
SUBMISSION

BCA response to Discussion Paper: 'Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance'

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OVERVIEW

The Business Council supports reforms that will strengthen the integrity of Australia's workplace laws so that everyone – business, workers and the community – can be confident that those laws will be observed and that breaches will attract appropriate consequences. All businesses need to conduct themselves in the right way. They should be transparent with their customers and workforces and they must always operate within the law.

There is a need to modernise the enforcement regime under the *Fair Work Act 2009* so that sanctions for the most serious breaches of workplace laws are more closely aligned to those that apply under other laws regulating business conduct. The Business Council supports the introduction of criminal sanctions for such breaches.

The law that is being enforced must be clear and unambiguous. Where this is not the case, the enforcement regime must be able to better deal with non-serious and inadvertent breaches in a non-punitive manner where this is appropriate.

The system requires a clear spectrum of remedies that recognises that many, if not most, breaches relating to underpayments are non-intentional and due to the complexity of the range of obligations placed on employers.

Members of the Business Council have expressed concern that the Fair Work Ombudsman (**FWO**) has in recent times adopted an inflexible policy in dealing with non-intentional breaches. This has resulted in disproportionate remedies being applied to companies who identify their own breaches and self-report, as well as discouraging other companies from self-reporting when such breaches are discovered or. The priority should be to encourage employers to pay employees correctly, to compensate employees where they may have been underpaid in error and to appropriately punish employers where breaches are intentional and employees have been knowingly underpaid.

This submission proposes that a broader suite of remedies should be available, with a range of remedies that distinguish between non-intentional breaches and deliberate wrongdoing. A balanced enforcement regime requires both carrots and sticks. At the one end of the spectrum, this should include criminal sanctions for the most serious wrongdoing. At the other end of the spectrum, it should include the ability for companies to self-report non-intentional breaches and access a 'Safe harbour' regime in which they can rectify underpayments in a timely manner without the threat of sanction, subject to meeting appropriate criteria.

KEY RECOMMENDATIONS

Stronger sanctions

1. The Business Council accepts the case for criminal sanctions to apply to the most serious breaches of workplace laws involving 'wage theft' or exploitation. The maximum penalties should be modelled on comparable sanctions under other laws governing corporate conduct.
2. Accessorial liability under any such criminal regime should reflect the existing accessory provisions under the Act, rather than adopt those of the Commonwealth *Criminal Code*.

3. An appropriate threshold for conduct attracting criminal sanctions could be the definition of 'serious contraventions' introduced by the 2017 *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017*. Serious contraventions relating to sham contracting should also be included in this category.
4. There is a further case for increasing maximum civil penalties for breaches of workplace laws across the board, as recommended by the Migrant Workers Taskforce.¹ They have historically been set at levels well below those that apply to other civil breaches by bodies corporate under comparable Commonwealth laws. If ever such a distinction was justified, it is not justified now.
5. Consideration should also be given to disqualifying company directors where they have a history of breaches of workplace laws, in the same manner that individuals may be disqualified for breaches of Corporations Law, as recommended by the Migrant Workers Taskforce.²

Streamlined compliance regime

6. The existing remedies available to the FWO should be augmented by criminal sanctions for the most serious breaches, together with a 'safe harbour' regime which can be accessed by employers in circumstances of non-intentional breaches where the employer self-reports to the FWO.

'Voluntary Enforceable Compliance' system for non-intentional breaches

7. Recognising that the complexity of the workplace relations system is a key driver of non-compliance for employers, the Business Council recommends the introduction of a 'safe harbour' system (Voluntary Enforceable Compliance) that will allow employers to rectify non-intentional breaches in a timely manner without exposing them to sanctions. This option should be reserved for situations in which breaches were clearly not intentional and the employer can rectify the problem in an effective manner. Such a regime could be modelled on those that have been proposed or implemented in relation to superannuation and insolvency laws.

¹ Recommendation 5, *Report of the Migrant Workers Taskforce*, March 2019.

² Recommendation 7, *Report of the Migrant Workers Taskforce*, March 2019.

RESPONSE TO DISCUSSION PAPER QUESTIONS

On 19 September 2019, the Attorney-General and Minister for Industrial Relations released the government's discussion paper, *"Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance"*. The closing date for submissions was 25 October 2019.

The Discussion Paper set out a number of specific questions on the following subjects:

- Adequacy of civil penalties
- 2017 Protecting Vulnerable Workers Act amendments
- Extending liability
- Sham contracting
- Criminal sanctions

Each of these questions are considered in turn below.

Adequacy of civil penalties

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

There is no apparent reason for the disparity in penalties for breaches of workplace laws and penalties for breaches of other laws governing corporate conduct. If ever there was such a justification, it no longer exists. The Business Council supports the recommendation of the Migrant Workers Taskforce to bring such penalties into closer alignment with other civil penalties that apply to corporate wrongdoing.

2. *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.*

A central consideration must be the measures of culpability or fault, taking into account that many, possibly most, breaches are inadvertent. The existing penalty regime allows the FWO and courts to take into account a range of factors in determining the level of penalties that are appropriate within the maximum penalty range, including the degree of culpability or fault. The Business Council does not believe there is a need to prescribe such factors in greater detail in the legislation or elsewhere. It would, for example, be anomalous to have two parallel systems where penalties for the same conduct differ according to the size of the business.

3. *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?*

The existing ability under the Act to allow multiple contraventions to be grouped are appropriate and should be retained. Where breaches are inadvertent they are often attributable to a flaw in a payroll system or some other single oversight which then affects

multiple employees over a period of time. It is not just to treat these as separate breaches or a 'course of conduct' that should attract higher sanctions.

The situation is, of course, different where breaches are intentional and a conscious decision has been made by an employer to act in breach of their obligations.

These are issues of judgement that should be left to regulators and courts to determine the most just approach in each given situation. The Business Council does not believe there is any requirement for the legislation to be more prescriptive in limiting their discretion in this regard.

2017 *Protecting Vulnerable Workers Act* amendments

1. *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?*

It is too early to pass judgement on the effectiveness of the 2017 amendments. In June 2019 the FWO reported that it currently had five matters before the courts that made use of the 2017 amendments.³ Until a larger number of such matters are determined it would not be appropriate to make an assessment.

FWO education and compliance activities raise awareness but in certain cases require greater specificity so that employers can rely on such advice.

The 2017 amendments expanded the accessorial liability provisions under section 550 of the Act. The Business Council is not aware of any evidence that has emerged since that time that would justify further expansion. This issue is addressed in further detail below in relation to the question of applying the accessorial liability provisions of the Commonwealth *Criminal Code*.

