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Workplace Relations Inquiry
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Submission by the Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia to the Productivity Commission in response to the Workplace Relations Framework Draft Report September 2015

The Justice and International Mission Unit of the Synod of Victoria and Tasmania, Uniting Church in Australia, welcomes this opportunity to make a submission to the Productivity Commission in response to the Workplace Relations Framework Draft Report.

The Unit completely agrees with the Productivity Commission that the requirement that an employer must have been 'reckless' for them to be prosecuted for misrepresenting the nature of an employment contract appears to be a high hurdle for legal action. We completely support the recommendation that the test of 'recklessness' be changed to a test of 'reasonableness' to discourage sham contracting and allowing regulators to apply out-of-court actions.

The Unit agrees with the Productivity Commission that the Fair Work Ombudsman (FWO) should be better resourced to deal with the human trafficking and exploitation of temporary work visa holders (recommendation 21.1). The role of the FWO should remain focussed on breaches of the law, including the *Migration Act*, by employers and not employees. The FWO should not have a role in taking action on breaches of the *Migration Act* by employees, so as not to deter reporting of unlawful activities by employers. If employees need to fear legal action against them by the FWO for breaches of the *Migration Act* then they will be less likely to report unlawful activities by employers.

The Unit agrees that the *Migration Act* should be amended so that employers can be fined by at least the value of any unpaid wages and conditions to migrants working in breach of the *Migration Act*, in addition to the existing penalties under the Act.

Recommendations

The Unit makes the following recommendations:

- That the ultimate employer be held responsible for the treatment of workers by any labour hire company contracted by the employer. The ultimate employer should be required by law to take reasonable steps to ensure that any labour hire company they obtain workers from is complying with all legal requirements around the pay and conditions of the workers. The Unit has done extensive work around human trafficking and forced labour in seafood

processing plants in Thailand. The worst abuses of migrant workers in these processing plants was usually at the hands of labour hire companies. It was when the Thai seafood industry accepted responsibility for the conduct of the labour hire companies they were using that forced labour and human trafficking into the processing plants largely disappeared.

- There is a need to have greater regulation and registration of labour hire companies in Australia. In the experience of the Unit there appear to be a significant number of individuals acting as effective labour hire businesses who appear to not be subject to any effective regulatory oversight, with allegations that some engage in sexual exploitation of female migrant workers. The Productivity Commission should recommend that the Government introduce a licensing system for labour hire businesses in specific industries with the aim to make it difficult for unscrupulous people to set up labour hire businesses and to create barriers to phoenix activity. Enforcement is made easier as it becomes an offence to run an unlicensed labour hire business.
- Temporary work visa holders who have been trafficked or subjected to significant exploitation, such as significant underpayment of wages, should be permitted to remain in Australia if they are pursuing civil remedies of compensation from the employer or if they are involved in any Fair Work processes. The Unit is deeply concerned by cases in which trafficked or grossly exploited temporary work visa holders have been rapidly removed from Australia before they can even obtain legal advice on their rights and avenues for legal action open to them. This measure should include the introduction of a Civil Justice Stay Visa to provide a temporary bridging visa to those workers who wish to pursue civil action against an employer that has unlawfully exploited them.
- Temporary work visa holders who are suspected to have been trafficked into Australia should be given access to independent legal advice. Further no one with indicators of having been subjected to human trafficking or slavery should be detained or removed, even if authorities are uncertain of the person's status as a victim of these offences, consistent with Action 59 of the National Action Plan to Combat Human Trafficking and Slavery.
- The Productivity Commission should recommend that the Government require employers allow temporary work visa holders have access to a non-government organization that is able to assist the migrant worker understand their rights and responsibilities, as is the case in Ireland for domestic workers. This would act as a significant protective factor against human trafficking and exploitation.
- All the provisions of the *Fair Work Amendment (Textile, Clothing and Footwear Industry) Act* should be retained and a national code of practice for the TCF Industry should be fully implemented.

Temporary Visa Holders

The Unit supports the Productivity Commission's suggestion that more should be done to ensure that new migrant workers are made aware of their workplace rights and entitlements upon arrival to Australia or approval of their visa. However, this is only a small step in the right direction and temporary work visa holders often may lack the ability to enforce their legal rights even when they are aware of them. However, the Unit agrees with the Commission that all temporary work visa holders should be given information about their workplace right upon receiving their approved visa. The Unit agrees that details of the visa holder's rights and conditions should be provided with any other information normally given to a migrant worker on visa approval or when they enter Australia.

