funded longitudinal national survey. Together with other research cited above, it altogether disposes of the ‘bad apple’ argument. If that argument was once a reflection of reality, the rot has since clearly since spread well across the barrel. This is unsurprising: where wage theft gets hold as an industry model, competition means that it forces down wages across the board, so that wage undercutting becomes widespread and normalised.

In its 2017 Final Report, the Black Economy Taskforce pointed to ‘a phenomenon similar to Gresham’s Law where good businesses are driven out of the market by illegitimate operators who are able to undercut prices by not complying with tax, employment and other obligations and by defaulting on creditors. These costs are borne across the economy’ (84). It pointed to a ‘vicious cycle’, whereby

As more people move into the black economy, this shift can build further momentum as the new behaviours and practices are normalised. At this stage, social norms can develop which legitimise the trend. When this stage is reached, enforcement of existing rules becomes far harder. (19)

If the government is serious about addressing the black economy and the wage theft which helps to sustain it, it should establish a realistic measure of its extent to serve as an indicator of the success of any response it institutes.

Recommendation 1: NFAW recommends that, in order to measure the effectiveness of measures taken by government to address wage theft, independent researchers be commissioned to analyse all available data, including annual HILDA data, to provide a benchmark report of its extent and its contribution to persistent low wage growth. We also recommend that independent analysts, drawing on FWO and other data, provide the FWO with a report of progress against this benchmark to be tabled in Parliament as part of its annual report.

• The extent of wage theft means penalty-based remedies alone will not be effective.

NFAW is deeply sceptical of the ‘honest mistake’ response made by many employers and employer associations to findings of systemic wage theft. The FWO is there to provide free advice and to conduct education campaigns; HR systems can be upgraded if necessary; there do not appear to be corresponding levels of honestly mistaken overpayment. In any event, employers are responsible for finding out and meeting their obligations to employees just as employees are responsible for finding out and meeting their obligations to the Australian Tax Office.

Once wage theft becomes endemic as is now the case in many industries in Australia, penalty-based remedies alone are ineffectual. The penalties being canvassed, at whatever level they are set, still rely on low paid employees in the weakest of bargaining positions bringing a complaint against their employer; risking the cessation of shifts, dismissal, redundancy, and even lawsuits ; and bearing the costs of protracted court cases dealing with complex issues of intentionality and often franchising structures.

At present, pursuing an underpayment matter in the Federal Court or the Federal Circuit Court can take months or even costly years. However many audits it undertakes, the Fair Work Ombudsman’s stated policy is that it will only commence an investigation if it involves "very serious issues" or it is in "the public interest" to do so. In 2014-15 the FWO responded to parties involved in 14,291 separate allegations relating to underpayment of entitlements by taking 42 actual litigations (0.3%). We understand that the FWO limits the cases it brings to unusual and test cases because its resources for litigation are themselves limited.

No penalties are likely to have broad impact on employer conduct under these circumstances. In addition to reviewing penalties for non-compliance, the government should address the need to improve mechanisms for detecting wage theft, for bringing cases, for recovering unpaid entitlements and for enforcement of penalties. These measures must also be complemented by increased enforcement activities with a properly resourced education campaign to ensure employers and employees know their rights and obligations.

Finally, forms of work must be reconsidered to ensure that vulnerable groups of workers are not pushed into insecure forms of work as contractors, sitting outside the realm of enforcement as contemplated by this Inquiry. The Black Economy Taskforce noted that sham contracting was a key contributor both to wage theft and to the broader black economy, defining it as occurring

when a standard employment relationship is wrongly presented as an independent contracting arrangement. This can be employer initiated, where the motivation is to avoid having to pay award wages, pay as you go withholding (PAYGW) and payroll taxes and superannuation contributions. Vulnerable workers can sometimes be pressured into these arrangements, which at their worst can amount to blatant exploitation.

