



September 2019

Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance

Industrial relations can play an important role in contributing to the strength of the Australian economy. Potential reform to, or changes within, the Australian industrial relations system should be measured against three criteria: driving jobs and wages growth, boosting productivity, and strengthening the economy, while ensuring protection of employees' rights.

Importantly, an effective industrial relations system should strive to achieve the best overall balance, having regard to the needs of both employees and employers, including those engaged in small business.

As recently announced, the Prime Minister has asked the Attorney-General in his capacity as Minister for Industrial Relations, to take a fresh look at the industrial relations system to identify how it is operating and where there are impediments to shared gains for employers and employees.

Request for public submissions

This paper provides background information on the current penalty framework in the *Fair Work Act 2009* (Cth) (Fair Work Act) and seeks input from the community (by way of written submissions) about the operation of the framework. Discussion questions are included to guide feedback; however, stakeholders may also provide further information and suggestions relevant to the matters discussed.

Submissions can be made to IRconsultation@ag.gov.au

The closing date for submissions is 25 October 2019.

Submissions will be made public (by being published on the Attorney-General's Department website) unless an express statement is included in the submission requesting confidentiality. If you request that your submission remain confidential, you are encouraged to consider whether the whole submission is confidential or whether some parts of the submission may be made public.

Background

Wage underpayment and employee exploitation deny employees their legal entitlements and have the further effect that there is not a level playing field for employers, such that the overwhelming majority of employers who are trying to do the right thing are competing against those that underpay or exploit workers. The Government considers it unacceptable that there is a persistence of underpayment and exploitation behaviours by a small number of employers and considers there to now be a strong case that the current penalty, compliance, and enforcement framework for breaches of the *Fair Work Act 2009* (Fair Work Act), established over a decade ago now, needs to be improved.

Many of these issues were highlighted in the Migrant Workers' Taskforce Report¹ earlier this year. The report made a number of recommendations directed at reducing employee exploitation through changes to elements of the Fair Work Act. In broad terms, those recommendations focused on:

- (i) the adequacy of the existing penalty framework
- (ii) the introduction of criminal sanctions for the most serious forms of exploitative workplace conduct
- (iii) the adequacy of compliance and enforcement tools available to workplace regulators and the courts
- (iv) mechanisms to recover unpaid wages.

This discussion paper is focussed on items (i) and (ii). A separate paper focusing on items (iii) and (iv) will be issued following the receipt of submissions on this paper.

Part I: Civil penalties in the Fair Work Act

Australian workplace laws are essentially enforced using a civil penalty regime set out in the Fair Work Act. The Fair Work Ombudsman (FWO) is the primary Australian Government agency that regulates compliance with these laws, and may pursue compliance and enforcement outcomes through various actions, including application to the courts.² The courts have access to a range of civil penalties to promote compliance and deter non-compliance with the Fair Work Act.

While the term 'wage theft' has been used as an umbrella term to describe all kinds of underpayment, it is important to note that employers who fail to comply with workplace laws generally fall into one of two distinct groups:

- employers that have made genuinely unintentional mistakes, for instance due to the complexity of the industrial relations system, which have led to miscalculations and underpayments, but are rectified once identified; and
- employers that knowingly underpay, or otherwise exploit, employees.

¹ Australian Government, [Report of the Migrant Workers' Taskforce](#), March 2019.

² Note the building and construction industry is also regulated by the *Building and Construction Industry (Improving Productivity) Act 2016*, and the Australian Building and Construction Commissioner is the regulator.

In recognition of the problem, the Government has already taken significant action to enhance protections for vulnerable workers.³

On 5 September 2017, the Parliament passed the *Fair Work (Protecting Vulnerable Workers) Act 2017* (Cth) (Protecting Vulnerable Workers Act) to amend the Fair Work Act to provide stronger penalties and FWO powers. First, the amendments increased penalties for record-keeping and payslip failures. Second, the amendments introduced a higher scale of penalties for ‘serious contraventions’ of prescribed workplace laws, being those contraventions done knowingly and as part of a systematic pattern of conduct.

These already achieved legislative changes recognised that higher penalties should be available to help effectively address a broad range of non-compliant conduct, including the most culpable forms of misconduct, such as:

- knowing underpayment of the minimum rates of pay, leave entitlements, termination, penalty rates, allowances and redundancy pay;
- unreasonable deductions or cash-back arrangements; and
- deliberate misclassification of employees.

