Ai GROUP SUBMISSION

Australian Government
Attorney-General's Department

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

25 October 2019

About Australian Industry Group

The Australian Industry Group (Ai Group) is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing, engineering, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, defence, mining equipment and supplies, airlines, health, community services and other industries. The businesses which we represent employ more than one million people. Ai Group members operate small, medium and large businesses across a range of industries. Ai Group is closely affiliated with many other employer groups and directly manages a number of those organisations.

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Introduction

The Australian Industry Group (**Ai Group**) welcomes the opportunity to make a submission in response to the Attorney-General's Department discussion paper on *Improving protections of employees' wages and entitlements: Strengthening penalties for non-compliance* (**Discussion Paper**). The Discussion Paper invites input on the penalty framework in the *Fair Work Act 2009* (Cth) (**FW Act**).

Ai Group supports and encourages lawful workplace practices by all parties and does not support any deliberate underpayment of wages or other entitlements. Most businesses devote substantial time and resources to ensuring that they pay their employees correctly.

Ai Group agrees with the important distinction made in the Discussion Paper between employers that have made genuine mistakes which have led to miscalculations and underpayments, and employers that deliberately underpay their employees. Many instances of incorrect payment are a result of misunderstanding or error. Employers should not be at risk of being labelled a 'thief' for such mistakes.

This submission argues that:

1. Given that the Protecting Vulnerable Workers Amendments to the FW Act, which increased penalties by up to 20 times, have only been in place for two years, there is inadequate evidence at this early stage to conclude that the measures will not be effective in addressing underpayments. The Australian Government has made it clear that any changes to Australia's workplace relations system should be evidence-based.

2. Over the past 12 months there has been a substantial increase in the number of underpayments self-reported to the FWO and remedied by employers. As acknowledged in the FWO's 2018-19 annual report, this development suggests that 'compliance and enforcement activities are creating the desired effect'.[1]

3. Ai Group opposes any disturbance to the existing accessorial liability provisions in the FW Act. These provisions are working effectively and as intended. Lowering the test to one of 'recklessness' rather than actual knowledge, would be unfair given the extreme complexity of Australia's workplace relations system, with thousands of pages of relevant legislation, regulations and award provisions. It is very challenging for large businesses and HR professionals to successfully navigate the workplace relations system, and even more challenging for SMEs.

4. There are many legitimate reasons why businesses engage in outsourcing and subcontracting. There would be many adverse consequences of imposing liabilities on businesses for underpayments of other businesses that they have outsourced or subcontracted work to. This proposal would operate as a major barrier to the restructuring

[1] Page 2.

of businesses and would impede productivity and competitiveness. It would also operate as a barrier to investment in Australia. More businesses would be driven offshore or wound up, and more jobs would be lost.

5. Ai Group strongly opposes the introduction of criminal penalties for wage underpayments. While at first glance, the introduction of criminal penalties for underpayments might seem like a good idea, there are many reasons why this is not in anyone's interests and needs to be rejected, including:

    a. Implementing criminal penalties for wage underpayments would discourage investment, entrepreneurship and employment growth;

    b. Exposing directors and managers of businesses to criminal penalties would operate as a major barrier to employers self-disclosing underpayments to the FWO; and

    c. Importantly, a criminal case would not deliver any back-pay to an underpaid worker. While a criminal case is underway, any civil case to recoup unpaid amounts would no doubt be put on hold by the Court until the criminal case is concluded. This means that underpaid workers could be waiting years for redress.

Part I: Civil Penalties in the Fair Work Act

Current approach to determining penalties

The FW Act exposes employers to substantial penalties for breaching civil remedy provisions, including those relating to minimum rates of pay and the National Employment Standards. Failure to pay employees correctly can result in a corporation receiving a penalty of up to $63,000. Further, the *Fair Work (Protecting Vulnerable Workers) Act 2017* (Cth) (**Protecting Vulnerable Workers Amendments)** amended the FW Act to introduce the concept of a 'serious contravention' of a workplace law. This applies where there is a 'knowing' contravention or the contravention formed part of a systematic pattern of conduct involving one or more persons. In such a case, the maximum penalties rise to $630,000 for a corporation. The amendments also gave the Fair Work Ombudsman (**FWO**) stronger powers to collect evidence in investigations.