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

As noted above, it is difficult to judge the outcome of these amendments in relation to either general or specific deterrence. Notwithstanding, it can be said that the increased maximum penalties now more closely reflect community expectations of the seriousness of certain conduct.

Extending liability

1. *Do the existing arrangements adequately regulate the behaviour of lead firms/head contractors in relation to employees in their immediate supply chains?*

The Act currently allows for accessorial liability in situations where a business is 'knowingly involved in' a contravention, through aiding or abetting, counselling or procuring a contravention by another party. These provisions are explored in greater detail below. The 2017 amendments clarified this liability in cases relating to franchisors

³ Sandra Parker, speech to 2019 AiG Annual National Policy Influence Reform Conference, 3 June 2019.

or related entity companies where a ‘parent’ company has control over arrangements of the employing entity to such an extent that they bear responsibility for its contraventions.

Where breaches occur in a supply chain, liability should only extend beyond the employing entity to another party when there is genuine culpability. This requires knowledge and intent, in addition to control.

The 2017 amendments are intended to capture arrangements in which the parent has the ability to control the employment arrangements of the employer. This is different to normal supply chain arrangements, in which parties freely enter into contracts in situations where one party does not have any pre-existing commercial control over the other.

2. *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?*

Proposals to extend liability to the “economic decision-maker” in a contractual chain on the basis that they have some influence over a sub-contractor would be highly problematic. Having some degree of economic influence over another party should not be sufficient. There must be an element of complicity in the breach. Such a regime would unfairly capture businesses that engage in routine commercial arrangements to outsource functions to specialist providers of services and have no control over the employment practices of such providers. This may also shift the focus from the legal obligations of the actual employer to pay their employees correctly and pass liability to the principal contractor who in all likelihood had negotiated a contract price in good faith, on the basis that the employer will comply with the law.

3. *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?*

The Migrant Workers Taskforce recommended that the accessorial liability provisions under the Act should be extended “*to cover situations where businesses contract out services to persons, building on existing provisions relating to franchisors and holding companies.*”⁴

If such a reform is adopted, it should be on the basis that the same factors that apply to franchisors and holding companies under the 2017 amendments also apply, in particular: ⁵

- the size and resources of the company; and
- the extent to which the company had the ability to influence or control the contractor’s conduct in relation to a contravention; and
- the nature of the company’s arrangements with the contractor.

⁴ Recommendation 11(a)

⁵ s.558B of the Act

4. *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?*

There is a risk that expanded accessorial liability provisions could capture companies engaged in normal business practice by contracting out particular functions for sound commercial reasons.

It is important to be mindful of the complexity of business arrangements and the risk of overreach. For example, in sectors such as Retail, business can operate under models in which individual outlets are owned and operated by independent businesses under franchising or bare branding licences without exercise of day-to-day operational control. While they operate under the same brand, they are the employing entity for the purposes of workplace laws and make their own decisions in relation to hiring and payroll. In some cases, where a business owns multiple outlets under such a model, the management of individual outlets may be the responsibility of an agent, who is then the employing entity with responsibility for compliance with workplace laws. While the company at the top of the contractual chain can apply policies and contractual terms, the independence of the employing entity precludes that same level of control or oversight that would apply in a direct employment relationship.

Therefore, it is important that any reforms take into consideration the reality that some business models have complex arrangements such as this. Liability for breaches should rest with the employing entity and should not extend further up a contractual chain unless there is sufficient evidence of complicity and culpability that satisfies the appropriate accessorial test.

There is a risk the employing entity may place less importance on its own legal obligations if it knows the party it has contracted with may be held accountable and even be required to, in effect, indemnify the employing entity who has breached the law. This will undermine the purpose of the law, which is to require the direct employer to take responsibility for its own compliance.

Sham contracting

1. *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 in certain cases can be as serious as other breaches of workplace laws. There is no reason why serious contraventions in this regard should not be treated in the same manner where the same fault elements are present and employees are equally disadvantaged by the contravention. This is particularly the case where the conduct involves intentionally fraudulent conduct to mis-characterise workers as contractors for the purpose of avoiding employment obligations.

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

The current provisions of s.357(2) provide a defence to sham contracting breaches where the employer did not know and was not reckless as to whether the worker was an employee rather than a contractor. This reflects the reality that businesses can make honest mistakes in classifying workers as independent contractors and that the distinction

between employees and contractors is complex and not always clear. Proposals to introduce an objective test would be unreasonable for some employers who have made genuine errors based on their understanding of the position.

Criminal sanctions

1. In what circumstances should underpayment of wages attract criminal penalties?

The Business Council supports the principle that criminal sanctions should also be available in the case of intentional conduct by an employer that equals the standard that applies to theft under the general law, namely an act which:

“dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.”⁶

The existing range of civil sanctions should remain, including higher sanctions for ‘serious breaches’. Current ‘serious breaches’ are a maximum of \$630,000⁷ per breach for companies and \$126,000 for individuals.⁸

Conduct that can attract a criminal penalty should also be prosecuted as a civil matter under the ‘serious contravention’ regime. This will enable prosecutors to exercise discretion as to the most appropriate sanction. It also acknowledges that in many cases it will be more difficult to secure prosecutions at the criminal standard of proof as opposed to the civil. It would be an anomalous outcome if the prospects of securing a sanction were to be reduced, in certain situations because it was not possible to satisfy the criminal standard.

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

Established principles of criminal law should apply. For any criminal sanction to be imposed, a court must be satisfied that any conduct that was part of a course of conduct meets the requisite criminal standard in relation to intent.

It should also be noted that breaches need not be systemic in order to attract criminal sanction. There may be cases in which a single act is serious enough to be treated as criminal (for example, ‘cash backs’ as outlined below).

3. What kind of fault elements should apply?

As previously stated, the fault elements should reflect those that apply under existing criminal laws. They should also apply equally in relation to accessorial liability.

4. 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?

There is no reason to apply the accessorial liability provisions of the Criminal Code. While they are largely similar to those under the *Fair Work Act*, as set out below, the Act’s

⁶ See, for example, s.72(1), *Crimes Act 1958* (Victoria).

⁷ 3,000 penalty units.

⁸ 600 penalty units.

provisions have been suitably adapted to reflect the context of workplace laws and are fit for purpose as they stand, particularly in light of the 2017 amendments. They should also apply to any criminal jurisdiction under the Act.

