



FACT SHEET

**PROTECTING
RIGHTS
AT WORK**

Protecting Rights at Work

A Shorten Labor Government will put in place a suite of reforms to protect rights at work by cracking down on unscrupulous employers who are willing to exploit workers.

What's the problem?

Recent examples of clear and widespread worker exploitation at notable companies have been met by silence and inaction from the Turnbull Government, despite continuous calls from Labor to give more power and resources to the Fair Work Ombudsman.

In 2015 we saw too many instances of workers' rights trampled, not just by fly-by-night operations, but by household names.

- [Myer sub-contractors employing cleaners on 'sham' contracts](#) resulting in workers being paid below the award wage, denied penalty rates and superannuation, and working without occupational health and safety protections.
- [Systemic exploitation in 7-Eleven stores](#) involving underpayment of wages, doctoring of pay records and intimidation of workers.
- [Pizza Hut delivery drivers being paid as little as \\$6 per hour](#) in rampant 'sham' contracting arrangements.
- [Widespread exploitation of workers in Baiada Group](#) food processing factories, including workers being required to work dangerously long hours, for less than the award wage.

These high profile examples are just the tip of the iceberg. [In 2014-15, the Fair Work Ombudsman recovered \\$22.3 million in back pay](#) for over 11,000 workers.

What change is needed?

Employers who deliberately underpay their workers not only deny working and middle class Australians a fair day's pay for a fair day's work, they also undercut employers who are doing the right thing for their workforce. It's a distortion of the market that drags everyone down.

According to the [Fair Work Ombudsman](#):

"unlawful employment practices impose significant costs on individuals and society. These behaviours create barriers to workforce participation, weaken the integrity of the workplace relations system, distort the labour market and undermine the principles of fair competition."

What is Labor's plan?

A Shorten Labor Government will stand up for working and middle class families. Labor will put people first, strengthening and protecting workers' rights at work by:

- Cracking down on the underpayment of workers, with increased penalties for employers who deliberately and systemically avoid paying their employees properly;

- Ramping up protections for workers from sham contracting;
- Giving the Fair Work Ombudsman the powers and resources to pursue employers who liquidate their companies in order to avoid paying the money they owe their workers; and
- Introducing reforms to ensure that temporary overseas workers are not being exploited and underpaid and that there is a level playing field for all workers in Australia.

Labor's package of reforms builds on its strong record of protecting wages and conditions and cracking down on worker exploitation. That is because only Labor understands that fairness at work helps to drive a more productive, competitive and prosperous economy.

Rather than a race to the bottom on wages and conditions, Labor will invest in the high-skilled, high-wage, decent jobs of the future.

Tougher penalties for failing to pay workers properly

Currently, an employer who fails to properly pay workers is liable for a civil penalty of up to \$10,800 per breach (60 penalty units) for a natural person or \$54,000 for a corporation (300 penalty units).

These penalties are clearly an inadequate deterrent given the brazen and systemic underpayment of workers we have seen in the last 12 months.

An employer who isn't paying the legal wage is not just ripping off workers. They are also making it harder for employers who are doing the right thing. As the Productivity Commission noted in its final report on Workplace Relations Framework: "underpayment can put employers and employees who adhere to the law at a competitive disadvantage".

Labor will increase the penalties for failing to pay workers properly and will seek the views of employers and their associations, workers and their unions on the scale of the proposed increase to ensure that the new penalties are an appropriate deterrent.

New penalties could be raised in line with existing penalties on anti-competitive conduct, which would allow the court to impose a penalty that is the higher of:

- three times the amount of the underpayment; or
- \$216,000 (1,200 penalty units) for an individual and \$1,080,000 (6,000 penalty units) for a body corporate.

Currently, the Fair Work Ombudsman (in accordance with its compliance guidelines), does not bring proceedings where the underpayment is clearly inadvertent. Rather this change will ensure the Courts have a range of penalties at their fingertips that enable it to respond to the most egregious cases of underpayment: where there has been widespread underpayment or non-payment of wages.

Labor is also seeking views about whether a new criminal offence is warranted where an employer intentionally or recklessly seriously rips off workers.

The penalty for such an offence could be in the order of \$43,200 (240 penalty units) or 2 years imprisonment for an individual or \$216,000 (1,200 penalty units) for a body

corporate.

Labor also proposes that Courts have the power to disqualify Directors in conjunction with these higher penalties.

Greater protection from sham contracting

The Fair Work Ombudsman defines sham contracting as: “where an employer tries to disguise an employment relationship as an independent contracting relationship... to avoid having to provide employees with their proper entitlements”.

There is nothing wrong with people working for themselves but no-one should be required to trade off their sick leave, annual leave, and occupational health and safety protections just to keep their job.

Sham contracting permits cost and risk shifting from the employer to the worker, discourages innovation and human capital development, creates health and safety risks and facilitates tax minimisation and evasion.

Sham Contracting Offence

Under the Fair Work Act, it is unlawful to pretend that a worker is an independent contractor when the worker is really an employee – but only if the employer didn't know the worker was really an employee.

In its final report into the workplace relations system released in December 2015, the Productivity Commission found that “it seems to be too easy under the current test for an employer to escape prosecution for sham contracting” and proposes instead a test of reasonableness. The Fair Work Review Panel established by Labor in 2012 also suggested this test.

Labor will change the test so that if a reasonable person would think someone is an employee, then the person must be treated as an employee, with access to workplace entitlements.

Although there is presently a test at common law as to whether someone is really an employee, Labor will work with workplace relations experts and practitioners, employers and unions to develop a definition of independent contracting that will provide certainty to workers and employers.

