

**23rd October 2019**

**Attorney-General’s Department**

**Industrial Relations Consultation**

IRconsultation@ag.gov.au

**AACS SUBMISSION: WAGE THEFT CRIMINALISATION**

To whom it may concern,

On behalf of members of the Australasian Association of Convenience Stores (AACS), the peak body for the convenience industry in Australia, we make the following submission to the Industrial Relations Consultation in relation to the Discussion Paper *Improving protections of employees’ wages and entitlements: strengthening penalties for non-compliance*.

The issue of wage theft is extremely serious. As a deterrent, the AACS supports the premise that employers who deliberately and knowingly underpay their staff are guilty of a criminal offence.

The key point here is, as acknowledged by the Government, whether the underpayment of staff is the result of a deliberate action or genuine oversight, on account of potentially confusing industrial relations requirements.

We understand the Government considers the current environment to be appropriate to seek a review of the penalty, compliance and enforcement framework for breaches of the Fair Work Act 2009.

While we agree with Government’s assessment that legislation enacted a decade ago should be subject to timely review, the AACS wishes to caution against the imposition of additional regulations and unnecessary red tape on small businesses, which invariably feel the significance of new regulations with greater force than the major chains.

One critical point we wish to emphasise, with many of our members operating franchise or licensed networks, is that it is highly inappropriate and frankly absurd that franchisors should in any way be held responsible for the decision by individual franchisees in their network to underpay their staff on purpose (while of course noting franchisors’ obligations to take reasonable steps to ensure underpayments by franchisees are not occurring).

In fact, we believe franchisors should have more immediate powers to terminate franchisee agreements in these instances, as such behaviour is clearly unacceptable, and the AACS recently made a submission to the Franchising Taskforce along these lines.

Any change to the Fair Work Act has significant implications for the convenience industry, which is largely comprised of small businesses operating under franchise or licence agreements, or independent brands.

As the representative body for these businesses, the AACS welcomes the opportunity to be involved in this consultation as it progresses.

Thank you for your consideration of our submission. Don’t hesitate to contact me should you require further information.

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**About the AACS**

Established in 1990, the Australasian Association of Convenience Stores (AACS) is the peak body for the convenience industry in Australia.

Nationally, our industry employs over 40,000 people in over 6,500 stores. The majority of these stores operate as family run businesses, often under licence or franchise agreement, or independent ownership. They regularly employ family members and people from the local communities in which they operate.

The AACS represents the interests of these small businesses; their owners, staff, suppliers and customers.

The convenience industry in Australia was valued at approximately $8.6 billion in merchandise sales in 2018 excluding petrol, according to companies contributing to the *2018 AACS Annual State of the Industry Report*. This report contains the most comprehensive information available on the convenience industry in Australia and we would be happy to provide a copy.

As an Association we enjoy strong ties with our international counterparts including the convenience stores associations in the US, Canada, the UK and New Zealand. We also visit similar stores in South East Asia to keep abreast of changing and emerging trends.

**Disclaimer**

The AACS has a broad membership comprising a variety of company sizes and structures which represent the diverse nature of the convenience sector. While our submissions always seek to represent the views presented by our members, we acknowledge that this is not always possible given a diverse membership and as such we would note that some members may not hold the same views as those expressed within this submission.

**Response to select questions in the Discussion Paper**

In this section, the AACS responds to select questions posed in the Discussion Paper.

**What level of further increase to the existing civil penalty regime in the Fair Work Act could best generate compliance with workplace laws?**

The AACS supports the implementation of a tiered penalty system, to consider all instances of wage theft, from inadvertent through to intentional. Civil penalties are appropriate where wage theft is inadvertent. However, civil penalties are required to be sufficient to deter wage theft and encourage employers to receive appropriate advice to ensure compliance with the National Employment Standards and relevant modern awards.

Currently, workplace laws including the Fair Work Act prescribe maximum civil penalties that can be awarded against companies and individuals. The current laws provide for grouping provisions for a court to ‘group’ penalties where a series of contraventions stem from the same course of action, including where a single contravention occurs in respect of multiple employees, or where multiple offences occur in respect of a single employee. Grouped contraventions then attract a single penalty, where the penalty is imposed concurrently, rather than one penalty per offence.