The Government recognises the need to review the ongoing effectiveness of these changes and, as part of its response to the Migrant Workers’ Taskforce report, committed in-principle to review penalties in the Fair Work Act more broadly.

The Government also recognises the benefit of a capable and resourced regulator. To this end, the Government has invested over \$60 million in additional funding for the FWO in recent years.

Current approach to determining penalties

In 2017–18, the FWO commenced 35 proceedings in court, and secured over \$7.2 million court-ordered penalties (in addition to the recovery of the unpaid wages and entitlements). Of this, \$5.8 million was ordered against companies and \$1.4 million against individuals. A list of civil penalties for breaches of wage related provisions that are presently contained in the Fair Work Act appears at [Attachment A](#).

The Fair Work Act prescribes the maximum penalty a court can award for each contravention of a civil remedy provision. When determining the maximum penalty that can be ordered, the Fair Work Act requires a court to ‘group’ a series of contraventions of the same provision that arise out of a ‘course of conduct’.⁴ These ‘grouped’ contraventions only attract a single penalty. The courts can apply this requirement in multiple ways.

For example, if a company engages in a course of conduct that contravenes a single term of a modern award in respect of ten employees, the court can group these ten contraventions so as to attract a single penalty. The system effectively makes individual breaches concurrent, meaning that the maximum penalty that can be ordered against the company will be 300 penalty units (currently \$63,000), rather than the 3000 penalty units

³ The exploitation of vulnerable workers had been examined in a range of reports, including the Senate Education and Employment References Committee report, *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, March 2016; the FWO’s *A Report of the Fair Work Ombudsman’s Inquiry into 7-Eleven*, April 2016 and *A Report on the Fair Work Ombudsman’s Inquiry into the labour procurement arrangements of the Baiada Group in New South Wales*, June 2015; and the Productivity Commission’s *Productivity Commission Inquiry Report: Workplace Relations Framework*, No. 76, November 2015.

⁴ *Fair Work Act 2009* (Cth), subsection 557(1).

(\$630,000) that could have been awarded if the contraventions against each employee were applied separately.

Alternatively, if a company engages in a course of conduct that contravenes the same civil remedy provision ten times in respect of one employee, the court can also group these contraventions so as to attract a single penalty. The court may also apply the rule against civil double jeopardy in section 556 of the Fair Work Act.

As a matter of process, civil penalties for contraventions of the Fair Work Act are determined at the court's discretion, subject to the maximum amounts prescribed by the Fair Work Act and any grouping required under section 557. The court may take into account a very broad range of factors, including the wrongdoer's capacity to pay the penalty. For example, a penalty order that is so high that it leads to the company becoming insolvent might mean that underpaid employees are not paid their entitlements, existing employees might lose their employment, and other creditors may suffer hardship.

It is important to note that orders relating to employee entitlements will typically take priority over penalty orders. This means that any civil penalty order would usually be imposed in addition to an order relating to employee entitlements (for example, paying any unpaid wages).

Issues

The Migrant Workers' Taskforce report noted that underpayment of employees (both mistaken and rectified underpayments, and those done knowingly) is not new and has been occurring over a number of years across sectors of the Australian labour market. Case studies and inquiries undertaken by the FWO and others have increased awareness of the matter in recent times.

The Migrant Workers' Taskforce report noted that, while it had considered the extent of exploitation of migrant workers:

'Given the hidden nature of the problem it is not possible to put a firm number on it. However, given the number of case studies and other pieces of information outlined in this chapter, it is clear that a significant proportion of temporary visa holders in Australia are being exploited.'⁵

Although it does not provide a definitive figure for the extent of the problem, data presented by the FWO in its annual reports provides useful insights into the potential prevalence of the issue. In 2014–15, the FWO reported it had recovered more than \$22.3 million for 11,613 workers. In its 2017–18 annual report, the FWO reported it had recovered \$29.6 million for 13,367 workers. During the same period, it completed 28,275 disputes, and filed 35 litigations. Recent high profile examples of underpayments suggest more could be done to identify and address non-compliance with workplace laws.

In exercising its functions relating to the building and construction industry, the Australian Building and Construction Commission have recovered \$1 million worth of wages for workers.

There is an obvious balance to be struck between recognising no underpayment is trivial and that all underpayments are serious, and not being crushingly punitive in cases of genuine mistakes leading to

⁵ Australian Government, [Report of the Migrant Workers' Taskforce](#), March 2019, p. 33.

underpayment, to the extent that the penalties ruin businesses and ultimately hurt the employees they are designed to protect.