Labor will also appropriate changes to the unfair dismissal and adverse action protections in the Fair Work Act so that workers cannot lose their jobs just for questioning whether they, or someone else, is an independent contractor or an employee.

Sham Contracting Penalties

Presently an employer who engages in sham contracting is liable for a civil penalty of up to \$10,800 (60 penalty units) per breach for an individual and \$54,000 (300 penalty units) for a body corporate.

The existence of sham contracting in high profile Australian companies suggests that the current penalties are inadequate to deter employers from engaging in sham

contracting.

Just like failing to pay the legal wage, sham contracting makes it harder for employers who are doing the right thing to compete. Labor is proposing to increase the penalty for employers who rip off their staff in line with other anti-competitive conduct.

Labor is seeking the views of employers and their associations, workers and unions about whether increasing penalties in line with the proposed increase in penalties for non-payment of wages is an appropriate deterrent.

Labor is also seeking views about whether a new criminal offence is warranted where an employer intentionally or recklessly and seriously engages in sham contracting. The penalty for such an offence could be in the order of \$43,200 (240 penalty units) or 2 years imprisonment for an individual and \$216,000 (1,200 penalty units) for a body corporate.

Labor's proposal will also allow the Courts to disqualify Directors in conjunction with these higher penalties.

Protecting workers from "phoenix" employers

Labor will introduce new enforcement powers to prevent exploitative employers escaping liability for wrongdoing through "phoenixing", by making Directors personally liable for debts in relation to outstanding compensation owing to workers or civil penalties owing in respect of breaches of the Fair Work Act.

The recent Productivity Commission report noted that: "there should be greater scope to pursue compensation from company directors of phoenix businesses that have engaged in exploitation."

"Phoenixing" involves the intentional transfer of assets from an indebted company to a new company to avoid paying creditors, tax or employee entitlements. Existing debts are left with the old company, often placing that company into administration or liquidation, leaving no assets to pay creditors including small businesses and workers. Meanwhile, a new company, often operated by the same Directors and in the same industry as the old company, continues the business under a new structure. By engaging in this illegal practice, the Directors avoid paying debts, including outstanding wages and other entitlements owed to workers.

In 2012, the former Labor Government amended superannuation laws to allow the Australian Taxation Office to hold Directors personally liable for unpaid Superannuation Guarantee payments where "phoenixing" had been used in an attempt to avoid superannuation obligations to workers. Establishing similar arrangements for unpaid employment entitlements will build upon this positive reform.

A more even playing field for workers

As at June 2015 there were 732,750 people in Australia on temporary visas with work rights: 51.1 per cent (374,570) on student visas, 25.7 per cent (188,000) on 457 visas and 19.6 per cent (143,920) on working holiday maker visas.¹ Data from the Fair Work Ombudsman (FWO) suggests that the complaint rate for temporary migrants is more than three times the rate for other employees.

¹ Productivity Commission Review of Workplace Relations, p. 917.

The Productivity Commission has found that migrant workers are more vulnerable to exploitation than are other employees, and this is especially true for illegally working migrants. This may require more proportional penalties to deter exploitation and further resourcing of the Fair Work Ombudsman to detect it.

Exploitation of migrant workers undermines wages and conditions for everyone. If an unscrupulous employer thinks they can get away with underpaying a migrant worker, then they're less likely to employ an Australian worker who is more likely to know they're underpaid, and is more likely to complain, because they don't rely on the goodwill of the employer to stay in Australia.

Specific penalties for exploitation of temporary overseas workers

Currently, it is a criminal offence to employ someone, or to refer someone to work, if they are not legally entitled to work. This offence is punishable by 2 years imprisonment. It is also an aggravated offence, punishable by 5 years imprisonment if that worker is also exploited.

Labor will introduce a new criminal offence for those who deliberately exploit temporary overseas workers, and fail to meet their obligations to the worker under the Fair Work Act, even if they are employing the worker in accordance with the terms of their visa. Inadvertence or negligence would not constitute an offence.

This offence will be punishable by up to 2 years imprisonment or a fine of up to \$43,200 (240 penalty units) for a natural person, or a fine of up to \$216,000 (1,200 penalty units) for a corporation.

The pervasive nature of the exploitation of temporary overseas workers indicates that specific penalties should be imposed, to send a clear message that this behaviour is wrong. Rogue employers often target temporary overseas workers for exploitation because of the vulnerabilities that arise from their poor English language proficiency, lack of local social networks, ignorance of Australian industrial relations laws and dependency on the employer for visa sponsorship.

Removing the incentive to employ illegal workers

As the law currently stands, it is not possible for "illegal" foreign workers employed in Australia without a visa to take action under the Fair Work Act. This creates a perverse incentive for rogue employers to favour illegal workers over legal workers because it means they can avoid paying the wages that they owe. The interim Productivity Commission found that "it may actually be cheaper to target workers who do not have an appropriate visa".²

Labor will ensure any person who is underpaid will have recourse to action to be paid what they are owed.

Improved support for temporary overseas workers

Labor will require employers to provide temporary overseas workers a Temporary Overseas Worker Support Pack upon their commencement of employment in Australia.

² Productivity Commission Review of Workplace Relations, interim report, p. 747

This pack will include information on employment entitlements and rights under Australian law, as well as contact details for relevant trade unions, migrant assistance organisations and workplace and occupational health and safety regulators. This information will be required to be provided in the worker's native language.

The Fair Work Ombudsman will produce the documents to be included in the Temporary Overseas Worker Support Pack and published online available via the FWO website, to ease the compliance burden on employers.