Workers who believe that they have not received their correct entitlements under the FW Act have a number of options to achieve redress. Applications may be made to the Industrial Magistrates Courts, the Federal Circuit Court or the Federal Court of Australia. The Fair Work Commission also has a role in settling disputes about entitlements.

The FWO has the role of monitoring compliance with, and investigating breaches of, the FW Act and fair work instruments (including modern awards and enterprise agreements). The FWO is a very well-resourced and effective regulator.

The Migrant Workers' Taskforce

The Final Report of the Migrant Workers' Taskforce (**Migrant Workers' Taskforce Report**), chaired by Professor Allan Fels, made recommendations which included the following:

> **Recommendation 5**
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> It is recommended that the general level of penalties for breaches of wage exploitation related provisions in the *Fair Work Act 2009* be increased to be more in line with those applicable in other business laws, especially consumer laws.
>
> **Recommendation 6**
>
> It is recommended that for the most serious forms of exploitative conduct, such as where that conduct is clear, deliberate and systemic, criminal sanctions be introduced in the most appropriate legislative vehicle.
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> **Recommendation 11**
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> It is 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:
>
> a) extending accessorial liability provisions of the *Fair Work Act 2009* to also cover situations where businesses contract out services to persons, building on existing provisions relating to franchisors and holding companies
>
> b) amending the *Fair Work Act 2009* to provide that the Fair Work Ombudsman can enter into compliance partnership deeds and that they are transparent to the public, subject to relevant considerations such as issues of commercial in confidence.
>
> **Recommendation 22**
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> It is recommended that the Government give a greater priority to build an evidence base and focus its existing research capacity within the Department of Jobs and Small Business on areas affecting migrant workers. It should do this to better understand the extent, nature and causes of any underpayment and exploitation migrant workers may experience. The department should work across departments where appropriate.

The Australian Government's response to the Migrant Workers' Taskforce Report accepted 'in principle' the 22 recommendations in the report.

In response to the release of the Migrant Workers' Taskforce Report, Ai Group released the following statement on 7 March 2019:

Migrant Workers' Taskforce recommendations are a mixed bag

The Migrant Workers' Taskforce Report contains many sensible recommendations that industry can readily support. However, a number of the recommendations would have adverse consequences for the community and should not be implemented. It is important that any proposed legislative amendments are very carefully considered before implementation.

The Taskforce has sensibly recommended a number of measures aimed at ensuring that employers and employees better understand their rights and obligations. The Taskforce has also focussed on the need for increased resources for the Fair Work Ombudsman and further research into the extent, nature and causes of underpayments.

The Taskforce's recommendation that criminal penalties be implemented for serious and deliberate breaches of workplace laws should not be implemented. While at first glance, this might seem like a good idea, there are many reasons why this is not in anyone's interests:

- Penalties for breaches of industrial laws were recently increased by up to 20 times and this already provides an effective deterrent.
- Implementing criminal penalties for wage underpayments would discourage investment, entrepreneurship and employment growth.
- Importantly, a criminal case would not deliver any back-pay to an underpaid worker. Where a criminal case is underway, any civil case to recoup unpaid amounts would be put on hold by the Court until the criminal case is concluded. This means that underpaid workers could be waiting years for back-pay.

The extension of the accessorial liability provisions of the Fair Work Act for businesses which contract out services is also problematic. Outsourcing is a legitimate and important way for businesses to remain competitive and to continue to employ Australian workers. The existing accessorial liability provisions already provide strong protections for workers and impose liabilities on businesses and people that are knowingly concerned in any breaches of the law by other businesses.