Similarly, there is a line between serious underpayments that are still appropriately dealt with in a civil law context and those most serious matters that — because of the scale, or repetitious nature, or state of knowledge — are appropriately dealt with in a criminal law context.

Reform Options

The Migrant Workers' Taskforce recommended that 'the general level of penalties for breaches of wage exploitation related provisions in the Fair Work Act be increased to be more in line with those in other business laws, especially consumer laws' (**Recommendation 5**). The Government's March 2019 response to the Taskforce report accepted this recommendation in principle.

Penalties for breaches of consumer and corporations laws have recently increased in response to stakeholder concerns.⁶ The Government introduced higher penalties for corporate and financial misconduct in the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth).⁷

The Australian Consumer Law Review⁸ found that, in the context of breaches of the Australian Consumer Law, the existing maximum penalties available were insufficient to deter non-compliant conduct that can be highly profitable. It found that some entities perceived existing penalties as 'a cost of doing business'. The judiciary had also suggested the previous maximum penalties were 'arguably inadequate' for large-sized corporations.⁹

In 2018, the structure for determining penalties for contraventions of consumer law under the *Competition and Consumer Act 2010* (Cth) (Competition and Consumer Act) added options for calculating maximum penalty amounts. Namely, three times the value of the benefit obtained from the contravention (if it can be determined) or 10 per cent of annual turnover (if the value of the benefit cannot be determined).¹⁰

Mr Rod Sims, Chair of the Australian Competition and Consumer Commission noted that the increase in penalties under the Competition and Consumer Act was 'very important' because, in his words, the regulator 'need[s] penalties that mean that when the penalty is announced, the share price takes a dip.' While there

⁶ See, for example, the [Australian Consumer Law Review Final Report](#), April 2017. See also the [Australian Securities and Investments Commission Enforcement Review Taskforce Final Report](#), provided to Government in December 2017.

⁷ These amendments increased penalties for prescribed serious offences under the *Corporations Act 2001*, *National Consumer Credit Protection Act 2009* and the *Insurance Contracts Act 1984*. For serious criminal offences in the Corporations Act, the maximum term of imprisonment was increased to 15 years, up from 5 or 10 years in limited circumstances. Pecuniary penalties for criminal offences were increased for **individuals** from 2000 penalty units (currently \$420,000) to 4500 penalty units (currently \$945,000) or three times the benefit derived from the contravention. For **bodies corporate**, new penalties of 45,000 penalty units (currently \$9.45m), three times the benefit derived from the contravention, or 10 per cent of annual turnover, were introduced. Pecuniary penalties for civil offences were increased for **individuals** from between \$10,500 and \$420,000 to the greater of 5000 penalty units (currently \$1.05m) or three times the benefit derived from the contravention. For **bodies corporate**, the increase was from between 150 penalty units (currently \$31,500) and 10,000 penalty units (currently \$2.1m), to the greater of 50,000 penalty units (currently \$10.5m) or three times the benefit derived from the contravention, or 10 per cent of annual turnover.

⁸ Australian Government, [Australian Consumer Law Review Final Report](#), April 2017.

⁹ See *ACCC v Coles Supermarkets Australia Pty Ltd*, [2014] FCA 1405 (Gordon J), at [106].

¹⁰ The *Treasury Laws Amendment (2018 Measures No. 3) Bill 2018* (Cth) increased maximum penalties in the *Competition and Consumer Act 2010* (Cth).

may be a case for inflicting ‘financial pain’ on non-compliant businesses under the Competition and Consumer Act¹¹, it is also important to maintain the courts’ discretion to determine penalties that are proportionate to the offence. This includes giving consideration to the nature and extent of the wrongdoing, whether the party that committed the contraventions has exhibited contrition, and the impact that any penalties might have on the viability of the business.

The *Taxation Administration Act 1953* (Cth) adopts an alternative approach to calculating the penalties to be applied where a taxpayer makes a false or misleading statement in their tax return that results in a shortfall in the tax paid. In addition to repaying the shortfall, the Australian Tax Office will levy a penalty calculated by reference to the degree of fault, ranging from 25 per cent of the shortfall amount (for example, failing to take reasonable care) to 75 per cent of the shortfall amount (for example, intentionally disregarding the law). These penalties can be increased or reduced if there are aggravating or mitigating circumstances.