Failure to provide temporary overseas workers with a Temporary Overseas Worker Support Pack upon their commencement of employment in Australia will make the employer liable for a civil penalty of up to \$10,800 (60 penalty units) for a natural person or up to \$54,000 for a corporation (5 x 60 penalty units).

Financial implications

Labor's proposed plan is not anticipated to come at any additional cost with new arrangements to be met within existing departmental resources. Over time, additional compliance activity is expected to generate additional revenue for the Commonwealth.



Authorised by G. Wright, Australian Labor Party,
5/9 Sydney Ave, Barton ACT 2600.

EXPOSURE DRAFT

2013-2014-2015-2016

The Parliament of the
Commonwealth of Australia

Presented and read a first time

**Fair Work Amendment (Protecting
Australian Workers) Bill 2016**

No. , 2016

(Mr O'Connor)

**A Bill for an Act to amend the *Fair Work Act 2009*,
and for related purposes**

1 **A Bill for an Act to amend the *Fair Work Act 2009*,**
2 **and for related purposes**

3 The Parliament of Australia enacts:

4 **1 Short title**

5 This Act may be cited as the *Fair Work Amendment (Protecting*
6 *Australian Workers) Act 2016*.

7 **2 Commencement**

8 (1) Each provision of this Act specified in column 1 of the table
9 commences, or is taken to have commenced, in accordance with

Error!
Unknown
document
property
name.

Error! Unknown document property name.

1

1 column 2 of the table. Any other statement in column 2 has effect
2 according to its terms.

3

Commencement information

Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this Act	The day after this Act receives the Royal Assent.	

4

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

5

6

7

(2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

8

9

10 **3 Schedules**

11

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

12

13

14

1 **Schedule 1—Main amendments**
2

3 ***Fair Work Act 2009***

4 **1 After subsection 7(2)**

5 Insert:

6 (2A) Part 4-1A contains offences for serious contraventions of this Act
7 that involve the use of coercion or threats.

8 **2 Section 12**

9 Insert:

10 ***disqualification order*** means an order under subsection 546A(1).

11 ***executive officer*** of a company: see subsection 545A(2).

12 ***phoenixing compensation order*** means an order under
13 subsection 545A(1).

14 ***pre-liquidation name***: see subsection 545A(7).

15 ***temporary overseas worker*** means an individual who:

- 16 (a) is the holder of a temporary visa (within the meaning of the
17 *Migration Act 1958*); and
18 (b) may perform work in Australia in accordance with the visa:
19 (i) without restriction; or
20 (ii) subject to one or more conditions.

21 **3 At the end of Division 3 of Part 1-2**

22 Add:

23 **15A Effect of migration laws**

24 None of the following affect whether a person employs, or usually
25 employs, an individual for the purposes of this Act:

- 26 (a) the fact that the individual is an unlawful non-citizen for the
27 purposes of the *Migration Act 1958*;

- 1 (b) the fact that the individual, or a person other than the
2 individual, has contravened that Act or breached a condition
3 of a visa granted under that Act;
4 (c) the fact that the individual is no longer entitled to remain in
5 in Australia in accordance with a visa granted under that Act.

6 **4 After subsection 124(2)**

7 Insert:

- 8 (2A) The Statement must contain the prescribed information about:
9 (a) the relationship between workplace laws and the *Migration*
10 *Act 1958*; and
11 (b) opportunities for redress for temporary overseas workers
12 affected by contraventions of workplace laws.
- 13 (2B) The Fair Work Ombudsman must cause the Statement to be
14 translated into the languages prescribed by the regulations for the
15 purposes of this subsection.
- 16 (2C) The Fair Work Ombudsman must publish the translations of the
17 Statement in the *Gazette*.

18 **5 Subsection 124(3)**

19 Omit “is not a legislative instrument”, substitute “, and the translations
20 required by subsection (2B), are not legislative instruments”.

21 **6 After subsection 125(1)**

22 Insert:

- 23 (1A) If an employer reasonably believes that an employee is not
24 proficient in written English, and the Statement has been translated
25 in accordance with subsection 124(2B) into a language in which
26 the employee is more proficient, the employer must for the
27 purposes of subsection (1) give the employee the translation of the
28 Statement in that language.

29 **7 Subsection 167(3)**

30 Omit “order the person to pay a pecuniary penalty under Division 2 of
31 Part 4-1”, substitute “make a pecuniary penalty order, a disqualification
32 order or a phoenixing compensation order”.

1 **8 Subsection 298(2)**

2 Omit “order the person to pay a pecuniary penalty under Division 2 of
3 Part 4-1”, substitute “make a pecuniary penalty order, a disqualification
4 order or a phoenixing compensation order”.

5 **9 At the end of section 340**

6 Add:

7 (3) A person must not take adverse action against another person (the
8 *second person*) because the second person raises, has raised, or
9 proposes to raise an issue or concern about whether the second
10 person or a third person has a workplace right.

11 Note: This subsection is a civil remedy provision (see Part 4-1).

12 **10 Subsection 357(2)**

13 Repeal the subsection, substitute:

14 (2) Subsection (1) does not apply if the employer proves that, when the
15 representation was made, the employer:

16 (a) believed that the contract was a contract for services rather
17 than a contract of employment; and

18 (b) could not reasonably have been expected to know that the
19 contract was a contract of employment rather than a contract
20 for services.