Comparison of accessory provisions under the *Fair Work Act* and the Commonwealth *Criminal Code*

	<i>Criminal Code Act 1995</i>	<i>Fair Work Act 2009</i>
Complicity and common purpose	A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed it. ⁹	The person has aided, abetted, counselled or procured the contravention; ¹⁰ or Has conspired with others to effect the contravention ¹¹
Joint Commission	A person and another party enter into an agreement to commit an offence and it is committed in accordance with the agreement, each is taken to have committed the joint offence. ¹²	Has been in any way, by act or omission, directly, or indirectly, knowingly concerned in or party to the contravention ¹³
Commission by proxy	A person who has a fault element procures conduct of another person to commit the offence is taken to have committed it. ¹⁴	Has induced the contravention, whether by threats or promises or otherwise ¹⁵

5. *What should the maximum penalty be for an individual and for a body corporate?*

As stated above, the Business Council endorses the recommendation of the Migrant Workers Taskforce that sanctions for breaches of the Act should be more closely aligned to those that apply to other forms of corporate wrongdoing. In relation to criminal sanctions, while the Business Council does not propose a particular figure, sanctions should be equivalent to theft or fraud offences under the general law, or other forms of corporate criminal conduct under other Commonwealth laws.

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

As stated above, any criminal regime under the *Fair Work Act* should not depart from general principles of criminal law. In this regard, it is important that criminal proceedings under the Act can only be brought by an independent prosecuting authority. This would mean that unions and employees would not have the same standing as they have to commence proceedings for civil breaches.

The prosecutor role could be performed by either the Commonwealth Director of Public Prosecutions or the FWO. If it is to be FWO then it will be necessary to ensure that it is

⁹ section 11.2 *Criminal Code Act 1995* (Cth)

¹⁰ s.550(2)(a)

¹¹ s.550(2)(d)

¹² section 11.2A *Criminal Code Act 1995* (Cth)

¹³ s.550(2)(c)

¹⁴ section 11.3 *Criminal Code Act 1995* (Cth)

¹⁵ s.550(2)(b)

adequately resourced and has appropriate expertise to assume the role of a criminal prosecutor. The FWO must also be expressly required to conduct any prosecutions in accordance with the *Legal Services Directions 2017*, with due regard to the obligation to conduct matters as a model litigant.

7. *Are there other serious types of exploitation that should also attract criminal penalties? If so, what are these and how should they be delivered?*

In some cases, underpayment practices already involve fraudulent or coercive acts that may already be punishable under existing criminal laws in their own right. Any such conduct should also be captured by criminal penalties under workplace laws.

The Business Council is aware of publicly reported situations of employers intentionally depriving employees of wages either through underpayments or ‘cash back’ arrangements in which employees are coerced into withdrawing money from an Automatic Teller Machine and returning it to the employer as a condition of their ongoing employment. In principle, this is no different to being ‘mugged’ at the same ATM by a stranger.

The Business Council also notes that systemic underpayments are often one part of a broader course of conduct that also involves breaches of other laws, such as Migration or Tax laws. In such circumstances, the Act could also provide that where there is a course of conduct involving breaches of other laws, this could be taken into account as an aggravating factor that attracts a higher penalty within the range of penalties available.

COMPLIANCE AMID COMPLEXITY

The compliance regime under the *Fair Work Act* must take into account the uniqueness and complexity of the Australian workplace relations system, acknowledging that most breaches of workplace laws relating to underpayments are not intentional. In many cases they are the direct result of the complexity of Australia's workplace relations system and the difficulties that employers and payroll systems have in complying with certain provisions.

Australia's system for setting minimum wages alone is more complicated than in most other countries. It is the only country that has a comprehensive system of industry and occupational awards. Unlike countries that set a single minimum wage (e.g. the United Kingdom, Germany and New Zealand) or a minimum wage that varies by state (e.g. the United States), the Australian system contains classification structures and thousands of award wages that currently range from the national minimum wage (currently \$19.49) to over \$170 per hour.¹⁶ This is before penalty rates, loadings and allowances are applied.

The nature of employers' obligations can also change as a result of court decisions that may overturn commonly accepted interpretations of certain entitlements, such as those under the National Employment Standards (**NES**), with the result that employers who had followed the accepted practice can suddenly find themselves in breach and facing a significant historic liability. Several examples of this problem are cited below.

Fair Work Commission research findings on award complexity

When the Fair Work Commission undertook research to better understand the experience of small business operators with modern awards, consistent themes emerged:

1. The layout of modern awards was found to have *"elicited negative sentiment and was considered daunting by some participants. The documents were seen as difficult to use, but in-line with their low expectations of a government, regulatory/policy document, i.e. complex and challenging"*¹⁷
2. Components of the modern awards such as layout, content structure, language and ease of use, were found to be:
 - **"Convolutd ...** Too long and unwieldy, suggesting a time intensive and difficult process.
 - **"Complex ...** The language was difficult to understand, with 'legalese' and jargon.
 - **"Ambiguous ...** Information provided was not clear, requiring too much interpretation.
 - **"Of questionable relevance ...** Difficult to identify which award was most relevant when employees' roles varied and did not clearly fit into a single industry.
 - **"Not for them ...** Written for the benefit of "bureaucrats and lawyers", with no consideration of end-user needs or capability".¹⁸

¹⁶ Bishop J (2018), 'The Effect of Minimum Wage Increases on Wages, Hours Worked and Job Loss', *Reserve Bank of Australia – Bulletin – September 2018*, p.3.

¹⁷ Sweeney Research for the Fair Work Commission, *A Qualitative Research Report on: Citizen co-design with small business owners*, 14 August 2014, p.5.

¹⁸ Sweeney Research for the Fair Work Commission, *A Qualitative Research Report on: Citizen co-design with small business owners*, 14 August 2014, p.5.

A lack of confidence and certainty in the award system was described as “*disempowering for small business owners in the study, and had led to some active avoidance*”.¹⁹ The researchers noted that while there were barriers to the use of modern awards, the small businesses in the study were ‘acutely aware’ of the need to follow them:

To manage this apprehension, most participants reported simply paying a little above modern award pay rates as a form of insurance, so they didn’t get caught out. They also reported providing basic holiday and leave entitlements but relied on reaching some understanding with employees about many of the other provisions around breaks and penalties. Some participants were changing their employment practices in order to avoid dealing with the modern awards, i.e. not hiring or moving towards contract labour.