These examples highlight that general comparisons between penalty regimes in the Fair Work Act and other legislation can be useful, but that the objectives of the relevant legislation and the kinds of behaviours and businesses they regulate can — and do — vary significantly.

In addition, it is important to consider other unintended consequences of changing the penalty structure. For example, overly prescriptive calculation methods may limit the broad discretionary powers conferred on the courts by the Fair Work Act.

Discussion questions

- What level of further increase to the existing civil penalty regime in the Fair Work Act could best generate compliance with workplace laws?
- What are some alternative ways to calculate maximum penalties? For example, by reference to business size or the size of the underpayment or some measure of culpability or fault.
- Should penalties for multiple instances of underpayment across a workforce and over time continue to be ‘grouped’ by ‘civil penalty provision’, rather than by reference to the number of affected employees, period of the underpayments, or some other measure?

Fair Work Amendment (Protecting Vulnerable Workers) Act 2017

As noted above, the Protecting Vulnerable Workers Act introduced a higher scale of penalties for ‘serious contraventions’ of prescribed workplace laws. Deliberate and systematic contraventions of these workplace laws now carry a penalty of up to \$630,000 per contravention for companies and \$126,000 per contravention for individuals, a ten-fold increase on the previous maximum penalty. Additional measures introduced through the Protecting Vulnerable Workers Act include:

- doubling of penalties for record-keeping and pay slip breaches
- extending liability to franchisors and holding companies for breaches by their networks where they knew or could reasonably be expected to have known of contraventions, and failed to take reasonable steps to address them

¹¹ Sydney Morning Herald, [‘We’re into punishment’: ACCC wants penalties with ‘financial pain’](#), 26 February 2019.

- additional evidence gathering powers for the FWO, including the power to compel witnesses to provide evidence or attend an interview
- outlawing cashback arrangements — making it unlawful for an employer to pay an employee and then make them give some, or all, of it back
- new provisions and penalties for hindering an investigation, or providing false or misleading information, documents or employment records
- a reverse onus of proof in underpayment cases, so employers that fail to keep records or issue pay slips have to disprove an allegation of underpayment.

Issues

Although the FWO has commenced court action alleging contraventions of some of these new provisions, the provisions remain relatively untested. The first decision in one of these matters was finalised in August 2019. The court awarded penalties of \$125,700 against the operators of two sushi outlets in Queensland for underpaying employees, and failing to make and keep accurate employment records.¹²

Reform options

The Government welcomes feedback on whether, and to what extent, the 2017 amendments have had an effect on behaviour, or if the amendments require further modification or more time to properly monitor their impact.

Discussion questions

- Have the amendments effected by the Protecting Vulnerable Workers Act, coupled with the FWO's education, compliance and enforcement activities, influenced employer behaviour? In what way?
- Has the new 'serious contravention' category in the Fair Work Act had, or is it likely to have, a sufficient deterrent effect?

Extending liability

As a general legal concept, a person is an accessory to an unlawful act (or omission) of another person where they participated in, but did not directly commit, the unlawful act (or omission) to such an extent that it would be appropriate to hold that person liable.

The Fair Work Act presently extends accessorial liability for contraventions of workplace laws in circumstances where a person or company is involved in that contravention but is not the principal person or company responsible for the contravention. This might occur in where they have aided, abetted, counselled or procured the contravention; induced the contravention; were knowingly concerned in the contravention or conspired with others to effect the contravention.¹³ An 'involved' person can be liable for penalties for their involvement in the contravention and, in some circumstances, for any unpaid employment entitlements.

¹² Fair Work Ombudsman, '[Sushi operators penalised \\$125,000](#)', Media Release, 21 August 2019.

¹³ *Fair Work Act 2009* (Cth), section 550.

The Protecting Vulnerable Workers Act introduced new provisions to hold franchisors and holding companies liable for breaches of workplace laws in their networks unless they can show they took reasonable steps to prevent the contraventions.¹⁴

Issues

The Migrant Workers' Taskforce argued that complex subcontracting, outsourcing, labour hire, and franchising arrangements create enforcement challenges, and that changes to the accessorial liability provisions could strengthen the FWO's ability to enforce these standards through the supply chain.