21 **11 Subsection 539(2)**

22 After “including”, insert “(subject to subsections 546(2) and (2A))”.

23 **12 Subsection 539(2) (table item 11, column 1)**

24 After “340(2)”, insert “340(3)”.

25 **13 Subsections 545(1), (3) and (3A) (note 1)**

26 Repeal the note, substitute:

27 Note 1: For the court’s power to make phoenixing compensation orders, see
28 section 545A.

29 Note 1A: For the court’s power to make pecuniary penalty orders, see
30 section 546.

31 Note 1B: For the court’s power to make disqualification orders, see
32 section 546A.

1 **14 After section 545**

2 Insert:

3 **545A Orders requiring executive officers of phoenix companies to**
4 **pay amounts owed by failed companies**

5 (1) The Federal Court, the Federal Circuit Court or an eligible State or
6 Territory court must order that a person (the *liable person*) pay an
7 amount to, or on behalf of, another person (the *affected person*) if
8 the court is satisfied that:

9 (a) a company registered under the *Corporations Act 2001* (the
10 *failed company*) contravened subsection 44(1), section 45,
11 50, 280, 293 or 305 or subsection 323(1) or 357(1); and

12 (b) the contravention involved a failure by the failed company to
13 pay an amount (the *underpayment*) that it was required to
14 pay to, or on behalf of, the affected person under this Act or a
15 fair work instrument; and

16 (c) the liable person was an executive officer of the failed
17 company at the time of the contravention; and

18 (d) after the contravention, the failed company was wound up;
19 and

20 (e) an unsecured debt or claim was proved in the winding up;
21 and

22 (f) the relevant date (within the meaning of the *Corporations Act*
23 *2001*) in relation to the winding up is on or after the
24 commencement of this subsection; and

25 (g) the liable person becomes an executive officer of a company
26 (the *phoenix company*) that is registered under the
27 *Corporations Act 2001* within 12 months after the failed
28 company was wound up; and

29 (h) the phoenix company uses any of the assets that were used by
30 the failed company before it was wound up; and

31 (i) some or all of the underpayment remains unpaid (whether by
32 the failed company, the phoenix company or any other
33 person) to the person or persons to whom it should have been
34 paid; and

35 (j) the liable person should not be exempt from this section in
36 relation to the contravention.

37

1 Note: Phoenixing compensation orders cannot be made in relation to
2 conduct that contravenes a term of a modern award, a national
3 minimum wage order or an enterprise agreement only because of the
4 retrospective effect of a determination (see subsections 167(3) and
5 298(2)).

6 *Meaning of executive officer*

7 (2) An *executive officer* of a company registered under the
8 *Corporations Act 1901* is a person, by whatever name called and
9 whether or not a director of the company, who is concerned in, or
10 takes part in, the management of the company.

11 *Amount payable under order*

12 (3) In determining the amount payable under the order, the court must
13 ensure that the combined effect of all orders made under this
14 section in relation to the contravention is that the whole of the
15 underpayment is paid to the person or persons to whom it should
16 have been paid.

17 *When orders may be made*

18 (4) The court may make the order:
19 (a) on its own initiative, during proceedings before the court; or
20 (b) on application.

21 *Exemptions*

22 (5) The court may exempt the liable person in relation to the
23 contravention only if:
24 (a) the court is satisfied that the liable person has acted honestly;
25 and
26 (b) having regard to all the circumstances of the case, the liable
27 person ought fairly to be exempt from this section in relation
28 to the contravention.

29 (6) In exercising its powers under subsection (5), the court must have
30 regard to the following matters:
31 (a) whether:
32 (i) at a time when the liable person was an executive
33 officer of the failed company, the failed company
34 incurred a debt; and

- 1 (ii) immediately before the time when the debt was
2 incurred, there were no reasonable grounds to expect
3 that the failed company would be able to pay the debt;
- 4 (b) the extent to which, and the circumstances in which, any
5 assets of the failed company have become assets of the
6 phoenix company;
- 7 (c) the extent to which, and the circumstances in which, any
8 individuals who were employed by the failed company have
9 become employees of the phoenix company;
- 10 (d) the extent to which, and the circumstances in which, any
11 premises that were used by the failed company have become
12 premises used by the phoenix company;
- 13 (e) the extent to which, and the circumstances in which, the
14 phoenix company uses:
- 15 (i) a pre-liquidation name of the failed company; or
16 (ii) a name that is so similar to a pre-liquidation name of the
17 failed company as to suggest an association with the
18 failed company;
- 19 (f) the extent to which, and the circumstances in which, any of
20 the following contact details that were used by the failed
21 company have become contact details used by the phoenix
22 company:
- 23 (i) a telephone number;
24 (ii) a fax number;
25 (iii) an email address;
26 (iv) an internet domain name;
27 (v) an internet URL;
- 28 (g) whether anything done, or omitted to be done, by the liable
29 person or the phoenix company is likely to create the
30 misleading impression that the failed company and the
31 phoenix company are the same entity;
- 32 (h) whether an order under this section has previously been made
33 for the liable person;
- 34 (i) any other relevant matters.

35 *Meaning of pre-liquidation name*

- 36 (7) A *pre-liquidation name* of a company that has been wound up is a
37 name by which the company was known at any time during the

1 12-month period ending at the start of the relevant date (within the
2 meaning of the *Corporations Act 1901*) in relation to the winding
3 up of the company.

4 (8) For the purposes of subsection (7), a company is *known* by each of
5 the following names:

6 (a) the name of the company;

7 (b) if the company carries on its business, or a part of its
8 business, under a particular name—that name.

9 *Time limit for orders in relation to underpayments*

10 (9) The court must not make an order under this section if the
11 underpayment relates to a period that is more than 6 years before
12 the proceedings concerned commenced.

13 *No limitation on orders*

14 (10) This section does not limit the orders that may be made under
15 section 545, 546 or 546A.