Penalties range between 60 and 600 penalty units for contraventions. The way the system is currently determined, a business may only be liable for a single penalty despite a contravention that affects numerous employees. The result of this is that deterrence of the civil penalties may be lessened, where a single contravention for multiple employees or multiple contraventions for a single employee will attract a lower penalty.

While the Fair Work Act provides for maximum penalties, civil penalties are at the discretion of the court. This court is also able to take into consideration a range of other factors, including the wrongdoer’s capacity to pay the penalty.

Providing the court with discretion on whether or not to group courses of conduct for the purpose of determining penalties, may be one way to improve the deterrence of wage theft. It would also allow for the court to impose multiple penalties for a single contravention for multiple employees where the culpability of the wrongdoer was higher.

**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.**

Currently, the workplace laws prescribe a maximum civil penalty and then the court has discretion on how to apply the penalty. A system which provided the court for discretion not to group penalties where the culpability of the wrongdoer was higher, provides a system that ties the penalty to the culpability of the employer, without radically changing the current penalty system.

The AACS supports the tying of civil penalties to the culpability or fault of the employer. However, the court needs to retain discretion in the levying of penalties. A penalty order so high that it leads to the employer becoming insolvent might mean that underpaid employees are not paid their entitlements, existing employees might lose their employment, and other creditors may suffer hardship. This can be counteracted by allowing the court to take into account the capacity of the employer to meet the penalty, as is currently the situation.

Merely tying the penalty to the size of the employer may not achieve the intended aim. The size of the employer is not necessarily indicative of the employer’s capacity to meet the penalty. Rather if this matter is left discretionary, the court can look at the individual financial circumstances of the wrongdoer to determine the appropriate penalty.

**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?**

As stated above, the AACS recommends that grouping of penalties remain, particularly in cases of genuine mistakes leading to underpayment.

However, if the court was provided with the ability to levy individual penalties for a course of conduct where the breaches are intentional, the appropriate penalty can be levied commensurate to the offending. Currently, grouping of courses of conduct may result in a lesser penalty being levied for extremely serious or intentional conduct.

The AACS also supports the criminalisation of wage theft where there is evidence the behaviour is known, intentional or systemic.

**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?**

The AACS does not have any data to determine whether the recent changes have affected employer behaviour. However, the recent Government and media focus wage theft and employee underpayment is likely to have a positive impact on employer compliance.

It is important that in addition to the penalties available to be levied on employers, that franchise arrangements contain appropriate measures to deal with wage theft.

Where employees can be additionally protected by the strengthening of underpayment laws and the criminalisation of wage theft, protections also need to be in place for franchisors to protect their networks and discourage underpayment by franchisees.

Franchisors should have the ability to terminate franchise agreements where franchisees are found to have seriously breached the Fair Work Act or other workplace instruments. This would have a dual purpose of discouraging underpayment by franchisees and providing public denouncement of wage theft.

This would also protect the franchisor’s brand and the investments of other franchisees in the network.

**Has the new ‘serious contravention’ category in the Fair Work Act had, or is it likely to have, a sufficient deterrent effect?**

We note that the introduction of serious contravention provisions provides that a contravention of a civil penalty provision is a serious contravention where a person knowingly contravenes a provision and the conduct was part of a systemic pattern of conduct relating to one or more persons.

This has the effect of increasing maximum penalties where a contravention is determined to be serious. The maximum penalty for the serious contravention is ten times the standard maximum penalty. However, the increase of the potential maximum penalty does not necessary result in a deterrent of wage theft.

Once matters filter through to the courts and the public becomes aware of instances of the new maximum penalty being implemented, then it is likely to result in greater deterrence. If the maximum penalty for a serious contravention is not levied, then it will not have any deterrence effect.

**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?**

We submit that the various levels of knowledge should be addressed by corresponding penalties. It is appropriate for penalties to be in place for all contraventions, regardless of intention, however they should be tiered to respond appropriately.

The AACS considers that underpayments by a franchisee should only attract a criminal prosecution for an employer where (i) the employer knew (that is, had evidence) that an underpayment was occurring and (ii) did not take reasonable steps to try and prevent it or address it (eg: rectify an underpayment discovered).