The FWO has observed that 'the most serious examples of exploitation often involve vulnerable migrant workers employed by an operator who is part of a much bigger supply chain or network'.¹⁵ Several FWO inquiries to date have uncovered serious cases of employee exploitation where corporate structures are fragmented into loosely connected networks that blur responsibility for ensuring workplace compliance.¹⁶

A number of cases have highlighted that the accessorial liability provisions in the Fair Work Act set a very high bar to prove accessory involvement. For example, the courts have interpreted the current formulation as requiring a person to have engaged in conduct that involves them in the contravention and have actual knowledge of the essential elements of the contravention before accessorial liability will be extended.¹⁷

Reform options

The Migrant Workers' Taskforce recommended that the Government consider additional avenues to hold individuals and businesses to account for their involvement in breaches of workplace laws, with specific reference to further extending these provisions to cover a broader range of business models, including where businesses contract out services to persons (**Recommendation 11**). The Government's March 2019 response to the Taskforce report accepted this recommendation in principle.

Discussion questions

- Do the existing arrangements adequately regulate the behaviour of lead firms/head contractors in relation to employees in their immediate supply chains?
- Should actual knowledge of, or knowing involvement in, a contravention of a workplace law be the decisive factor in determining whether to extend liability to another person or company? If not, what level of knowledge or involvement would be appropriate? Would recklessness constitute a fair element to an offence of this type?

¹⁴ *Fair Work Act 2009* (Cth), section 558B.

¹⁵ Fair Work Ombudsman, *Annual Report 2016/17*, p. 21.

¹⁶ See, for example, Tess Hardy and Melissa Kennedy, Submission to Western Australia Department of Mines, Industry Regulation and Safety *Inquiry into Wage Theft in Western Australia*; Fair Work Ombudsman, *A report on the Fair Work Ombudsman's Inquiry into the labour procurement arrangements of Baiada Group in New South Wales*, FWO, 2015; Fair Work Ombudsman, *An inquiry into the procurement of cleaners in Tasmanian supermarkets*, FWO, 2018; Fair Work Ombudsman, *Harvest Trail Report*, FWO, 2018; Fair Work Ombudsman, *Inquiry into the procurement of security services by local governments*, FWO, 2018; Andrew Stewart and Tess Hardy, Submission to the Senate Education and Employment References Committee *Inquiry into the Exploitation of General and Specialist Cleaners Working in Retail Chains for Contracting or Subcontracting Cleaning Companies*, p. 2.

¹⁷ *Rural Press Ltd v Australian Competition and Consumer Commission* [2002] FCAFC 213; (2002) 118 FCR 236 at [159]–[160]; *Giorgianni v The Queen* (1985) 156 CLR 473 at 506–7 by Wilson, Deane and Dawson JJ; *Construction, Forestry, Mining and Energy Union v Clarke* [2007] FCAFC 87; (2007) 164 IR 299 at [26]; *Qantas Airways Ltd v Transport Workers' Union of Australia* [2011] FCA 470; (2011) 280 ALR 503; at [324]–[325].

- What degree of control over which aspects of a business is required before a business owner should be expected to check the compliance of contractors further down the supply chain?
- What are the risks and/or benefits of further extending the accessorial liability provisions to a broader range of business models, including where businesses contract out services?

Sham contracting

Sham contracting generally refers to the unlawful practice of an employer wrongly treating someone whose relationship with the employer should properly be characterised as an employee (whether full- or part-time) as an independent contractor. The motivation for such conduct would usually be to avoid paying employee entitlements such as minimum wage, paid leave, and superannuation contributions. Employers found to have engaged in sham contracting may be penalised separately for the sham contracting and underpayment contraventions.

The sham arrangements provisions of the Fair Work Act presently provide civil penalties for conduct including:

- misrepresenting an employment relationship as an independent contracting arrangement, with a defence for those who can show that they did not know, and were not reckless about whether, the individual was an employee¹⁸
- dismissing or threatening to dismiss an employee to engage them as an independent contractor¹⁹
- knowingly making a false statement to influence an employee to become an independent contractor.²⁰

Each of these provisions attract a maximum civil penalty of 60 penalty units (currently \$12,600) for an individual and 300 penalty units (currently \$63,000) for a body corporate. These maximum penalties are consistent with other civil penalties in the Fair Work Act.