16 **15 Subsection 546(2)**

17 After “must not”, insert “(subject to subsection (2A))”.

18 **16 After subsection 546(2)**

19 Insert:

20 (2A) For a contravention of subsection 44(1), section 45, 50, 280, 293 or
21 305, or subsection 323(1) 357(1), involving conduct intentionally
22 engaged in by a body corporate that is not a small business
23 employer, the pecuniary penalty must not be more than __ times
24 the maximum amount that would otherwise have applied under
25 subsection (2) of this section.

26 Note: This subsection might apply for an individual who is involved in a
27 contravention by a body corporate (see section 550).

28 **17 Subsection 546(5)**

29 After “545”, insert “545A or 546A”.

30 **18 After section 546**

31 Insert:

1 546A Orders disqualifying persons from managing corporations

- 2 (1) The Federal Court, the Federal Circuit Court or an eligible State or
3 Territory court may, on application, make an order disqualifying a
4 person from managing corporations (within the meaning of the
5 *Corporations Act 2001*) for a period that the court considers
6 appropriate if the court is satisfied that:
- 7 (a) the person has contravened or was involved in a
8 contravention of subsection 44(1), section 45, 50, 280, 293 or
9 305, or subsection 323(1) or 357(1); and
- 10 (b) the contravention involved conduct intentionally engaged in
11 by a body corporate that is not a small business employer;
12 and
- 13 (c) the disqualification is justified.
- 14 Note 1: Section 206EC of the *Corporations Act 2001* provides that a person is
15 disqualified from managing corporations if a court order is in force
16 under this section. That Act contains various consequences for persons
17 so disqualified.
- 18 Note 2: Disqualification orders cannot be made in relation to conduct that
19 contravenes a term of a modern award, a national minimum wage
20 order or an enterprise agreement only because of the retrospective
21 effect of a determination (see subsections 167(3) and 298(2)).

22 *Determining whether disqualification order is justified*

- 23 (2) In determining whether the disqualification is justified, the court
24 may have regard to:
- 25 (a) the person's conduct in relation to the management, business
26 or property of any corporation (within the meaning of the
27 *Corporations Act 2001*); and
- 28 (b) any other matters that the court considers appropriate.

29 *Applicant to notify ASIC*

- 30 (3) The applicant must notify the Australian Securities and
31 Investments Commission (*ASIC*) if the court makes a
32 disqualification order. The applicant must give *ASIC* a copy of the
33 order.

34 Note: *ASIC* must keep a register of persons who have been disqualified from
35 managing corporations—see section 1274AA of the *Corporations Act*
36 *2001*.

1 *No limitation on orders*

2 (4) To avoid doubt, a court may make a disqualification order in
3 addition to one or more orders under section 545, 545A or 546.

4 **19 Paragraph 548(1)(a)**

5 After “pecuniary penalty order”, insert “or a disqualification order”.

6 **20 At the end of section 549**

7 Add:

8 Note: In some circumstances, contravening a civil remedy provision may be
9 an element of an offence (see Part 4-1A).

10 **21 Subsection 558(2)**

11 After “546”, insert “(disregarding subsection 546(2A))”.

12 **22 After Part 4-1**

13 Insert:

14 **Part 4-1A—Offences for serious contraventions of**
15 **this Act**

16 **Division 1—Introduction**

17 **559A Guide to this Part**

18 This Part contains offences for serious contraventions of this Act
19 that involve the use of coercion or threats.

20 **559B Meanings of employee and employer**

21 In this Part, employee and employer have their ordinary meanings.

22 Note: See also Division 2 of Part 6-4A (TCF contract outworkers taken to be
23 employees in certain circumstances).

1 **Division 2—Offences for serious contraventions of this Act**

2 **559C Offences for serious contraventions of this Act**

- 3 (1) A person commits an offence if:
4 (a) the person engages in conduct; and
5 (b) the conduct contravenes subsection 44(1), section 45, 50,
6 280, 293 or 305, or subsection 323(1) or 357(1); and
7 (d) the contravention involves the use of coercion or a threat
8 (both within the meaning of Division 270 (slavery and
9 slavery-like conditions) of the *Criminal Code*).

10 Penalty: Imprisonment for 2 years or 240 penalty units, or both.

- 11 (2) A person commits an offence if:
12 (a) the person engages in conduct; and
13 (b) the conduct contravenes a civil remedy provision; and
14 (c) the contravention involves the use of coercion or a threat
15 (both within the meaning of Division 270 (slavery and
16 slavery-like conditions) of the *Criminal Code*) in relation to a
17 temporary overseas worker.

18 Penalty: Imprisonment for 2 years or 240 penalty units, or both.

19 **559D Exception—retrospective determination varying modern**
20 **award or national minimum wage order**

21 Section 559C does not apply in relation to conduct if:

- 22 (a) either:
23 (i) a determination varying a modern award has a
24 retrospective effect because it comes into operation
25 under subsection 165(2) or 166(3) on a day before the
26 day on which the determination is made; or
27 (ii) a determination varying a national minimum wage order
28 has a retrospective effect because it comes into
29 operation under subsection 297(2) on a day before the
30 day on which the determination is made; and
31 (b) the conduct was engaged in before the determination was
32 made; and

1 (c) but for the retrospective effect of the determination, the
2 conduct would not have contravened a civil remedy
3 provision.

4 Note: A defendant bears an evidential burden in relation to the matter in this
5 section (see subsection 13.3(3) of the *Criminal Code*).

6 **559E No defence of victim consent or acquiescence**

7 To avoid doubt, it is not a defence in a proceeding for an offence
8 against section 559C that a person against whom the offence is
9 alleged to have been committed consented to, or acquiesced in,
10 conduct constituting any element of the offence.