The idea of a national labour hire licensing scheme for certain industries only has merit if the State labour hire licensing schemes in Victoria, Queensland and South Australia are abolished. Otherwise, a national licensing scheme would simply impose an even more unreasonable cost and onerous regulatory burden on labour hire businesses and their clients.

We welcome the Australian Government's commitment to consult thoroughly with industry groups and other stakeholders about the Taskforce's recommendations, and Ai Group looks forward to participating in this process.

Ai Group's views on the recommendations of the Migrant Workers' Taskforce remain as set out above.

The Protecting Vulnerable Workers Amendments, and the lack of evidence that higher penalties are needed

The Protecting Vulnerable Workers Amendments increased maximum penalties under the FW Act for underpayments by 10 times and for breaches of the pay record requirements by 20 times. The increases applied from 15 September 2017.

The Migrant Workers' Taskforce was established in 2016. The main Stakeholder Roundtables that the Taskforce conducted took place in July 2017. Notably, this was prior to the implementation of the Protecting Vulnerable Workers Amendments.

The Australian Government has made it clear that any changes to Australia's workplace relations system should be evidence-based. Given that the Protecting Vulnerable Workers Amendments have only been in place for two years, there is inadequate evidence at this early stage to conclude that the measures will not be effective in addressing underpayments.

Over the past 12 months there has been a substantial increase in the number of underpayments self-reported to the FWO and remedied by employers. As acknowledged in the FWO's 2018-19 annual report, this development suggests that 'compliance and enforcement activities are creating the desired effect'.[2]

The Migrant Workers' Taskforce recommended that the Australian Government 'give a greater priority to build an evidence base… to better understand the extent, nature and causes'[3] of underpayments. In making this recommendation, the Taskforce is acknowledging that the current evidence base is inadequate.

In building an evidence base, the Government should inquire into the regularity with which the current maximum penalties in the FW Act are being imposed. If Judges are regularly awarding the maximum penalties for breaches of workplace laws this may provide an indication that higher penalties are warranted. However, this does not appear to be the case.

Higher penalties would increase inconsistencies with State and Territory laws

Despite the implementation of a national workplace relations system in 2006, underpinned by the Corporations Power in the Constitution, hundreds of thousands of employees are still covered by State and Territory workplace relations laws.

The current maximum penalties under the FW Act already dwarf those under State and Territory industrial laws, as highlighted in the following table. Increasing penalties under the FW Act would increase the level of inconsistency, and lead to more unfairness for employers covered by the national workplace relations system.

[2] Page 2.

[3] Recommendation 22.

State or Territory Legislation	Penalty Provision	Maximum Penalty
Industrial Relations Act 1996 (NSW)	s. 357 - Civil penalty for breach of industrial instruments	$10,000
Industrial Relations Act 2016 (Qld)	Sch 3 / s.151 – Contravention of modern awards	135 Penalty Units - $18,015.75 (Corporation)
Fair Work Act 1994 (SA)	s.224 – Non-Compliance with Awards and Enterprise Agreements	$2,500
Industrial Relations Act 1979 (WA)	s.83(2) – Enforcing awards etc.	$2,000
Industrial Relations Act 1984 (Tas)	s.48 – Breach of awards and enterprise agreements	50 penalty units - $8,400

Grouping provisions

The Discussion Paper canvasses whether any amendments should be made to the 'grouping' of contraventions into a course of conduct pursuant to s.557 of the FW Act. Ai Group is of the view that changes in this area are not warranted and that the existing provisions need to be retained.

Predecessor provisions to s.557 of the FW Act can be traced back to s.119(1A) of the *Conciliation and Arbitration Act 1904* (Cth). Similar provisions were included in the *Industrial Relations Act 1988* (Cth) (s.178(2)) and the *Workplace Relations Act 1996* (Cth) (s.719(2)).