The Taskforce recommended that the legal threshold for a defence of a contravention of the sham contracting provisions in the Fair Work Act 2009 should be lowered. Under the current law, employers can escape prosecution if they can demonstrate that they were not acting ‘recklessly’.

Recommendation 2: NFAW recommends that, in addition to simply reviewing penalties for non-compliance, the government

• address the need to improve mechanisms for detecting wage theft, for bringing cases, for recovering unpaid entitlements and for enforcement of penalties.

• complement increased enforcement activities with a properly resourced education campaign to ensure employers and employees know their rights and obligations

• review forms of work to ensure that vulnerable groups of workers are not pushed into insecure forms of work as contractors and thus outside the realm of enforcement contemplated by this Inquiry.

NFAW recognises that the 2019 budget included $10.8 million to enhance the FWO’s capacity to investigate underpayment and related issues in high-risk labour hire sectors such as horticulture, cleaning, meat processing and security as well as to deliver on an education mandate to address those honest mistakes. This is a start, which, when the education funding is netted out, should enable the FWO to conduct some more investigations in some targeted industries, but does not address the systemic and endemic nature of wage theft, nor does it increase the capacity of the agency to take court action in more than .3% of complaints.

More funding is needed for both these purposes. We note that such funding might be partly offset by a reduction in the costs of taxpayer supported program funding for employee entitlements lost to employees through the conduct of phoenixing employers.

Recommendation 3: NFAW recommends that the government significantly increase the resources available to the FWO to conduct industry audits and investigations in response to the human and economic costs of wage theft.

Recommendation 4: NFAW recommends that the government increase the resources of the FWO to bring court cases

• while any new legislation including in relation to penalties is being tested in courts, and

• until the government has established an accessible, quick and low-cost small claims tribunal to enable victims to recover money taken through wage theft.

In addition, the government should examine proposals being developed in Victoria which, in addition to funding investigations and increasing penalties for non-compliance, include:

• new laws to make it faster, cheaper and easier for workers to get the money they are owed by their employer through the courts. Claims of up to $50,000 will be heard before a special small claims tribunal where filing fees will be lowered, claims will be heard within 30 days and court processes will be simplified.

• the introduction of an automatic enforcement model that puts the onus on the employer to demonstrate they have complied with court orders and paid the entitlements owed to workers.

Recommendation 5: In order to broaden its strategy for addressing endemic wage theft, NFAW recommends that the government draw on the suite of detection and case management measures being developed by the Victorian government to address wage theft in its jurisdiction. These include:

• new laws to make it faster, cheaper and easier for workers to get the money they are owed by their employer through the courts. Claims of up to $50,000 will be heard before a special small claims tribunal where filing fees will be lowered, claims will be heard within 30 days and court processes will be simplified.

• the introduction of an automatic enforcement model that puts the onus on the employer to demonstrate they have complied with court orders and paid the entitlements owed to workers.

• Exclusion of migrant workers from the Fair Entitlement Guarantee

In 2012, the Australian government established the Fair Entitlement Guarantee (FEG), which protects the employees of companies which go bankrupt. Australian citizens and permanent residents are entitled to up to 13 weeks of unpaid wages, as well as any unpaid annual leave and redundancy pay (but not unpaid superannuation contributions).

More than 900,000 temporary migrants in Australia with work rights are excluded from the FEG, despite repeated calls that they are among the most vulnerable workers in Australia, at significant risk of exploitation by companies going into liquidation, and should be protected. When caught underpaying staff, some employers have expressly threatened to go into liquidation as a tactic to force workers to accept a smaller settlement. This move is available to those employers because temporary migrant workers have no access to the FEG scheme to recover their unpaid entitlements.

In its March 2019 response to the report of the Migrant Workers’ Taskforce, the government undertook to ‘examine whether to extend the FEG to migrant workers with work rights. Where these workers have been doing the right thing by satisfying their taxation obligations, the Government considers it reasonable that they, in turn, be protected by the FEG program’ (Australian Government Response, 2-3).