11 **559F Other laws not excluded**

12 (1) This Part is not intended to exclude or limit the operation of any
13 other law of the Commonwealth or any law of a State or Territory.

14 (2) Without limiting subsection (1), this Part is not intended to exclude
15 or limit the concurrent operation of any other law of the
16 Commonwealth, or a law of a State or Territory, that makes:

- 17 (a) an act or omission that is an offence against this Part; or
18 (b) a similar act or omission;

19 an offence against the law of the Commonwealth, State or
20 Territory.

21 (3) Subsection (2) applies even if the other law of the Commonwealth,
22 or the law of the State or Territory, does any one or more of the
23 following:

24 (a) provides for a penalty for the offence that differs from the
25 penalty provided for in this Part;

26 (b) provides for a fault element in relation to the offence that
27 differs from the fault elements applicable to the offence
28 under this Part;

29 (c) provides for a defence in relation to the offence that differs
30 from the defences applicable to the offence under this Part.

31 (4) This section applies subject to Part 1-3 of this Act.

1 **Schedule 2—Consequential amendments**

2

3 ***Corporations Act 2001***

4 **1 After section 206EB**

5 Insert:

6 **206EC Disqualification under the Fair Work Act 2009**

7 A person is disqualified from managing corporations if a court
8 order disqualifying the person from managing corporations is in
9 force under section 546A of the *Fair Work Act 2009*.

10 **2 After section 206GA**

11 Insert:

12 **206GB Involvement of applicants for disqualification orders under**
13 **the Fair Work Act 2009—leave orders under**
14 **section 206G**

15 *Scope of section*

16 (1) This section applies in relation to a person who is disqualified from
17 managing corporations under section 206EC.

18 *Notice lodged with ASIC before leave application*

19 (2) If the person lodges a notice with ASIC under subsection 206G(2),
20 ASIC must give the applicant for the order mentioned in
21 section 206EC a copy of the notice.

22 *Leave orders*

23 (3) If the person lodges a copy of an order with ASIC under
24 subsection 206G(4), ASIC must give the applicant for the order
25 mentioned in section 206EC a copy of the order.

26 *Revoking leave*

27 (4) If ASIC decides to apply for an order under subsection 206G(5) in
28 relation to the person, it must consult the applicant for the order

1 mentioned in section 206EC before making the application under
2 that subsection.

3 **3 Paragraph 1274AA(1)(a)**

4 After “206EB”, insert “, 206EC,”.

5 **4 After paragraph 1274AA(2)(ac)**

6 Insert:

7 (ad) every court order referred to in section 206EC; and

EXPOSURE DRAFT
FAIR WORK AMENDMENT (PROTECTING AUSTRALIAN WORKERS) BILL 2016

EXPLANATORY MEMORANDUM

(Circulated by authority of the Shadow Minister for Employment and Workplace Relations, the Honourable Brendan O'Connor MP)

FAIR WORK AMENDMENT (PROTECTING AUSTRALIAN WORKERS) BILL 2016

NOTES ON CLAUSES

In these notes on clauses, the following abbreviations are used:

ABCC	<i>Australian Building and Construction Commission</i>
ASIC	<i>Australian Securities and Investment Commission</i>
FW Act	<i>Fair Work Act 2009</i>
FW(RO) Act	<i>Fair Work (Registered Organisations) Act 2009</i>
FWC	Fair Work Commission
FWIS	Fair Work Information Statement
FWO	Fair Work Ombudsman
ICA	<i>Independent Contractors Act 2006</i>
NES	National Employment Standards
PC Inquiry	Productivity Commission Inquiry into the Workplace Relations Framework.

Clause 1 – Short title

1. This is a formal provision specifying the short title.

Clause 2 – Commencement

2. The table in this clause sets out when the provisions of the Bill commence.

Clause 3 – Schedule(s)

3. Clause 3 of the Bill provides that an Act that is specified in a Schedule is amended or repealed as set out in that Schedule, and any other item in a Schedule operates according to its terms.

Schedule 1 – Amendments

Fair Work Act 2009

Item 1 – After subsection 7(2)

4. Item 1 is consequential to the amendment made in Item 23.

Item 2 – Section 12

5. Item 2 inserts signpost definitions for *disqualification order*, *executive officer*, *known*, *phoenixing compensation order*, *pre-liquidation name*.
6. Item 2 also defines a *temporary overseas worker* as the holder of a temporary visa that allows the performance of work in accordance with the visa. This includes people on temporary skilled migrant visas (457), working holiday maker visas (417 and 462), and student visas.

Item 3 – At the end of Division 3 of Part 1-2

New Section 15A – Effect of migration laws

7. Item 3 introduces section 15A, which clarifies that the FW Act applies to all workers, irrespective of their immigration status.
8. In their Workplace Relations Inquiry, the PC concluded that “making clear the Fair Work Act applies to migrants that breach their visa conditions... should motivate more migrants to report their employer, and reduce instances of exploitation”¹.
9. The FWO enforces the FW Act for all workers, including migrants working in breach of their visa conditions, and has recovered payments for some of those workers. In the case of *Smallwood vs Ergo Ltd*², however, the FWC found that a visa holder did not have an employment contract that was enforceable. The FWO has also indicated that it would be beneficial if the position was made clear.