In summary, the challenges faced by the smaller end of the business community suggest that **regulatory documents will struggle to have optimal impact if not presented in a manner that demonstrates an appreciation of the needs and capabilities of the end-user. Information that is too hard to deal with may result in ‘best guess’ solutions or avoidance of the document altogether** (emphasis added).²⁰

Payroll system issues

Payroll systems are generally ‘off the shelf’ products from outside Australia, which must then be adapted to Australian conditions. It is often the case that the ‘standard’ payroll system will be configured for its country of origin’s regulatory environment and not easily configured to accommodate the complexity of the Australian system.

A small or medium business paying under a modern award will not just have to observe the set of core legislated standards set out within the NES. It will need to navigate the intricacies of one or more modern awards that apply to it and which set out a range of different allowances applying to particular circumstances (including the types of tools an employee uses, the temperature in which they are working), loadings for different types of employment and for working at different times of the day, and multiple and overlapping triggers for overtime and payment of penalties.

These entitlements and the potential triggers for them need to be coded into the payroll system and this is not always an easy task, particularly where complex formulae are involved in calculating the amount or overlapping penalties.

It should also be noted that a business may purchase another business which may have a deficient payroll system. Provided the new owner/employer works to remedy the errors it discovers as soon as possible, it should not be penalised for the errors of others, which may potentially extend back over many years, where the new owner had no control over the situation.

The result is that an individual business cannot be certain of full compliance, regardless of its size or the resources available to it. Multiple competing interpretations of employment obligations arise within the system, with the effect that even lawyers and regulators can get it wrong.

¹⁹ Sweeney Research for the Fair Work Commission, *A Qualitative Research Report on: Citizen co-design with small business owners*, 14 August 2014, p.5.

²⁰ Sweeney Research for the Fair Work Commission, *A Qualitative Research Report on: Citizen co-design with small business owners*, 14 August 2014, p.7.

An increasing number of enterprise agreements are approved with undertakings that need to be complied with in addition to the provisions of the enterprise agreement, rising from around 20 per cent in 2013 to 68 per cent of all approved agreement applications approved with an undertaking in 2017-18.²¹

It is common for these administratively complex 'reconciliation' style undertakings to be made to secure agreement approval. However, these undertakings can of themselves give rise to a compliance risk if systems are not configured in a way that will enable them to be implemented in practice.

Such problems are equally likely to arise in large and small businesses. While it is understandable to assume that larger business ought to have sufficient resources to enable them to take all reasonable steps to preventing payroll problems, the experience of Business Council members and other large employers is that even with the most modern systems and regular audits, it is not possible to avoid errors. Small and medium sized businesses, with fewer resources, face a higher risk of such errors.

In 2018, Thales Australia 'self-reported' to the FWO after it had identified a payroll system error that had resulted in a number of employees under individual arrangements being underpaid relative to their classification level in the company's enterprise agreement.

The company self-reported to the FWO on 5 September 2018 and had remediated all existing employees within three months and all former employees within nine months of this date.²²

Based on publicly available information, the breach was the result of a system error which had misallocated staff to incorrect agreement classifications. As a result, the payroll system failed to keep pace with movements in the equivalent classification benchmarks under the agreement.²³

The company implemented a proactive remedial process, including implementing a new payroll system. In the circumstances, it was as much as could have been reasonably done by an employer once it had discovered the breach.

A number of member companies of the Business Council have expressed concerns that they have similar automated payroll systems which may be prone to such errors.

If non-human errors arise they should not absolve an employer of responsibility, but it should allow for some degree of nuance in terms of the regulatory response. While the law must be upheld, both the law and its application should not be so prescriptive as to not distinguish between system errors and genuine culpability.

Awards are becoming more complex for employers who pay annualised salaries

The recent Fair Work Commission decision to include new clauses regarding annualised salaries in modern awards will impose particularly onerous record keeping and reconciliation requirements that largely negate the efficiency benefits of annualised arrangements. These arrangements will take effect from 1 March 2020 and will require employers to:

- record in an agreement/arrangement the provisions of the award that are included in the annualised wage and the method through which this has been calculated

²¹ Fair Work Commission, *Annual Report 2017 – 18 'Access to Justice'*, p. 61.

²² Enforceable undertaking between Thales Australia Limited and the FWO, 13 August 2019.

²³ "Thales signs court-enforceable undertaking", FWO media release, 30 August 2019.

- record the 'outer limits' of the number of overtime hours or other hours to which penalties apply and which are rolled into the annualised wage agreement/arrangement
- pay employees amounts beyond the annualised salary for hours worked beyond the 'outer limits' (i.e. overtime and penalty rates)
- keep time and attendance records showing start, end and break times and have employees sign to acknowledge this is accurate each pay or roster cycle
- conduct a 12-monthly comparison calculation to assess whether the employee is paid at least what they would have been paid under the award and if a shortfall is identified, rectify this within 14 days.

These new requirements mean that if an employer is paying under an annualised salary arrangement, they will need to ensure that their systems are not only set up to ensure payment of the annual salary but are set up to calculate comparison pay based on the granular provisions in the award and the actual hours worked.

While it may be a commonly held belief that people on annualised salaries don't get overtime and that hours of work therefore don't need to be recorded, this will no longer be the case for those relying on annualised salary provisions under the relevant awards.

Case studies in complexity

The following examples are set out in detail in **Appendix 1**. They are a representative sample of common challenges created by the NES, Modern Awards and Enterprise Agreements:

1. Court overturns the accepted approach to calculating personal leave
2. Annual leave loading to be paid on termination – even when the award says it isn't to be paid
3. Annual leave accrual when not working and receiving workers' compensation
4. Casual workers employed as casuals and paid casual loadings aren't actually casuals
5. Award coverage of optometrists – an entire industry in breach?
6. Retail Award – calculation upon calculation upon calculation – when the clause isn't even clear
7. Building Award – 23 inputs required to determine one hourly rate
8. Underpayments due to intricacies
9. Award complexity crashes a payroll system – of a government
10. Twenty expired agreements required to determine pay rates under the current agreement

STREAMLINED COMPLIANCE REGIME

The FWO currently has four enforcement tools available to it under the *Fair Work Act*²⁴:

- Compliance Notices
- Enforceable Undertakings
- Infringement Notices
- Litigation and civil penalty sanctions.

It is described as an ‘enforcement pyramid’, with the most serious sanctions at the top.²⁵

The Business Council proposes that these remedies be enhanced with the addition of criminal sanctions and the creation of a ‘Safe harbour’ system. This would create an 8-level compliance suite of remedies that are adapted to particular levels of breaches.

