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Thursday, 31 March 2016

Request to appear at the Senate inquiry into the Fair Work Amendment (Gender Pay Gap) Bill 2015 to the Education and Employment Legislation Committee

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FOR IMMEDIATE RELEASE

Dear Senators;

On Friday February 5, 2016 Gary Morgan (Director of Linkhill Pty Ltd and Roy Morgan Research Ltd) and Michele Levine (Director of Roy Morgan Research Ltd) wish to give evidence to the Senate inquiry into the Fair Work Amendment (Gender Pay Gap) Bill 2015 to the Education and Employment Legislation Committee.

The Fair Work Building Construction (FWBC) (prior to June 2012 known as the Australian Building and Construction Commission ('ABCC')) is a Federal Government Commission established by statute.

Changes contemplated by the Turnbull Government to increase penalties, including jail sentences, for underpaying workers or sham contracting need to be considered carefully. In our view, these changes should not, and can not be made in isolation from other important changes and reforms to the powers and responsibilities of the Federal Government and its commissions. These changes include increases in the accountability of public servants given the responsibility to administer such laws, and tangible steps to reign in the 'cash economy'.

Criminal charges are a good idea so long as the public can be confident in the honesty and integrity of the administrators of the system. The public generally has confidence in the country's police forces, because the avenues to review the conduct of police officers are broad and accessible to all. Virtually regardless of merit, if a claim is made about the conduct of a police officer, it is investigated and reported upon. The public has no such confidence in the integrity and honesty of public servants – Federal, State or Local.

Linkhill was recently convicted of sham contracting and underpayment of workers when the **workers were clearly overpaid**. The undisputable fact of the case – accepted by FWBC – was that the workers were all paid well above Award rates – \$253,281.00 in overpayments against \$152,865.00 in alleged 'underpayments'. The allegation of 'underpayment' was based on a legal technicality, about which none of the Judges hearing the case or the Appeals actually made a finding. The 'legal technicality' is not particularly complex – can you deduct amounts overpaid from amounts allegedly underpaid?

The FWBC argued, and the Courts blithely accepted, that being paid significantly above the Award by an employer in one area but not enough in another equals 'underpayment'! This, at a time, when both the Federal Government and the Opposition are relying on 'growing the economy' as a strategy for recovering from Budgetary distress. Paying workers twice for the same work – by ordering repayment of 'technical underpayments' – is wrong, and is a disincentive to business, not a stimulus. Where is the 'fair go all round'?

Yet for no explicable reason, both the FWBC and the three Courts ignored completely the 'other work' the workers did for third parties while engaged by Linkhill, and ignored the fact that in the main, most of the 'other work' was performed for cash (evidence of the 'other work' and cash payments was put before the Court). So in this case, the employer Linkhill who was acting reasonably, paying rates of pay well above Award rates, as well as all entitlements, was convicted and fined and penalised \$466,365.00 for alleged 'underpayments' of around \$152,865 (despite a nett over Award payment of **\$100,416** having been paid to the workers by Linkhill), whilst no attention whatsoever was given to the work performed by the workers in the 'cash economy'. None - not a word said nor question asked!

Why does the Federal Government threaten to toughen up on rogue employers? Because it's easy! Why does the Federal Government ignore the 'cash economy'? Because it's hard!

Which is the bigger evil to the Australian economy?

The 'cash economy' in Australia is inextricably related to a number of systems in the economy, such as the complicated tax system, industrial relations and related legislation, and the broad industrial relations environment. Whenever the law and regulation of the working environment becomes too onerous, people and businesses move into the 'cash economy' (thus avoiding all law and complication). The same happens when tax is too high or the overall administrative burden is too high.

Unfortunately it is hard to reverse the move of employers and workers into the 'cash economy'. Reducing tax rates doesn't naturally encourage someone to leave the 'cash economy' and return to the mainstream. This means two things.

First, the Federal Government should never make the system so hard to live with so people opt out completely and move into the 'cash economy'.