Item 4 – After subsection 124(2)

Item 5 – Subsection 124(3)

10. Section 124 requires the FWO to publish a FWIS that contains information about *inter alia* the NES, Awards, agreement making under the FW Act, the right to freedom of association and the role of the FWC and the FWO.
11. Item 4 requires the FWIS to also include information prescribed in the regulations about:
- the relationship between workplace laws and the *Migration Act 1958*; and
 - opportunities for redress for temporary overseas workers affected by contraventions of workplace laws.

¹ Productivity Commission 2015, *Workplace Relations Framework*, Final Report, Canberra, p. 930

² [2014] FWC 964

12. Workplace laws is defined in the FW Act as including the FW Act, the FW(RO) Act, the ICA or any other Commonwealth, State or Territory law that regulates the relationships between employers and employees.

13. Item 4 deals with the same problem identified by the FWO and the PC referred to in Item 3. It makes clear that everyone has rights under the FWA, irrespective of their migration status, which is anticipated to result in the increased reporting of exploitation and reduced prevalence.

14. Item 4 also ensures that material is produced in relevant languages, in recognition that there are no English language requirements for some temporary visa workers, for example people on subclass 417 working holiday visas.

15. Item 5 is consequential to the amendment made in Item 4.

Item 6 – After subsection 125(1)

16. Section 125 presently requires an employer to provide an employee the FWIS when the employee commences.

17. Item 6 ensures that the FWIS is provided to an employee in a language in which they are proficient.

Item 7 – Subsection 167(3)

18. Item 7 is consequential to the amendments made in Items 14 and 18.

Item 8 – Subsection 298(2)

19. Item 8 is consequential to the amendment made in Items 14 and 18.

Item 9 – At the end of section 340

20. Section 340 deals with protection from adverse action. The new subsection (3) specifies that a person must not take adverse action against another person because the person questions whether a workplace right (defined in section 341) exists. The questions may be asked on the person's own behalf or on the behalf of another person.

21. Item 9 will ensure that adverse action cannot be taken if a worker asks whether someone is an employee not an independent contractor.

22. Subsection (3) is a civil remedy provision, punishable by a maximum penalty of 60 penalty units. This is the same penalty as is exists now for subsections 340(1) and 340(2).

Item 10 – Subsection 357(2)

23. Section 357 is a civil remedy provision dealing with the misrepresentation of employment as independent contracting, also known as *sham contracting*. Subsection 357(2) currently provides that an employer is not involved in sham contracting if s/he didn't know and wasn't reckless as to whether the contract was a contract of employment rather than a contract for services.

24. The replacement 357(2) introduces an objective test such that an employer is not involved in sham contracting if they believed the contract was a contract for services and a reasonable person would have believed the contract was a contract for services.

25. This provision gives effect to recommendation 25.1 of the PC Inquiry³, as well as the Sham Contracting Inquiry Report by the ABCC in 2011⁴ and the 2012 post-implementation review of the FW Act⁵.

Item 11 – Subsection 539(2)

26. Item 11 is consequential to the amendment made in Item 16.

Item 12 – Subsection 539(2) (table item 11, column 1)

27. Item 12 is consequential to the amendment made in Item 9.

Item 13 – Subsection 545(1), (3) and (3A) (after note 1)

28. Item 13 is consequential to the amendments made in Items 14 and 18.

Item 14 – After section 545

New section 545A – Orders requiring directors of phoenix companies to pay amounts owed by failed companies

29. Item 14 inserts new section 545A.

30. The new section 545A gives effect to Labor's commitment to hold executive officers responsible for the non-payment of wages, when a company with which they are associated is phoenixed.

31. This is consistent with provisions introduced when Labor was last in Government that allowed the Tax Office to hold directors personally liable for unpaid superannuation guarantee contributions.

32. The court may make a *phoenix compensation order* where:

- there has been a contravention of the FW Act involving an underpayment of wages; and
- the company is wound up and the underpayment has not been redressed; and
- the executive officer becomes executive officer of the phoenix company within 12 months; and
- the phoenix company uses assets used by the failed company.

This reflects the ASIC definition of phoenixing.

³ Productivity Commission, *op cit.*, p. 815

⁴ ABCC 2011, *Sham Contracting Inquiry Report*, Melbourne

⁵ Department of Education, Employment and Training 2012, *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation*, Canberra

33. The executive officer will not be held liable if the phoenix company pays the compensation.

Executive Officer

34. An executive officer is a person who is concerned in or takes part in the management of the company, whether or not they are a director. This will allow compensation orders to be sought from persons who use a dummy director or figurehead.

Amount payable under order

35. The court is required to take into account in making the order the combined effect of all orders made under the section so that the whole of the underpayment is paid.

When orders may be made

36. The court may make an order on its own initiative or on application.

Exemptions

37. The court may exempt an executive officer from liability if they have acted honestly, and they ought fairly be exempt. In deciding whether to exempt someone from liability the court is required to take account of a range of circumstances that relate to the indicia of phoenixing.

Meaning of pre-liquidation name

38. The pre-liquidation name of a company is any name the company was known by in the 12 months preceding liquidation. This is relevant to the indicia of phoenixing in subsection (6).

Time limit for orders in relation to underpayments

39. There is a time limit of 6 years of recovery of underpayments. This is the same time limit as for a section 545 compensation order.

No limitation on orders

40. The use of phoenixing compensation order does not limit the use of compensation orders, pecuniary penalty orders, or disqualification orders.