Issues

The 2017 Black Economy Taskforce Final Report noted that sham contracting arrangements are not only unfair to employees, but they also penalise employers who abide by the law (through the persistence of uneven commercial playing fields). On this point the Report stated that:

The capacity for people to abuse the system by engaging in sham contracting is unambiguously contributing to the black economy. Unscrupulous employers engaged in this practice get an unfair commercial advantage through reduced labour costs, both over law-abiding employers and those engaged in genuine independent contracting arrangements. In some circumstances, they exploit workers who have very little bargaining power, denying them their lawful workplace entitlements. More broadly, society is affected because sham arrangements facilitate tax avoidance by both employers and workers, and subvert the policy settings underpinning retirement savings.²¹

¹⁸ *Fair Work Act 2009* (Cth), section 357.

¹⁹ *Fair Work Act 2009* (Cth), section 358.

²⁰ *Fair Work Act 2009* (Cth), section 359.

²¹ Australian Government, [Black Economy Taskforce Final Report](#), October 2017, p. 231.

The incidence of sham contracting is difficult to estimate, given the likelihood that significant numbers of cases go unreported. The Black Economy Taskforce went on to state that, while it did not have specific estimates on the size of the sham contracting problem:

...our consultations suggest it may be growing and numerous examples have been brought to our attention in sectors such as IT, labour hire, courier, beauty and hairdressing, and even executive assistants, but this is an area which requires further examination.²²

Reform options

To respond to sham contracting, the Black Economy Taskforce recommended ‘tougher and more visible enforcement’, including ‘new and strengthened penalties’.²³ The Government’s May 2018 response to the taskforce agreed with this recommendation in principle. The Government subsequently provided additional funding in the 2019–20 Budget for the FWO to establish a dedicated sham contracting unit to help educate individuals about their rights and crackdown on the practice. The Government also announced a commitment to introduce tougher penalties for sham contracting contraventions.

In order to increase the deterrent effect of the sham arrangements provisions, the Black Economy Taskforce and other reviews recommended amendments to the recklessness defence in section 357 of the Fair Work Act. This provision enables employers to avoid liability under that provision if they can prove that they did not know an individual was an employee and *were not reckless* about this. It has been suggested that employers should instead be required to prove that they did not know, and *could not reasonably be expected to know*, the individual was an employee.

Discussion questions

- Should there be a separate contravention for more serious or systemic cases of sham contracting that attracts higher penalties? If so, what should this look like?
- Should the recklessness defence in subsection 357(2) of the Fair Work Act be amended? If so, how?

Part II: Criminal sanctions

Australian law draws a distinction between criminal and civil liability. Criminal sanctions are generally reserved for the most serious misconduct, with the intention of ensuring just punishment for the misconduct, protecting the community by denouncing such conduct, specifically deterring the offender from ever repeating the conduct and generally deterring others from potentially engaging in such conduct, and promoting rehabilitation of the offender.²⁴ Central to the concept of criminality are the notions of identifying the most serious types of wrongdoing, where there can be demonstrated individual culpability and the criminal intention for the wrongful actions.

A criminal offence is the ultimate sanction for breaching the law. Where criminal offences form part of a suite of enforcement options available to a regulator, they are reserved for the most serious and culpable cases of non-compliance, consistent with theories of responsive regulation and the ‘regulatory pyramid’.

²² Australian Government, [Black Economy Taskforce Final Report](#), October 2017, p. 231.

²³ Australian Government, [Black Economy Taskforce Final Report](#), October 2017, Recommendation 6.

²⁴ Australian Law Reform Commission, [Same Time, Same Crime: Sentencing of Federal Offenders \(ALRC Report 103\)](#), September 2006, p. 54.

Current approach to criminal sanctions as part of the enforcement framework

The federal workplace relations system sets out a range of civil remedies for breaches of employment standards. Some civil penalties set out in the Fair Work Act have sought to capture the deterrent and punishment objectives that have historically been reserved for criminal sanctions. For example, the ‘serious contraventions’ category in the Protecting Vulnerable Workers Act raised maximum penalty amounts to 600 penalty units for individuals (\$126,000) and 3000 penalty units for bodies corporate (\$630,000).

A small number of criminal offences are already included in the Fair Work Act but these are limited to matters such as contempt of court, and provisions which make it an offence to give, receive or solicit a corrupting benefit (for example, a bribe).²⁵ There are also criminal penalties in other legislation, whose subject matter relates to ‘work’, for instances of slavery, servitude, forced labour, deceptive recruiting and debt bondage in the Criminal Code, which is contained in the Schedule of the *Criminal Code Act 1995* (Cth).