If it is the case that an employer has been reckless or indifferent to underpayment, a civil penalty would be appropriate, commensurate to the level of offending, the number of employees involved, and the employer’s ability to meet any penalty.

Where an employer has been knowingly underpaying or committing wage theft, it would be appropriate for this to be treated as a criminal offence.

There are no circumstances that AACS could envisage that an employer would not have a level of responsibility for underpayment.

With regard to circumstances of franchise arrangement, the franchisor would need to have actual knowledge of the offending to be held liable and not have taken reasonable steps to prevent it (for example, by investigating the underpayment and either issuing a breach notice {in the case of a franchisor} for minor underpayments or terminate the franchise agreement in cases of significant underpayments).

Otherwise, franchisors cannot be responsible for the actions of individual franchisees where they had no actual knowledge of the offending.

**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?**

This will depend on the individual relationship between the business and the contractor. For instance, where the contractor is in the role of recruitment company providing staff to the business, then the employer should actively ensure compliance with workplace laws.

However where the relationship is more remote, such as between franchisor and franchisee, the franchisor should need to have actual knowledge of offending to be held responsible for underpayment or wage theft.

A business would need to have control over staffing or employment aspects of a contractor’s business or vice versa (such as a relationship with an employment hire company) in order to be responsible for any instances of workplace non-compliance.

**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?**

Accessorial liability should only be implemented to business models where one party has a level of control or knowledge over staffing or employment matters of the other party.

**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?**

Sham contracting is a serious issue and AACS believes instances of sham contracting should be dealt with as such. Sham contracting results in individuals who should be treated as employees instead being engaged as contractors, and not receiving their proper entitlements or superannuation.

This practice is regrettably common among unscrupulous employers which hire migrant workers whose knowledge of their rights is perhaps limited.

Where a wrongdoer is engaging in both sham contracting and wage underpayment, higher penalties should apply as a deterrent. Penalties could be determined on the basis that a higher maximum penalty applies where numerous types of offences have occurred, being sham contracting and underpayment.

**Should the recklessness defence in subsection 357(2) of the Fair Work Act be amended? If so, how?**

The AACS does not believe that the recklessness defence needs to be amended. Currently, an employer is only liable if they were aware or not reckless to the possibility that the contractor arrangement was actually an employment arrangement.

The removal of this defence would mean that any employer would be penalised for sham contracting even where they held a genuine belief that the arrangement was actually that of contractor, not employee.

**In what circumstances should underpayment of wages attract criminal penalties?**

The AACS believes that individual employers which knowingly underpay staff are guilty of a criminal offence.

Where the culpability of offending is low, such as in circumstances of genuine mistake, we believe that employers should not be subject to criminal penalties. Nevertheless, employers must always be required to compensate employees for lost wages.

Criminal penalties are appropriate in circumstances where the course of action that lead to the underpayment or wage theft was intentional or systemic.

**What consideration/weight should be given to whether an underpayment was part of a** **systematic pattern of conduct and whether it was dishonest?**

The AACS submits that significant weight should be placed on whether underpayment is part of a systemic pattern of conduct. Further, dishonesty should be relevant in determining the culpability of an employer in wage theft.

Penalties should be considerably more significant, namely criminal, where conduct is intentional or systemic.

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 over which it occurred, and whether there has been any dishonesty.

**What kind of fault elements should apply?**

Determination of fault elements is a complex endeavour, and appropriate determination would need to be made to ascertain criminality. The standard for criminal fault could be based on intention, knowledge, recklessness or negligence. The precise level would need to be determined, and at this preliminary stage the AACS does not have a view on the precise fault elements.

**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?**

The attribution of corporate criminal responsibility can be difficult. The larger the organisation the more complex the attribution of liability can become. Criminal liability requires the fault to be attributed or traced back to a particular individual or management group.

The current Criminal Code already provides for circumstances where the fault element is intention, knowledge or recklessness as opposed to negligent.

**Are there potential unintended consequences of introducing criminal sanctions for wage underpayment? If so, how might these be avoided?**

Provided the implementation of criminal sanctions for wage theft is appropriately managed, there should not be any unintentional consequences.

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