The intent of s.557 derives from the common law 'course of conduct principle' which prevents a defendant from being punished twice for the same act. Bromwich J made the following comments in *Fair Work Ombudsman v Lohr* which highlights the well-developed concepts that underpin s.557:[4]

> "The object and purpose of provisions such as s 557 and its predecessor provisions is to ensure that an "offender is not punished twice for what is essentially the same criminality". When considering the principles to be applied when imposing a penalty for contraventions of the *Building and Construction Industry Improvement Act 2005* (Cth) Middleton and Gordon JJ in *Construction, Forestry, Mining and Energy Union v Cahil*l [2010] FCAFC 39, (2010) 269 ALR 1 stated the issue to be resolved in that appeal as follows:
>
> > [35] The appellants submitted that the sentencing discretion miscarried because her Honour failed to consider a relevant matter (whether the three contraventions ought properly be seen as arising out of the one course of conduct) or because her Honour misdirected herself in the application of the "one course of conduct" or the "one transaction" principle...

[4] *Fair Work Ombudsman v Lohr* [2018] FCA 5, [18].

In resolving that argument, their Honours concluded:

> [39] As the passages in *Construction, Forestry, Mining and Energy Union v Williams* [2009] FCAFC 171; (2009) 191 IR 445 explain, a "course of conduct" or the "one transaction principle" is not a concept peculiar to the industrial context. It is a concept which arises in the criminal context generally and one which may be relevant to the proper exercise of the sentencing discretion. The principle recognises that where there is an interrelationship between the legal and factual elements of two or more offences for which an offender has been charged, care must be taken to ensure that the offender is not punished twice for what is essentially the same criminality. That requires careful identification of what is "the same criminality", and that is necessarily a factually specific enquiry. Bare identity of motive for commission of separate offences will seldom suffice to establish the same criminality in separate and distinct offending acts or omissions. ..."

Extending liability

The Discussion Paper refers to 'enforcement challenges' raised in the Migrant Workers' Taskforce Report as a result of 'complex subcontracting, outsourcing, labour hire and franchising arrangements'. Various options are put forward in the Discussion Paper for addressing these matters, including altering the threshold required to find accessorial liability under s.550 of the FW Act and extending liability for breaches of workplace laws further into the supply chain.

Ai Group opposes any disturbance to the existing accessorial liability provisions. These provisions are working effectively and as intended.

Subsection 550(1) of the FW Act states that a person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision. Subsection 550(2) of the Act limits 'involvement in' a contravention to circumstances where the person:

(a) has aided, abetted, counselled or procured the contravention; or

(b) has induced the contravention, whether by threats or promises or otherwise; or

(c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or

(d) has conspired with others to effect the contravention

The wide variety of actions potentially caught by s.550 is underlined by the capacity for liability to arise where a party is 'indirectly knowingly concerned in or party to a contravention'.

The breadth of s.550 is highlighted by the decision of the Full Court of the Federal Court in *EZY Accounting 123 Pty Ltd v Fair Work Ombudsman*.[5] The Court held that an accounting firm was 'knowingly concerned' in the underpayments of a client's business.[6]

The breadth of s.550 is also highlighted by the decision of the Federal Court in *FWO v Oz Staff Career Services Pty Ltd & Ors (No.2)*.[7] In this case, the Federal Court held that a HR Manager employed by a labour hire agency (supplying casual cleaners to Crown Casino and Federation Square) was an accessory to the company's breach of the FW Act.

The statutory provisions regarding 'involvement' in a contravention draw an appropriate line for accessorial liability. Willful blindness to a contravention has been treated as equivalent to knowledge of it.[8]

A requirement for knowledge of the essential elements of a contravention of the FW Act protects potential accessories from liability where they could not have understood that their actions would result in a contravention of the Act.

A lower threshold would lead to unfair outcomes for individuals and businesses. For example, if the requisite test was one of 'recklessness' rather than knowledge, this would be very unfair given the extreme complexity of Australia's workplace relations system, with thousands of pages of relevant legislation, regulations and award provisions. It is very challenging for large businesses and HR professionals to successfully navigate the workplace relations system, and even more challenging for SMEs.