The Productivity Commission should recommend the establishment of a licensing system for labour hire businesses for industries that are at high risk of human trafficking, forced labour or severe exploitation, such as agriculture, food processing, construction, domestic work, hospitality, nursing and manufacturing.¹ The licensing system should provide a barrier to unethical and criminal operators setting up legal labour hire businesses. Features of the labour hire licensing system should include:

- Making it an offence to operate a labour hire business without a licence, making it easier to shut down unethical and criminal operators without having to prove human trafficking, forced labour or exploitation related offences. In 2011, Singapore increased penalties for operating without a licence from S\$5000 for a first offence to up to S\$80,000 (approximately A\$70,000) and/or up to two years imprisonment. The maximum fine for repeat offenders increased to S\$160,000, and/or up to four years imprisonment.
- A public register of licenced labour hire businesses to make it easy for employers seeking labour hire to know they are dealing with a licenced business.
- It should be an offence for an employer to knowingly or recklessly using an unlicensed labour hire business, or knowingly or recklessly using labour hire workers in ways which breach the licensing requirements of the labour hire business with whom they have contracted.
- Exclusion of people with relevant criminal records from controlling or operating a labour hire business.
- The requirement to pay a bond large enough to cover a reasonable level of unpaid wages as a means to deter phoenix behavior by unethical operators.
- A requirement to disclose the ultimate beneficial owner or controller of the labour hire business to ensure accountability and as a further safeguard against criminal operators running labour hire businesses.
- A minimum level of competency of the operators of the labour hire business to run such a business, which Singapore introduced into its licencing system in 2011.

In the past decade, an increasing number of countries have introduced licencing arrangements, or strengthened existing requirements of licencing schemes for labour hire businesses. The former includes most EU countries, where licencing has gone hand-in-hand with implementation of the EU *Directive on Temporary Agency Workers*. The latter includes the Japan, Singapore and South Korea.

In Sweden, in order to be authorized to operate, each labour hire agency must:²

- complete a one-year probationary period prior to receiving authorization;
- be bound by collective agreements;
- be financially sound;
- comply with tax requirements;
- have liability insurance;
- comply with the code of conduct; and
- pass an assessment to renew their authorization annually.

¹ Based largely on the work that has been conducted by the Australian Institute of Criminology, Fiona David, *Labour trafficking*, AIC Reports Research and Public Policy Series 108, 2010.

² ILO Sectoral Activities Department, 'Final Report of the Discussion. Global Dialogue Forum on the Role of Private Employment Agencies in Promoting Decent Work and Improving the Functioning of Labour Markets in Private Services Sectors', GDFPSS/2011/10, 18 – 19 October 2011, p. 11.

Licensing of labour hire businesses is only one measure needed to curb human trafficking for labour purposes and egregious exploitation of temporary work visa holders, and should not be seen as the whole solution.

In addition to licensing of labour hire businesses, there has been an increasing number of jurisdictions that hold the employer using the labour hire employees jointly responsible for some forms of exploitation experienced by the employees. For example, in South Africa if a labour hire business fails to pay amounts owing to its employees, the client for whom the employees worked is liable for these payments.³

The Productivity Commission should recommend to Government that it support the Recruitment and Consulting Services Association initiative to introduce a mandatory *Employment Services Industry Code* under the *Competition and Consumer Act*.⁴ The proposed Code will not replace the need for a licensing system for labour hire companies

Homebased Textile, Clothing and Footwear Workers

In response to the Productivity Commission's request for arguments around the changes made by the *Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012*, the Unit supports the measures introduced due to the long standing systemic exploitation of home based workers in the TCF industry, which included sham contracting and widespread violation of minimum award and legal conditions. The Unit urges the reforms introduced by the *Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012* be retained.

The Unit notes the direct experience of the Textile Clothing and Footwear Union of Australia is that the Act has resulted in modest, but appreciable, improvements in the wages and conditions of home-based TCF workers.

The new laws have placed home-based workers on an equal footing by giving them equal access to award and legislative minimum protections, including wages, leave, redundancy and other protections of the *Fair Work Act 2009*. As a result, sham contracting has been more readily exposed and remedied.

The *Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012* made provision for a TCF Outwork Code of Practice to be developed at national level. This has not yet happened and the Unit supports the introduction of a mandatory code of practice to enhance transparency of supply chains in the TCF industry by placing certain record keeping and reporting requirements on supply chain participants.

Supply chains in the TCF industry are incredibly complex. For example, a member of the Justice and International Mission Unit team visited a school uniform business in Victoria that outlined 40 suppliers to the business; many of these suppliers engage sub-contractors, and so the 'chain' goes on. Without record-keeping requirements being made compulsory for all stakeholders in

³ Paul Benjamin, 'Untangling the Triangle. The regulatory challenges of triangular employment', 2009, p. 3, <http://www.ilo.org/legacy/english/protection/travail/pdf/rdwpaper17a.pdf>

⁴ <http://www.rcsa.com.au/ESIC/Employment%20Services%20Industry%20takes%20aim%20at%20illegal%20and%20Unethical%20Labour%20Practices.pdf>

the supply chain there is little chance of exploitation being uncovered and prosecuted. The existing codes ensure that all stakeholders conduct record-keeping in this area. Regulatory bodies have been able to uncover illegal practices due to these requirements. Uniformity of record-keeping requirements for all Australian jurisdictions also fosters fair competition.