Proposed 8-level compliance regime

Level	Description	Elements	Comparator
1.	Minor breaches	<ul style="list-style-type: none"> • Voluntary compliance, no further action • Particularly relevant to SMEs 	Current FWO approach to inadvertent breaches
2.	Compliance Notice	<ul style="list-style-type: none"> • ‘Non-punitive’ response to alleged contraventions. No admission or finding of contraventions.²⁶ Penalties can apply for non-compliance • Compliance with the notice precludes the FWO commencing court proceedings 	Current ‘compliance notice’
3.	Enforceable Voluntary Compliance (New category)	<ul style="list-style-type: none"> • Self-reporting, subject to meeting FWO criteria • Necessary in larger and more complex cases 	New category. Would apply to some cases currently dealt with by enforceable undertakings
4.	Enforceable undertakings	<ul style="list-style-type: none"> • Acceptance in limited circumstances, such as self-disclosure and commitment to rectify breaches • Acceptance of the undertaking precludes the FWO commencing court proceedings • Where Enforceable Voluntary Compliance regime does not apply, or ceases to apply 	Current ‘enforceable undertaking’
5.	Administrative Penalties	<ul style="list-style-type: none"> • Penalty infringement notice 	Current ‘infringement notice’

²⁴ FWO Compliance and Enforcement Policy, July 2019, pp.6–11.

²⁵ Sandra Parker speech, 3 June.

²⁶ FWO Compliance and Enforcement Policy, July 2019, p.6.

Level	Description	Elements	Comparator
6.	Civil Penalties	<ul style="list-style-type: none"> Existing civil penalties could be increased 	Current civil contraventions
7.	Serious Civil Penalties	<ul style="list-style-type: none"> New categories introduced in 2017 – ‘serious, systemic’ conduct, specific conduct such as ‘cash backs’ Should also include sham contracting 	‘Serious contraventions’ under 2017 legislation
8.	Criminal Penalties (New category)	<ul style="list-style-type: none"> Overlap with most of the Serious Civil Penalty breaches Should also include sham contracting Can also be prosecuted as civil matters where appropriate 	Existing ‘serious contraventions’ could also be dealt with as criminal matters

PROPOSED ENFORCEABLE VOLUNTARY COMPLIANCE SYSTEM

The current enforcement regime – the FWO’s approach

Where employee underpayments occur, businesses should voluntarily disclose the breach and take steps to rectify the breach in a timely and effective manner. In many cases, such breaches are the result of failures in the payroll system. Alternatively, breaches can arise as a result of a particular interpretation of a complex industrial instrument, which a court of the FWO subsequently determines was not correct. In either case, there is no element of intent to breach the law. In such circumstances, breaches can be undetected for years, which means the liability for back pay is significant once they are discovered. The extent of any underpayment thus does not reflect the degree of culpability of the business.

The FWO has indicated that in such circumstances, an enforceable undertaking is to now ‘be required, as a minimum’ and that:

employers that self-report should also expect to make a contrition payment reflecting the seriousness of their contravening conduct, because it is simply not acceptable for businesses to throw their hands up when they’ve been underpaying workers and expect to move on without consequences once the back pay is in the workers’ accounts.²⁷

The Business Council believes such an approach is overly prescriptive and does not serve to incentivise self-reporting by employers. In certain cases the contrition payment that is imposed or mediated by the FWO may be greater than the penalty a court would have imposed.

The FWO currently adopts a policy of “a breach is a breach”²⁸ in dealing with voluntary disclosures of inadvertent breaches by employers. In these circumstances, there should be an incentive for businesses to take prompt action to rectify the problem and voluntarily report to the FWO. Where certain criteria can be met, this should be on the basis that the FWO will not exercise its enforcement powers, unless any subsequent evidence emerges that the employer was culpable due to deliberate human acts or omissions, or acting recklessly based on all the circumstances.

At present, the FWO does not exercise discretion in response to self-reporting. Companies that self-report due to inadvertent errors are in the same position as companies who commit deliberate or reckless breaches. This is not only unjust, but also means that the finite resources of the FWO may be disproportionately focused on pursuing inadvertent breaches rather than targeting intentional wrongdoers who are more deserving of sanction, and who will not self-report.

The Business Council proposes that the FWO’s first-resort option should be to seek voluntary compliance by the employer and redress for employees in the quickest possible manner. Its approach to sanctions must be able to distinguish between inadvertent and deliberate breaches.

This does not require the FWO to take a softer approach or act as a ‘mediator’ rather than enforcer. The FWO would need to be satisfied that the criteria for Safe harbour have been

²⁷ Sandra Parker, speech to 2019 AiG Annual National Policy Influence Reform Conference, 3 June 2019.

²⁸ Sandra Parker, speech to 2019 AiG Annual National Policy Influence Reform Conference, 3 June 2019.

met. If evidence to the contrary was to subsequently emerge, then the FWO should have the power to revoke such status.

The Business Council endorses the sentiments expressed by the Fair Work Ombudsman, Ms Parker, that:

Parliament has given us increased powers and more resources, so it's on us to send a strong message of deterrence to would-be lawbreakers.²⁹

Such an approach is to be encouraged, but it is not inconsistent with a new regime to facilitate self-reporting under a Safe harbour regime when this is appropriate.

Most importantly, small to medium enterprises are equally likely to be subject to payroll system errors. Unlike large companies, they don't have the resources to engage accounting or law firms to investigate the problem and calculate compensation. They require practical help that the FWO is best-placed to provide. The FWO should encourage them to self-report on the basis that the FWO will assist them to rectify the problem.

Proposed elements of an Enforceable Voluntary Compliance system

The Business Council proposes a new Enforceable Voluntary Compliance system be included in the 8-level suite of enforcement options, incorporating elements of both the Compliance Notice and Enforceable Undertaking regimes. It would sit between the two on the scale of sanctions.

The following criteria would apply for employers to access the Safe harbour:

1. The employer must satisfy certain criteria that the breaches were inadvertent; that it has taken proactive steps to commence remedial action; and has self-reported to the FWO in a timely manner
2. The employer must satisfy the FWO that it is taking steps to introduce improved systems and other measures as required to prevent recurrences
3. The FWO will have discretion to invoke 'safe harbour status', which can be revoked at any time if new evidence emerges that the criteria in points 1 and 2 were not met or are no longer being met
4. 'Safe harbour' status will require the employer to take all reasonable steps to, among other things, compensate affected employees (current and former) in a timely manner, including paying interest on underpayments; cooperating with employee representatives (as appropriate); and agreeing to requests for information by the FWO
5. Employer compliance with obligations under point 3 to be monitored by the FWO to the extent the FWO deems necessary, taking into account the size and complexity of the underpayments and the steps the employer is taking. In some cases, a 'light touch' approach with very limited oversight may be sufficient
6. Obligations of the employer to be spelt out in an enforceable undertaking with the FWO
7. Employer obligations to not include contrition payment if the criteria in points 1, 3 and 4 continue to be met. This condition could be time-limited, during which sanctions would

²⁹ Sandra Parker, speech to 2019 AiG Annual National Policy Influence Reform Conference, 3 June 2019.

not be pursued, provided the time limit to rectify breaches is complied with as far as is practicable.