There are many legitimate reasons why businesses engage in outsourcing and subcontracting. There would be many adverse consequences of imposing liabilities on businesses for underpayments of other businesses that they have outsourced or subcontracted work to. This proposal would operate as a major barrier to the restructuring of businesses and would impede productivity and competitiveness. It would also operate as a barrier to investment in Australia. More businesses would be driven offshore or wound up, and more jobs would be lost.

Any further extension of accessorial liability into supply chains would ignore the justification for making franchisors and holding companies liable for underpayments by their franchisees and subsidiaries, in certain circumstances, under the Protecting Vulnerable Workers Amendments. The Amendments responded to perceived special conditions applicable to franchising and subsidiary arrangements as identified in the explanatory memorandum:[9]

[5] [2018] FCAFC 134.

[6] *EZY Accounting 123 Pty Ltd v Fair Work Ombudsman* [2018] FCAFC 134, [33] – [34].

[7] *FWO v Oz Staff Career Services Pty Ltd & Ors (No.2)* [2016] FCCA 2594

[8] *Australian Competition & Consumer Commission v IMB Group Pty Ltd* [2003] FCAFC 17 at [135]; *Martin v Repeller Nominees Pty Ltd & Ors (No.2)* [2019] FCCA 2102, [285].

[9] Explanatory Memorandum, *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017*

> The provisions only apply to responsible franchisor entities which have a significant degree of influence or control over the relevant franchisee's affairs. By definition, holding companies have control over the affairs of their subsidiaries. Control relates to the affairs of the franchisee or subsidiary broadly, not only as to minor matters that would not have any impact on the management and operational decisions of the business.

The Migrant Workers' Taskforce Report refers to the 2012 amendments to the FW Act which enable contract outworkers in the textile, clothing and footwear industry to recover unpaid amounts from contractors along the supply chain. These amendments do not provide any justification for the recommendation in the Report. The 2012 amendments were intended to enhance existing protections available under the FW Act for a very small section of the workforce that was considered particularly at risk as a result of the nature of their engagement. The explanatory memorandum to the Bill stated (emphasis added):

> Research has consistently shown that outworkers in the TCF industry suffer from unique vulnerabilities as a result of their engagement or employment in non-business premises. These vulnerabilities are often exacerbated by poor English language skills, a lack of knowledge about the Australian legal system and low levels of union membership in the industry.

There is inadequate evidence at this early stage to assess the impact of the 2017 extension of the accessorial liability arrangements in the FW Act, through the Protecting Vulnerable Workers Amendments. Therefore, any further extension is not justified.

Sham contracting

The Discussion Paper posits a separate contravention for more serious or systemic cases of sham contracting, attracting a higher penalty. It also considers whether the recklessness defence in s.357(2) of the FW Act should be amended. These ideas derive from recommendations made in the Black Economy Taskforce Final Report (**Black Economy Report**) to amend the sham contracting penalty provisions as proposed in the Productivity Commission's 2015 Inquiry Report into the Workplace Relations Framework (**Productivity Commission Review**).

The Productivity Commission Review recommended that the Australian Government introduce amendments to the FW Act to make it unlawful to misrepresent an employment relationship or a proposed employment relationship as an independent contracting arrangement (under s.357) where the employer 'could be reasonably expected to know otherwise'.[10]

At the present time, there is insufficient data on the extent of 'sham contracting' arrangements to warrant increasing penalties for breaches of the relevant provisions of the FW Act. The Black Economy Report states that the Taskforce was not in possession of specific estimates on the size of the 'sham contracting problem' and that it had only received anecdotal evidence. The Report acknowledges that this area requires further examination.

[10] Productivity Commission 2015, *Workplace Relations Framework*, *Final Report*, Canberra p 815.

The Australian Government has made it clear that any changes to Australia's workplace relations system should be evidence-based. There is inadequate evidence at the current time about the incidence of sham contracting and whether there are any deficiencies in the existing sham contracting provisions of the FW Act.