Research into the treatment of outworkers has revealed a disturbing pattern of exploitation and the need for special protection over a significant period. This was borne out in numerous Senate inquiries and Federal reviews while the Australian Industrial Relations Commission and Federal Court decisions recognised the particular exploitation that occurs in the 'supply chains' of this sector - a complex web of interconnected subcontracting relationships where homeworkers are engaged under 'sham contracting' arrangements⁵.

To address high levels of exploitation in the clothing industry, a range of Commonwealth and state laws were introduced in order to protect homeworkers.⁶

While there are relatively good legislative protections in Victoria, protections are not nationally uniform with Western Australia, the Northern Territory and ACT failing to recognise outworkers as employees. Furthermore, despite these protections, in 2004 the Victorian Ethical Clothing Trades Council⁷ found a disturbing lack of compliance by some Victorian companies in meeting the minimum levels of lawful entitlements of clothing outworkers as set out in the Victorian Act.

In addition to legislative protections, the Homeworkers Code of Practice ('the Code') is a voluntary accreditation scheme that is administered by Ethical Clothing Australia (ECA). The scheme practically assisted Australian clothing, textile and footwear businesses to ensure that their supply chains and contracting arrangements are transparent and lawfully compliant. Once deemed compliant under the Code by the ECA, businesses are licensed to display the ECA trademark on their Australian-made products, providing consumer recognition for their commitment to local and ethical manufacturing.⁸ Ethical Clothing Australia was defunded as of 1 July 2014 by the Federal Government, but the Victorian Government has provided funding to allow it to continue its work.

Clothing industry mandatory codes of practice were in force in NSW, South Australia and Queensland (since repealed). If a more comprehensive framework was adopted, as outlined in the *Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012*, there would be a reduction in complexity for businesses that work across various Australian jurisdictions.

Research undertaken in 2007 by the Brotherhood of St Laurence highlighted the unfortunate situation of homeworkers at that time:

One group said they were paid \$2.50 for a detailed shirt which took one hour to sew. Another group said they were paid between \$2 and \$3 an hour. When asked about

⁵ FairWear Victoria [Thompson, L.], 2008, *Submission of the FairWear campaign to the Senate Education, Employment and Workplace Relations Committee Inquiry into the Fair Work Bill*, [online],

<https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=39891bfd-1887-4a08-8648-bec1cf4b0c2d>

⁶ Workforce Victoria, [not dated], *A guide to engaging outworkers in Victoria's clothing industry*, [online], accessed at:

http://www.business.vic.gov.au/busvicwr/assets/main/lib60052/diird%20-%20outworkers%20brochure_english.pdf

⁷ Ethical Clothing Trades Council of Victoria, 2004, *12 Month Report*, [online], available from:

[http://www.irv.vic.gov.au/CA256EF9000EB8A3/WebObj/332BC39C68F5407CCA256FCE0016683F/\\$File/Ethical-Clothing-Trades-Council-Report-final.pdf](http://www.irv.vic.gov.au/CA256EF9000EB8A3/WebObj/332BC39C68F5407CCA256FCE0016683F/$File/Ethical-Clothing-Trades-Council-Report-final.pdf)

⁸ See: <http://www.ethicalclothingaustralia.org.au/business/how-it-works>

*hours worked, most indicated that they often went weeks without a job but when the work was available they worked long hours.*⁹

In 2011, the Textile, Clothing and Footwear Union of Australia (TCFUA) found that clothing workers associated with a Victorian school uniform manufacturer were being illegally paid as homeworkers, earning as little as \$7 dollars per hour. This was less than half the hourly award rate¹⁰.

In this light, the passage of the *Fair Work Amendment (Textile, Clothing and Footwear Industry) Act* was needed as it applied nationally consistent rights for outworkers in the TCF industry, and whether they were treated as an employee or a contractor by their employer. The reforms go to the heart of sham contracting which feeds low wages and exploitation of outworkers. It also places the industry on a level playing field.

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⁹ Brotherhood of St Laurence [Diviney, E. & Lillywhite, S.], 2007, *Ethical Threads*, [online], available from: http://www.nosweatshoplabel.com/media/Diviney&Lillywhite_ethical_threads.pdf

¹⁰ Heard, H., 2011, *\$7-an-hour sweatshop clothes*, Sunday Herald Sun, 16 July, [online], accessed at: <http://www.heraldsun.com.au/news/victorians-wearing-7-an-hour-sweatshop-clothes/story-e6frf7jo-1226095989369> [29 October 2011]