



FACT SHEET

PROTECTING RIGHTS AT WORK

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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 is change 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.



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