Comparable systems

‘Safe harbour’ arrangements are not novel, and a range of precedents exist for such a system to be introduced under the *Fair Work Act*. From time to time, governments will implement measures to proactively incentivise compliance. Arrangements such as amnesties have also been used where there are deficiencies in legal systems, for example because of poor system design³⁰, and can be combined with a ‘carrot and stick approach’, through encouraging compliance immediately before the introduction of new or strengthened penalties.

An amnesty typically involves a temporary grace period during which non-compliance can be corrected with reduced or waived penalties. This is different to a safe harbour arrangement, which will typically afford protection from liability or penalty in certain circumstances or where certain conditions are met and may not necessarily be a temporary measure.

The three precedents outlined below are of direct relevance when considering compliance with employment obligations. In particular, these approaches are concerned with:

- encouraging remediation of the problem in the interests of those that the law seeks to protect;
- improving systems to ensure future compliance; and
- avoiding perverse outcomes arising from an overly punitive approach.

Superannuation

Proposed amendments to the *Superannuation Guarantee (Administration) Act 1992* (Cth) are intended as a means of encouraging employers to voluntarily correct historical non-compliance without penalty during an amnesty period. Treasury has estimated that the amnesty will result in the collection of a further \$230 million in superannuation entitlements, beyond what would have been collected through usual compliance activities.³¹

The legislation would provide a one-off amnesty. This amnesty would mean that an employer who voluntarily discloses non-compliance and corrects this (including by paying the shortfall, nominal interest and any general interest charge) would be able to claim tax deductions for payments of SG charge or contributions made during the amnesty period to offset SG charge and would not be subject to penalty.

In order to strengthen the operation of the amnesty, stronger legislated minimum penalties are proposed for employers that fail to voluntarily remediate non-compliance during the amnesty period (which would be for six months after the Bill receives royal assent). During

³⁰ Le Borgne E and Baer K, 2008, ‘Tax Amnesties: Theory, Trends , and Some Alternatives’, *Association of Southeast Asian Nations*, accessed 14 October 2019 < <https://asean.elibrary.imf.org/view/IMF058/09193-9781589067363/09193-9781589067363/ch02.xml> >

³¹ Mr Robert Jeremenko, Division Head, Retirement Income Policy Division, Treasury, *Committee Hansard*, 12 June 2018, p. 30.

the Bill's Second Reading, the Minister explained that this approach "*offers both a carrot and a stick to encourage non-complying employers to come forward*".³²

Insolvency

Amendments to the *Corporations Act 2001* (Cth) were introduced in 2017 to provide a safe harbour from certain insolvent trading provisions in order to strike a better balance between protecting creditors and encouraging company directors to help the business remediate its financial difficulties³³, particularly where this would achieve a better outcome than appointing an administrator or liquidator.³⁴

The safe harbour provisions provide that a director will only be liable for debts incurred while the company was insolvent where it can be shown they were not developing or taking a course of action that was (at that time) reasonably likely to lead to a better outcome than proceeding to administration or liquidation.

In order to qualify for this protection, regard may be had to whether the director is:

1. properly informing himself or herself about the company's financial position
2. taking appropriate steps to prevent any misconduct by officers or employees that could adversely affect the company's ability to pay its debts
3. taking appropriate steps to ensure that the company is keeping appropriate financial records consistent with its size and nature
4. obtaining advice from an appropriately qualified entity that was given sufficient information to provide that advice
5. developing or implementing a plan for restructuring the company to improve its financial position.³⁵

Failing to implement a course of action, or to appoint an administrator or liquidator within a reasonable time of identifying severe financial difficulty will see a director lose the benefit of the safe harbour. Of note, directors will also be unable to access the safe harbour where the company is failing to pay the entitlements of its employees by the time they fall due.³⁶

American safe harbour for mis-classification of workers

Safe harbour provisions exist in several areas of law in the United States, including taxation. One notable example of a safe harbour provision applies in relation to worker classification. In particular, s.530 of the *Internal Revenue Code*³⁷ provides a safe harbour relating to the classification of workers as independent contractors, and therefore immunity from liability for employment taxes and penalty if the following criteria are satisfied:

³² Commonwealth, *Parliamentary Debates*, House of Representatives, 18 September 2019, 3368, Michael Sukkar, Assistance Treasurer and Minister for Housing.

³³ Explanatory Memorandum, *Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill 2017* (Cth), p. 6.

³⁴ Explanatory Memorandum, *Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill 2017* (Cth), p.7.

³⁵ *Corporations Act 2001* (Cth), s 588GA(2).

³⁶ *Corporations Act 2001* (Cth), s 588GA(4).

³⁷ U.S. Code Title 26 – Internal Revenue Code.

1. There is a reasonable basis for not treating the workers as employees (e.g. due to a ruling, previous IRS audit, industry treatment of similar workers, or some other reasonable basis such as reliance on the advice of a lawyer or accountant).
2. The workers and similar workers have been treated similarly (i.e. in a substantively consistent way).
3. The business has treated the classification of workers consistently across all filed tax returns.

A notable feature of this safe harbour provision is that immunity from penalty will apply where a business is endeavouring to comply in good faith, for example because it relied on the advice of the regulator, sought the advice of an expert or applied an industry standard. This is of particular relevance to Australia.

As noted above, the complexity of the Australian workplace relations system is such that even lawyers, industry bodies and the FWO can make errors. There is substantial merit in considering options to protect a business from penalty in circumstances where credible external advice or regulator guidance has been relied on but turns out to be wrong.

APPENDIX 1 – CASE STUDIES IN COMPLEXITY

1. Court overturns the accepted approach to calculating personal leave

In *Mondelez v AMWU*³⁸ the Full Federal Court found that the NES required that 12-hour shift workers were entitled to 120 hours or 10 calendar days of paid personal/carer's leave rather than a lesser amount based on the common approach of accruing leave on the basis of hours worked. This was contrary to the existing arrangements where full-time employees who worked 36 hours per week received 72 hours of personal leave per year. This reflected the typical method of accrual in payroll systems.