Reform option

The Migrant Workers’ Taskforce report recommended that criminal sanctions be introduced for the ‘most serious forms of exploitative conduct, such as where that conduct is ‘clear, deliberate and systemic’ **(Recommendation 6)**. The Government’s March 2019 response to the Taskforce report accepted this recommendation in principle.

In response to the recommendation the Government has commenced work on drafting legislation to criminalise the underpayment of employees.

Adding criminal sanctions to the suite of penalties available to regulators will provide the regulators and the courts with the appropriate tools to address serious contraventions of the Fair Work Act, and send a strong and unambiguous message to employers that they cannot get away with exploiting vulnerable employees. It is equally clear that such sanctions should be reserved for the most serious and culpable forms of workplace misconduct and would not be designed to capture employers who have made inadvertent mistakes leading to underpayment.

The potential of criminal penalties for wage underpayment and employee exploitation is expected to enhance specific and general deterrence and reduce the harmful effects of this unlawful conduct.

Issues

The Government welcomes stakeholders’ views on the following general issues and specific discussion points, and any other, aspects of the criminal sanctions regime that should be considered as part of the development of the Government’s legislation giving effect to this commitment.

²⁵ These provisions were introduced to the Fair Work Act by the *Fair Work Amendment (Corrupting Benefits) Act 2017* (Cth). Under the provisions, it is a criminal offence for an employer to provide, offer or promise a cash or in kind payment to a relevant employee organisation; and for a relevant employee organisation to request, receive or agree to receive a cash or in kind payment from an employer.

Fault elements

A key consideration for introducing criminal sanctions is determining the precise level at which criminal, rather than civil, penalties are appropriate. Relevant criteria might include the nature of the conduct, the deliberateness of the conduct, the period of time over which it occurred, and whether there has been any dishonesty.

Commonwealth criminal offences are generally comprised of physical elements and fault elements. The Crown is required to prove both elements in order to establish guilt for the offence.

The physical element of an underpayment offence could, for example, relate to withholding full payment of wages that are due to an employee. The mental element of an underpayment offence could take multiple different forms. For example, liability could be attached to payments that were withheld intentionally, but could also be attached to payments that were withheld recklessly, or negligently.

The physical act of underpayment could be relatively straightforward to establish because it can be tested against the appropriate rate of payment set out in a modern award or other industrial instrument. Essentially, what would need to be established is that the worker was paid less than that rate. Proving the applicable fault element (intention, knowledge, recklessness or negligence), however, could be more complex.

Any new offence would need to be carefully framed to target only the most serious and culpable underpayment cases — rather than unintentional mistakes or miscalculations.

Attributing criminal liability

Attributing criminal liability to a corporation can be difficult, particularly in cases involving large organisations with complex corporate structures, geographically dispersed operations and diffuse management chains. It may be difficult to trace fault back to a particular individual, or leadership cohort, in such businesses.

Part 2.5 of the Criminal Code seeks to address this difficulty. Under Part 2.5, where the relevant fault element is intention, knowledge or recklessness, fault can be attributed to the company not only on the basis of the conduct of the company's leadership, but also by reference to the company's corporate culture. Intention, knowledge or reckless can be attributed to a company, for example, where the company failed to create and maintain a corporate culture that required compliance with the provision in question. Further, where the fault element is negligence, Part 2.5 allows this to be made out by aggregating the conduct of any number of the company's employees, agents or officers.²⁶

Maximum criminal penalties

Any punishment should be proportionate, reflecting the seriousness of the offending and the culpability of the offender, and punishment should be commensurate to criminal sanctions penalising other comparable forms of wrongdoing. For example:

²⁶ On 10 April 2019, the Attorney-General referred to the Australian Law Reform Commission (ALRC) for inquiry and report, pursuant to section 20(1) of the *Australian Law Reform Commission Act 1996* (Cth), a consideration of whether, and if so what, reforms are necessary or desirable to improve Australia's corporate criminal liability regime. The ALRC is due to report on 30 April 2020. See the [Review page](#) for more information.

- the ‘corrupting benefits’ provisions under the Fair Work Act, which attract criminal penalties of 10 years imprisonment or 5000 penalty units, or both for individuals, or 25,000 penalty units for a body corporate
- the model work health and safety laws, which attract a fine and/or criminal penalties of up to five years imprisonment for Category 1 offences
- general theft offences, which are typically punishable by a fine and/or between five to 10 years imprisonment, depending on the jurisdiction.

Interaction with civil ‘serious contraventions’ regime

Any new criminal offence provision would need to be framed in a manner that is proportionate to the existing ‘serious contraventions’ regime in the Fair Work Act.