Second, the Federal Government needs to actively encourage people back from dealing unlawfully in 'cash'.

In our view, that will necessarily require some kind of moratorium on cash traders until a specified and advertised future date when serious penalties will apply.

The 'cash economy' is unlawful, inequitable and should not be tolerated by the Federal Government or the public. Yet it is 'booming'. It is 'booming' because the Federal Government continues to ignore it. The Productivity Commission's report into Australia's industrial relations system **made only one mention of the 'cash economy'**.

Neither of the two main political parties has a policy on the 'cash economy', yet we all know what stimulates people to turn to the 'cash economy', and we all know how it operates.

If the Federal Parliament is to give new powers to the FWBC (or ABCC), a statutory body, then the accountability of the FWBC (or ABCC), or any statutory commission given such punitive powers, must be reviewed and reformed at the same time. **As it exists now, the FWBC is secretive and not answerable to anyone.**

If an allegation of misconduct is made against the FWBC, in its handling of litigation against a person, corporate entity or union, there is currently **no** means available to the public or a targeted respondent to have the FWBC's conduct investigated or reviewed. None. Linkhill has demonstrated this.

The FWBC has no published grievance or complaints handling procedures. There is no means by which an individual may initiate an integrity investigation or review. There is no anti-corruption agency with authority to inquire into the internal workings and decision making of the FWBC. In short, the employees and officers of the FWBC are not, and cannot be held, responsible for their conduct in litigation they commence. There is no transparency whatsoever, and no apparent desire within the FWBC to provide any transparency. How many mistakes have been covered up? How many defendants have been falsely accused, and damned with false evidence? How many proceedings have been commenced in circumstances where taxpayers money could and should have been spent elsewhere?

When Linkhill sought to commence its own private prosecution against the FWBC, the case was taken over by the Commonwealth Department of Public Prosecution (as the CDPP is entitled to do), and immediately abandoned. Whilst no reasons were ever given to Linkhill by the CDPP as to why it did not continue Linkhill's criminal case against the FWBC, we can only assume that it did not pass the CDPP's prosecutorial guidelines – namely that there was insufficient evidence, or that the case was NOT in the public interest! How are members of the public supposed to obtain evidence on the internal operations of the FWBC? **Information obtained by Linkhill from FWBC using FOI was highly censored.** The CDPP has the power to do this, but in the Linkhill case did not exercise its power. And how can allegations of serious misfeasance in public office not be in the public interest?

If penalties for the public are to include jail time for sham contracting or underpayments (the two usually go hand in hand), the penalties for the public servants administering the system must also be **as severe**. The officers and employees of Federal Government commissions must be subject to both genuinely independent review, and serious criminal sanction for abuse of their special position of trust, power and responsibility.

The attached document and its many linked attachments show the injustice in the FWBC case against Linkhill Pty Ltd. **The documents show beyond doubt (information obtained under FOI) that the FWBC (prior to June 2012) instigated proceedings against Linkhill at the request of the CFMEU and ETU, and then knowingly submitted misleading and deceptive information to the Federal Court about the alleged 'underpayments'.** The documents also show the unapologetically pathetic responses and inaction of all of the people, officers, departments and agencies who were asked to investigate a reasonable allegation of improper and unlawful conduct by persons engaged in a Federal Statutory Authority.

Judges in the Federal Court and High Court proceedings knowingly, for differing reasons, ignored the fact that the FWBC presented a case based on false and misleading facts, as a basis for prosecuting Linkhill Pty Ltd.

The Federal Court and High Court Judges hid behind judicial and civil process to excuse themselves from inquiring into, or attending to, the issues that are the real evils within our workplace relations system and economy. They ignored the issues, such as the 'cash economy', the conduct of prosecutorial agencies, and the flagrant waste of taxpayer's money – that actually affect the many, and not just the few. This is what has to change. And it won't change by threatening higher penalties to errant employers. This will only increase the size of the 'cash economy'.

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