In the 2019-20 Federal Budget an extra $9.2 million over four years was provided to the FWO to enable it to establish a dedicated Sham Contracting Unit. Once the Unit has been in operation for a reasonable time, more information will no doubt be available on the incidence of sham contracting and how the existing sham contracting provisions of the FW Act are working in practice.

With regard to the current maximum penalties in the FW Act for sham contracting, it is important to bear in mind that the relevant provisions are part of the General Protections in the Act. Under the General Protections, unlimited compensation can be awarded for breaches. Therefore, it is inappropriate to simply consider the civil penalties in isolation when assessing the appropriateness of the existing penalties.

With regard to whether the current recklessness defence in s.357(2) of the FW Act should be amended to a test of 'reasonableness', in Ai Group's view, such an amendment is not warranted.

Since the Productivity Commission made its recommendation, the test in s.357(2) has been clarified by the Federal Court. In *Fair Work Ombudsman v Ecosway Pty Ltd*,[11] White J considered in detail the judicial treatment of the concept of 'recklessness' and concluded that the concept already includes an objective element:

> [198] In my opinion, construing the word "reckless" in s 357(2) as including an objective element is consistent with the purpose for which the provision was enacted.
>
> [199] Accordingly, I consider that employers seeking to discharge the s 357(2) onus must prove that they did not know that the contract was a contract of employment rather than a contract for services and further that, in the circumstances known to them at the time they made the misrepresentation, they could not reasonably be expected to have known that the contract may be a contract of employment. That is the approach which I will apply in this case.

The recklessness test in s.357(2) of the FW Act should not be amended unless there is a demonstrable need to do so. Given the clearer light that has been shed on the meaning of 'reckless' as a result of White J's judgment in *Fair Work Ombudsman v Ecosway Pty Ltd*, the amendment to s.357(2) proposed in the Productivity Commission Review and in the Black Economy Report is unwarranted.

[11] [2016] FCA 296. This decision is referred to on page 15 of the Consultation Paper.

Part II: Criminal sanctions

Part II of the Discussion Paper canvasses whether criminal penalties should be introduced for the *'most serious forms of exploitative conduct, such as where that conduct is clear, deliberate and systemic'*, as recommended by the Migrant Workers' Taskforce.[12]

Ai Group strongly opposes the introduction of criminal penalties for wage underpayments.

While at first glance, the introduction of criminal penalties for underpayments that are serious and deliberate might seem like a good idea, there are many reasons why this is not in anyone's interests.

Implementing criminal penalties for wage underpayments would discourage investment, entrepreneurship and employment growth.

Exposing directors and managers of businesses to criminal penalties would operate as a major barrier to employers self-disclosing underpayments to the FWO and undo the positive developments that have been taking place in this area, as discussed in Part I of this submission.

Importantly, a criminal case would not deliver any back-pay to an underpaid worker. Where a criminal case is underway, any civil case to recoup unpaid amounts would no doubt be put on hold by the Court until the criminal case is concluded. This means that underpaid workers could be waiting years for redress.

The treatment of underpayments of wages and entitlements as a criminal offence is incongruous with the history of workplace relations in Australia and harmful to the 'balanced framework for cooperative and productive workplace relations'[13] the FW Act aims to establish.

Under Australia's extremely complex workplace relations system, it is incumbent on employers to navigate 122 Federal industry and occupational awards, the lengthy and complex FW Act, State and Territory legislation governing long service leave and, depending on the organisation, an intricate web of common law contracts and policies.

For those employers covered by one or more awards, it is worth noting that the FWC's current 4 Yearly Review of Modern Awards has uncovered countless competing interpretations of award terms, including coverage terms and provisions relating to penalties and allowances. Many employers, particularly SMEs, lack dedicated human resources personnel to assist in ensuring that each employee is paid correctly. Most businesses devote substantial time and resources to ensuring that they pay their employees correctly.