Interaction with other criminal laws

A number of states have indicated their intention to consider introducing criminal sanctions for wage underpayment matters. In addition, existing state-based criminal offences may also regulate similar conduct. Consideration would need to be given to the interaction between Commonwealth and state laws.

Enforcement considerations

Criminal offences carry fault elements and a higher evidentiary burden than a similar civil contravention. This reflects the significant consequences typically attached to criminal offences and the need to provide safeguards against wrongful conviction.

The Migrant Workers’ Taskforce report noted that the *Migration Act 1958* includes a number of criminal offence provisions targeted at employers to deter and respond to illegal work. These provisions allow for a range of penalties for non-compliant employers and labour suppliers who allow illegal work, or refer a person for illegal work. Illegal work includes unlawful non-citizens working and lawful non-citizens working in breach of conditions attached to their visas.²⁷

Discussion questions:

- In what circumstances should underpayment of wages attract criminal penalties?
- What consideration/weight should be given to the whether an underpayment was part of a systematic pattern of conduct and whether it was dishonest?
- What kind of fault elements should apply?
- Should the Criminal Code [see the Schedule to the *Criminal Code Act 1995* (Cth)] be applied in relation to accessorial liability and corporate criminal responsibility?
- What should the maximum penalty be for an individual and for a body corporate?
- Are there potential unintended consequences of introducing criminal sanctions for wage underpayment? If so, how might these be avoided?
- Are there other serious types of exploitation that should also attract criminal penalties? If so, what are these and how should they be delivered?

²⁷ Australian Government, [Report of the Migrant Workers’ Taskforce](#), March 2019, pp. 68–71.

ATTACHMENT A: FWO enforcement tools and Fair Work Act penalties

Table 1: FWO enforcement tools

Enforcement tool*	Description
Compliance Notice	Requires a person to take specified action to remedy the direct effects of the identified contraventions and/or require to person to produce reasonable evidence of compliance.
Infringement Notice	Similar to an on-the-spot fine and can be issued by a FWO inspector where there is reasonable belief that a person has contravened record keeping or payslip obligations.
Enforceable Undertaking	A written undertaking given by an employer who is 'reasonably believed' to have contravened the Fair Work Act, and accepted by the FWO. Can include any agreed undertaking, such as a 'contrition payment'.
Litigation	The FWO will only commence proceedings if it considers that there is sufficient evidence to do so and it would be in the public interest.

*See the FWO 'Compliance and Enforcement Policy' for guidance on when the FWO will use a particular compliance tool.

Table 2: Penalties available in the Fair Work Act

Contravention	Current maximum penalty level (\$ per individual/ body corporate)
Record keeping failure (i.e. payslip requirements, timesheet)	Infringement Notice issued by a FWO inspector of <ul style="list-style-type: none"> • 1260/6300 for a contravention of the Fair Work Act • 420 for a contravention of the Fair Work Regulations
	<ul style="list-style-type: none"> • 12,600/63,000 for a contravention • 126,00/630,000 for a serious contravention
Underpayment (i.e. base rates, overtime, penalty rates)	<ul style="list-style-type: none"> • 12,600/63,000 for a contravention • 126,000/630,000 for a serious contravention
Failure to pay an employee with correct method or frequency	<ul style="list-style-type: none"> • 12,600/63,000 for a contravention • 126,000/630,000 for a serious contravention
Unreasonable requirements to spend or pay amount ('Cash-back arrangements')	<ul style="list-style-type: none"> • 12,600/63,000 for a contravention • 126,000/630,000 for a serious contravention

Contravention	Current maximum penalty level (\$ per individual/ body corporate)
Hindering or obstructing the FWO and inspectors etc.	12,600/63,000
Failure for a person to provide a FWO inspector with the person's name or address if requested	6300/31,500
Providing false or misleading documents to the FWO	12,600/63,000
Failure to comply with an Enforceable Undertaking	A court can make an order to: <ul style="list-style-type: none"> • direct a person to comply with the undertaking • award compensation for loss that a person has suffered because of the contravention; or • any other order that the court considers appropriate.
Failure to comply with Compliance Notice	6300/31,500
Failure to comply with notice to produce records or documents to a Fair Work Inspector	12,600/63,000
Failure to comply with FWO Notice (compelling a person to provide information, produce documents, or attend and answer questions)	126,000/630,000