Item 15 – Subsection 546(2)

41. Item 15 is consequential to the amendment made in Item 16.

Item 16 – After subsection 546(2)

42. Item 16 introduces a new maximum penalty for certain breaches of the Fair Work Act.

43. Subsection (2A) relates to breaches that contravene one of:
- the National Employment Standards (section 44);
 - a Modern Award (section 45);
 - an Enterprise Agreement (section 50);
 - a Workplace Determination (section 280);
 - a National Minimum Wage Order (section 293);
 - an Equal Remuneration Order (section 305);
 - the requirements related to the method and frequency of payments (section 323); or
 - sham contracting (section 357).
44. The higher penalty will only apply to companies which could be expected to have a level of human resources sophistication; and which already have statutory duties in relation to their behaviour. The higher penalty will not apply to small businesses.
45. It is expected that consistent with standard practice, where breach of the sham contracting provision also constituted a breach of one or more provisions relating to underpayment, that in sentencing, the court would look at the totality of the conduct, and determine a civil penalty that reflects the conduct as a whole.

Item 17 – Subsection 546(5)

46. Item 17 is consequential to the amendments made in Items 14 and 18.

Item 18 – After section 546

New section 546A – Orders disqualifying persons from managing corporations

47. Item 18 inserts new section 546A.
48. The courts have the power under the Corporations Act to disqualify people from managing corporations for a certain period in relation to contraventions of certain civil penalty provisions, if the court is satisfied the disqualification is justified.
49. The new section 546A allows the court to disqualify a person from managing corporations for a certain time for certain breaches of the FW Act, if the court is satisfied the disqualification is justified. The disqualification provisions relate to breaches by corporations which contravene the following provisions:
- the National Employment Standards (section 44);
 - a Modern Award (section 45);
 - an Enterprise Agreement (section 50);
 - a Workplace Determination (section 280);
 - a National Minimum Wage Order (section 293);
 - an Equal Remuneration Order (section 305);
 - the requirements related to the method and frequency of payments (section 323); or
 - sham contracting (section 357).

Determining whether disqualification order is justified

50. The court must take into account the same matters as it does for disqualification under the Corporations Act. That is the person's conduct in managing the business and any other matters the court considers appropriate.

Applicant to notify ASIC

51. The applicant for the order must notify ASIC of the order so that it can update the register of disqualified persons.

No limitation on orders

52. The use of a disqualification order does not limit the use of compensation orders, pecuniary penalty orders, or phoenixing compensation orders.

Item 19 – Paragraph 548(1)(a)

53. Item 19 is consequential to the amendments made in Item 18.

Item 20 – At the end of section 549

54. Item 20 is consequential to the amendments made in Item 22.

Item 21 – Subsection 558(2)

55. Item 21 is consequential to the amendments made in Item 16.

Item 22 – After Part 4-1*Part 4-1A – Offences for serious contraventions of this Act**Division 1 – Introduction**New Section 559A – Guide to this Part*

56. Item 23 introduces a new Part 4-1A which provides for new offences for serious contraventions of the provisions of the Fair Work Act relating to underpayments to employees, sham contracting and the treatment of temporary visa workers.

57. The new section 559A provides a Guide to the new Part 4-1A.

New Section 559B – Meanings of employee and employer

58. The new section 559B provides that employee and employer are taken to have their ordinary meaning.

*Division 2 – Offences for serious contraventions of this Act**New Section 559C – Offence – serious contravention of this Act*

59. The new section 559C introduces two new criminal offences punishable by imprisonment for 2 years or 240 penalty units, or both.

60. The new offence relates to certain breaches of the Fair Work Act that involve coercion or a threat within the meaning of the slavery and slavery-like conditions provisions of the *Criminal Code*.

61. Subsection 559C(1) relates to contraventions of the following provisions:

- the National Employment Standards (section 44);
- a Modern Award (section 45);
- an Enterprise Agreement (section 50);
- a Workplace Determination (section 280);
- a National Minimum Wage Order (section 293);
- an Equal Remuneration Order (section 305);
- the requirements related to the method and frequency of payments (section 323); or
- sham contracting (section 357).

62. Subsection 559C(2) relates to all contraventions of the Fair Work Act, where the contravention involves a temporary overseas worker.

63. Coercion includes coercion by any of the following: force; duress; detention; psychological oppression; abuse of power; or taking advantage of a person's vulnerability. Coercion in this context does not affect the definition of coercion in other parts of the FW Act.

64. This offence is intended to penalise conduct which is serious, but which falls short of existing offences relating to forced labour, servitude and the like.

New Section 559D – Exception – retrospective determination varying modern award or national minimum wage order

65. This makes clear that the first element of the offences in 559C is not made out if the only reason for the contravention relates to the retrospective application of an instrument made under the FW Act.

New Section 559E – No defence of victim consent or acquiescence

66. The new section 559E makes clear that it is not a defence to section 559C that the person who has been victimised consented to or acquiesced in the conduct constituting any element of the offence.

New Section 559F – Other laws not excluded

67. The new section 559F makes clear that this Part does not exclude or limit the operation of any other laws.

Schedule 2 – Amendments

Corporations Act 2001

Item 1 – After section 206EB

New section 206EC – Disqualification under the Fair Work Act 2009

68. Item 1 is consequential to the amendment made in Schedule 1, Item 19.

Item 2 – After section 206GA

New section 206GB – Involvement of applicants for disqualification orders under the Fair Work Act 2009 – leave orders under section 206G

69. Item 2 introduces a new section 206GB that is consequential to the amendment made in Schedule 1, Item 19.

70. The new section 206GB provides for any applicant for a disqualification order made under 546A to be notified in the event that a person who is disqualified under that section seeks leave to manage a corporation, despite the disqualification.

Item 3 – Paragraph 1274AA(1)(a)

71. Item 3 is consequential to the amendment made in Item 1.

Item 4 – After paragraph 1274AA(2)(ac)

72. Item 4 is consequential to the amendment made in Item 4.