Many underpayments are the result of genuine misunderstandings and payroll errors. Even businesses that promote themselves on the basis of a social conscience agenda and/or with being closely aligned with unions, have been identified as making very large underpayments to

[12] Recommendation 6.

[13] Section 3 of the FW Act.

employees, allegedly due to errors or misunderstandings of legal entitlements (e.g. Lush Cosmetics and Maurice Blackburn Lawyers).

In January 2019, the ABC apologised after admitting that it had underpaid up to 2,500 casual staff.

As explained in Part I of this submission, the existing system of civil penalties for underpayments is appropriate. The Protecting Vulnerable Workers Amendments to the FW Act, which increased penalties by up to 20 times, have only been in place for two years, and there is inadequate evidence at this early stage to conclude that the measures will not be effective in addressing underpayments. The Australian Government has made it clear that any changes to Australia's workplace relations system should be evidence-based and there is insufficient evidence at this stage that any changes to penalties are warranted.

The concept of 'wage theft'

Various inquiries initiated by State Labor Governments have proposed criminalising underpayments and have widely used the term 'wage theft'. This is an inappropriate, misleading and overly emotive term which is leading to some employers being branded as thieves as a result of underpayments which were the result of genuine payroll errors. Such a label is inappropriate for use in the context of underpayments.

As the Discussion Paper acknowledges, the phrase has been used as an 'umbrella term' to describe all kinds of underpayment which may fall into the category of unintentional mistakes or deliberate contraventions.

Most ordinary people equate 'theft' with the taking of a 'thing' with knowledge that the object taken rightfully belongs to someone else. To break down this necessary distinction between the civil and criminal legal systems would be a retrograde measure, returning the civil law system to a bygone era where a party could be arrested and imprisoned for failure to pay a debt. In a 1969 report on Supreme Court procedure, the NSW Law Reform Commission made the following comment regarding 'arrest and attachment of the person' for enforcement of an order for the payment of money:

> Imprisonment for debt is the survival of an archaic procedure and we think that it has no place in a modern system.

Exposing an employer to imprisonment for non-payment of a debt to an employee constitutes a regressive development in the system of workplace relations reversing more than a century of modernisation since the abolition of debtors' prisons in the middle of the nineteenth century.

Criminal legislation already contains penalties which deal with 'theft'. For example, section 131.1 of the *Criminal Code Act 1995* (Cth) requires dishonest appropriation of property belonging to another with the intention of permanently depriving the other of that property in order for the meaning of the term to be satisfied. It is inappropriate to disturb an existing legal framework by extending the concept of 'theft' beyond its current definition.

Section 571 of the FW Act prohibits a Court from ordering a person to serve a sentence of imprisonment if the person fails to pay a pecuniary penalty imposed by the Act. It would be incongruous for the Australian Government to introduce criminal penalties, including imprisonment, for underpayments.

If, despite Ai Group's strong opposition, criminal penalties are introduced, the penalties must only apply to very serious, deliberate and repeated conduct

If the Australian Government is determined to introduce criminal penalties for certain conduct relating to wage underpayments, despite Ai Group's strong opposition, the penalties should only apply to very serious, deliberate and repeated conduct by a natural person.

Given that the FWO, employees and employee representatives have ready access to civil remedies, if criminal penalties are to apply, they should be limited to circumstances where a Court orders a natural person to remedy an underpayment and the natural person deliberately does not comply with the Court order.

If the Australian Government decides that criminal penalties should be extended beyond the above circumstance, criminal penalties should be limited to actions by a natural person:

- Where he or she **knows that the conduct is unlawful**; and
- The conduct is **deliberate**; and
- The conduct is **serious**; and
- The conduct is **repeated**.

Imposing criminal penalties for 'reckless' conduct or exposing directors or managers to potential imprisonment if they fail to implement the necessary systems to ensure compliance would be extremely harsh and inappropriate. This is particularly so given the complexity of Australia's workplace relations system.

Implementing criminal penalties for underpayments is not in anyone's interests. The idea needs to be rejected.

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