NFAW is not aware of any further action being taken to implement this commitment. In our view the government take action to enable temporary migrant workers to have access to the FEG scheme to recover their unpaid entitlements.

We note that this recommendation does not address the situation of both independent contractors and victims of sham contracting. That is because the FEG scheme is limited to conventional employment relationships. As he final report of the Black Economy Taskforce noted,

The way Australians are working is changing. Contracting arrangements appear to be shifting. Concerns were raised with us about the prevalence of sham contracting and exploitation of vulnerable workers such as those with visa restrictions. Growth in the sharing economy appears to be outstripping the development of a comprehensive regulatory framework. This change is happening now. (Black Economy Task Force, 2017, 35)

Recommendation 6: NFAW recommends that the government take action to enable temporary migrant workers and victims of sham contracting practices to have access to the FEG scheme to recover their unpaid entitlements.

• Concern that penalties ultimately hurt employees they are designed to protect

The discussion paper identifies ‘obvious [need for a] balance to be struck between recognising no underpayment is trivial and that all underpayments are serious, and not being crushingly punitive in cases of genuine mistakes leading to underpayment, to the extent that the penalties ruin businesses and ultimately hurt the employees they are designed to protect.’

Against this concern lies an equal concern that in a number of cases unscrupulous businesses have used the threat of closure as a means of silencing underpaid employees, and have not infrequently used closure itself as a mechanism for avoiding the payment of wages that have been withheld. PwC has estimated in a report to the FWO that phoenixing alone costs employees between $208,466,289 and $714,170,200 annually or on average around 10 times the figures in unpaid entitlements which the discussion paper cites as indicative of the extent of all wage theft nationally.

If the government is anxious to avoid causing closures for scrupulous businesses, it should at the same time take steps to ensure that unscrupulous businesses are unable to use closure to threaten or avoid legal obligations to their employees.

We are aware that some measures are in train. However, it is important to note that the Victorian government proposes to address this issue by making those receiving a criminal conviction for wage theft automatically disqualified from managing corporations for five years in accordance with section 206B of the Corporations Act 2001. Assuming the threshold for a criminal conviction is set at a meaningful level, disqualification would be a meaningful addition to the measures proposed in the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, which still awaits action in the parliament. In our view this measure should be pursued as part of any regime to deter wage theft nationally.

Recommendation 7: NFAW recommends making those receiving a criminal conviction for wage theft automatically disqualified from managing corporations for five years in accordance with section 206B of the Corporations Act 2001.

• Criminalisation

NFAW endorses the call of the former Australian Competition and Consumer Commissioner and head of the Migrant Workers’ Taskforce for wage theft to be criminalised, as well as his reasoning that ‘wage theft is just as serious as consumer theft. The law and the penalties should be put on the same basis as consumer and competition law’ (Canberra Times, September 19).

We are however concerned that the reliance on the ‘bad apple’ and ‘honest mistake’ theories of wage theft in the discussion paper is indicative of an inclination to set the threshold for criminal responsibility so high that any nominal deterrent value will be altogether nugatory. In particular we are concerned that cases of long term and systemic underpayment will not meet evidence standards set for intention or deliberation in wage theft.

For this reason we have recommended that HILDA data be used to set a benchmark for annual performance in reducing the incidence of wage theft. We also recommend that the FWO be required to report annually on the number of wage theft audits and investigations it has undertaken; the number of cases it has taken to court; and the number of criminal prosecutions that have been conducted annually, together with their outcomes. This information should form the basis of a parliamentary inquiry into the effectiveness of the legislation to be conducted three years after the passage of the proposed legislation.

Recommendation 7: NFAW endorses criminalisation of long term and systemic wage theft, and recommends that the threshold for criminal conviction be set at a level to operate as a practical deterrent including a reverse onus of proof for re-offending businesses. In order to establish the effectiveness of the final legislative package, we also recommend that Parliament review its impact after three years drawing on the benchmark and research data set out in recommendation 1.

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