The Federal Court's interpretation of the NES³⁹ is that a "day" refers to a portion of a 24-hour period that would have otherwise been allotted to work.⁴⁰ It has been suggested that this interpretation could expose employers in up to \$2 billion a year in liabilities for breaches.⁴¹

With payroll systems typically accruing paid leave entitlements on the basis of hours worked (including for part-time employees and employees with variable daily hours), this has created significant confusion as to how employers should respond to the decision and correct what will now be deemed to be breaches of the NES.

2. Annual leave loading to be paid on termination – even when the award says it isn't to be paid

In *Centennial Northern Mining Services Pty Ltd v CFMEU*⁴², the full court of the Full Federal Court found that where an employee has an entitlement to annual leave loading, the NES⁴³ requires it to be paid out on the termination of an employee's employment, regardless of the terms of an award or contract.

This decision gave rise to considerable confusion because 29 Modern Awards had included terms expressly stating that annual leave loading would not be paid out on termination.

Of note, the FWO's website states:

If an employee gets annual leave loading during employment then it also has to be paid out when employment ends. Annual leave loading is paid out **even when an award**, registered agreement or employment contract **says that it's not** (emphasis added).⁴⁴

³⁸ [2019] FCAFC 138

³⁹ s. 96(1) of the Act

⁴⁰ *Mondelez v AMWU* at [199].

⁴¹ Workplace Express, 'Government seeks High Court leave to appeal Mondelez decision', 16 September 2019, accessed 16 October 2019 <

https://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&nav=10&selkey=58205&utm_source=instant+email&utm_medium=email&utm_campaign=subscriber+email&utm_content=article+headline&utm_term=Government%20seeks%20High%20Court%20leave%20to%20appeal%20Mondelez%20decision>

⁴² [2015] FCAFC 200

⁴³ S.90(2) of the Act

⁴⁴ FWO, accessed 15 October, <https://www.fairwork.gov.au/ending-employment/notice-and-final-pay/final-pay>.

The consequence of this is that even where an employer had relied on the wording of an award that clearly said one thing, they could be found to be in breach of the NES, which was found to mean the opposite.

3. Annual leave accrual when not working and receiving workers' compensation

In *Anglican Care v NSW Nurses and Midwives' Association*⁴⁵, the Full Federal Court found that *the Fair Work Act*⁴⁶ allowed for the accrual of annual leave when a person was on workers compensation, with the result that employees in New South Wales were entitled to accrue annual leave (and potentially other entitlements).

Prior to this decision, employers had generally understood that employees were not entitled to take or accrue leave when in receipt of workers compensation. As a result, employers in jurisdictions that did not require accrual of leave have been in breach and have had to remediate this for employees who were off work on workers compensation.

4. Casual workers employed as casuals and paid casual loadings aren't actually casuals

In *WorkPac Pty Ltd v Skene*⁴⁷ the Full Federal Court ruled that despite an employee being engaged on the understanding that he was a casual employee under the terms of the employment contract, he was in fact a permanent employee and therefore entitled to payment for annual leave due to the predictability of his working arrangements.

This has created a risk that a long-term casual employee with a predictable pattern of engagement may be deemed permanent at law regardless of the terms of their contract, and the fact they have received a casual loading. Employers are at risk of being in breach in a number of situations, regardless of the understanding of the employer or the wishes of the employee. This could create situations where an employee unwittingly converts from casual to permanent employment once they have worked regular hours for a sufficient period of time, despite continuing to be paid as casual.

5. Award coverage of optometrists – an entire industry in breach?

Confusion regarding award coverage can even arise at an industry-wide level. One recent example arose in relation to employees performing administration, sales and dispensing roles in optometrist stores, and whether the *General Retail Industry Award 2010* or the *Health Professionals and Support Services Award 2010* applies.

Industry body Optometry Australia stated in its online newsletter:

Confusion arose after FWO published a four-line press release on its website, stating the HP&SS Award is applicable to all optometry practice staff. At the time, OA labelled the FWO's stance as confusing and **conflicting with previous advice**; exacerbated by

⁴⁵ [2015] FCAFC 81

⁴⁶ s.130(2) of the Act

⁴⁷ [2018] FCAFC 131

the fact that most employers had been applying the General Retail Award 2010 to support staff ... (emphasis added) ⁴⁸

One workplace law specialist was reported as saying:

It is possible that all optometrist support staff paid under the retail award have been incorrectly classified and potentially underpaid. These difficulties do crop up fairly regularly, but not on such a large scale.

Unless the practice is prepared to have a fight in court about the correct Award application, the least risky path is to reclassify the employees. In doing this, it should be noted that there could be a back pay issue for up to six years if the employees were paid less than the new award classification rates over that period. ⁴⁹

6. Retail Award – calculation upon calculation upon calculation – when the clause isn't even clear

Each provision with a monetary consequence in an award requires the identification of 'pay rules' and the configuration of the payroll system to reflect those rules. Many payroll systems are simply not designed to accommodate such complexity. This can give rise to unintentional non-compliance and significant liabilities.

By way of example, under the *General Retail Industry Award 2010*, clause 31.2 provides that:

Where an employee recommences work without having had 12 hours off work then the employee will be paid at double the rate they would be entitled to until such time as they are released from duty for a period of 12 consecutive hours off work without loss of pay for ordinary time hours occurring during the period of such absence.

The challenge with this wording and similar expressions is that they do not express the penalty rate as a percentage of the ordinary rate or clearly stipulate a formula for calculation of the rate.

This one clause may require a separate payroll rule to be configured within the system for each of the individual permutations that would require a rate to be doubled, taking into account:

- whether the employee is working full-time, part-time or casual
- whether the work is between the ordinary span of hours, on a Saturday, Sunday or public holiday, or after 6pm
- whether they are a shift worker; and
- transitional arrangements applying to changes in penalty rates.

⁴⁸ Hume, M for Optometry Australia 2019, 'Fair Work refuses to budge over optometry pay awards', *Insight*, 26 June 2019, accessed 15 October 2019 < <https://www.insightnews.com.au/Article3/2232/Fair-Work-refuses-to-budge-over-optometry-pay-awards>>.

⁴⁹ Hume, M for Optometry Australia 2019, 'Fair Work refuses to budge over optometry pay awards', *Insight*, 26 June 2019, accessed 15 October 2019 < <https://www.insightnews.com.au/Article3/2232/Fair-Work-refuses-to-budge-over-optometry-pay-awards>>.

This calculation can require almost 60 different payroll codes and complex system configuration, due to the overlapping penalties and the multitude of rates that will need to be doubled, and the need to set up specific payroll codes in the system.

7. Building Award – 23 inputs required to determine one hourly rate

Another example of such complexity can be seen in the *Building and Construction General On-site Award 2010*, where the application of various loadings and allowances require a highly complex formula for determining an employee's base rate of pay. For example, to determine the hourly rate of pay for a 'daily-hire' carpenter who works for a small building business and who supervises two others as a leading hand, a payroll system will need to be configured to generate the following result, applying multiple different formulae. The order in which a formula or allowance is applied can mean that the hourly rate is calculated incorrectly. The extract below is a snapshot of the FWO's calculation methodology, which demonstrates the complexity:

Hourly pay rate

Result

\$26.60

Calculations

The employee's hourly base rate of pay \$26.60 [Detail >>](#)

- The employee's hourly base rate of pay without loadings : \$26.60 [Detail >>](#)
- The employee's hourly base rate of pay amount : \$26.60 [Detail >>](#)
- The employee's daily hire hourly wage : \$26.60 [Detail >>](#)

$$\$963.63 / 38 + \$1.24 = \$26.60$$

- The employee's daily hire weekly wage with applicable pre-base rate allowances and the special allowance : \$963.63 [Detail >>](#)

$$52 / 50.4 \times \$926.52 + \$7.70 + \$0.00 \times 38 = \$963.63$$

- The multiplier to apply to the calculation of the employee's daily hire minimum wage : 52
- The divisor to apply to the calculation of the employee's daily hire minimum wage : 50.4
- The employee's daily hire weekly wage with applicable pre-base rate allowances : \$926.52 [Detail >>](#)

$$\$862.50 + \$0.00 + \$31.91 + \$32.11 + \$0.00 = \$926.52$$

- The employee's full-time adult minimum weekly wage : \$862.50
- The employee's mobile crane capacity adjustment : \$0.00
- The employee's industry allowance amount : \$31.91 [Detail >>](#)
 - The industry allowance amount : \$31.91

$$3.70\% \times \$862.50 = \$31.91$$

- The employee's tool allowance amount : \$32.11 [Detail >>](#)
 - The tool allowance amount : \$32.11
- The underground allowance amount per week : \$0.00
- The employee's special allowance amount : \$7.70
- The employee's refractory bricklaying allowance amount : \$0.00
- The average number of ordinary hours a full-time employee works per week : 38
- The divisor applicable to the employee : 38
- The employee's hourly leading hand allowance amount : \$1.24 [Detail >>](#)
 - The hourly leading hand allowance amount : \$1.24 [Detail >>](#)

$$\$47.16 / 38 = \$1.24$$

- The weekly leading hand allowance amount : \$47.16 [Detail >>](#)
 - The weekly leading hand allowance amount for a daily hire : \$47.16

$$\$45.71 \times 52 / 50.4 = \$47.16$$

- The divisor applicable to the employee : 38

8. Underpayments due to intricacies

When cosmetics business Lush was found to have underpaid its staff, it was reported that this resulted from a failure of the company's payment system to "interpret the intricacies of the modern awards correctly".⁵⁰ Lush's National Director was reported as saying that the payroll systems it used were "just not sophisticated enough" to correctly interpret the Retail and Manufacturing awards, resulting in a failure to correctly account for overtime rates.⁵¹ Lush emphasised that the underpayment was unintentional.⁵²

9. Award complexity crashes a payroll system – of a government

It should also be noted that the challenges associated with implementing a compliant payroll system in the context of complex industrial instruments is not an issue that is isolated to the private sector. The challenges can be compounded when a business is working across multiple industries and/or awards.

When the Queensland Government attempted to implement a payroll system developed for one department in another department, this resulted in publicly reported payroll errors and litigation between the Queensland Government and service providers it had contracted to implement the system. It was reported that:

"[s]ome workers were overpaid, some workers were underpaid and others not at all, requiring hundreds of extra workers to manually process the pay" and that "the system and the processing of awards was taking so long and was so slow almost one pay cycle finished before another started".⁵³

While this occurred under state-based awards, such problems are no less likely under complex federal industrial instruments.

10. Twenty expired agreements required to determine one person's pay under the current agreement

In the transportation sector it is common for employment entitlements to be set out not just within the current enterprise agreement but for those entitlements to be drawn from a multitude of expired agreements, awards and legacy arrangements that are imported into the agreement by reference. This has the effect that a number of documents need to be read and interpreted concurrently, applying complex interaction rules, in order to determine a person's employment entitlements.

One enterprise agreement for one major transport company provides that, in addition to the provisions of the enterprise agreement:

⁵⁰ McGowan, M 2018, 'Lush cosmetic payroll error underpaid staff by \$2m', *The Guardian*, 17 July 2018, accessed 15 October 2019 < <https://www.theguardian.com/australia-news/2018/jul/17/lush-cosmetics-payroll-error-underpaid-staff-by-2m> >

⁵¹ McGowan, M 2018, 'Lush cosmetic payroll error underpaid staff by \$2m', *The Guardian*, 17 July 2018, accessed 15 October 2019 < <https://www.theguardian.com/australia-news/2018/jul/17/lush-cosmetics-payroll-error-underpaid-staff-by-2m> >

⁵² McGowan, M 2018, 'Lush cosmetic payroll error underpaid staff by \$2m', *The Guardian*, 17 July 2018, accessed 15 October 2019 < <https://www.theguardian.com/australia-news/2018/jul/17/lush-cosmetics-payroll-error-underpaid-staff-by-2m> >

⁵³ Ludlow M 2015, 'Qld claims payroll project too complex for IBM', *Australian Financial Review*, 26 August 2015, accessed 15 October 2019 < <https://www.afr.com/politics/qld-claims-payroll-project-too-complex-for-ibm-20150826-gj7vdp> >

- various awards and local arrangements listed in schedules and appendices attached to the agreement continue to apply, with 20 expired enterprise agreements and five historical awards listed in the schedules; and
- if there is inconsistency between these arrangements then a complex, five-tiered hierarchy needs to be applied to determine which provision takes precedence.⁵⁴

The enterprise agreement for another major transport company provides that:

- in addition to the terms of the enterprise agreement, the *Road Transport and Distribution Award 2010* and *Road Transport (Long Distance Operations) Award 2010* are incorporated by reference; and
- ‘local agreements’ as set out in a list within the agreement, totalling 115 agreements, continue to have effect.⁵⁵

⁵⁴ TNT – TWO Fair Work Agreement 2017-2020

⁵⁵ Toll – TWU Enterprise Agreement 2017-2020

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