Law Council
OF AUSTRALIA

# Industrial Relations Consultation

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

**Attorney-General's Department**

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The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

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- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
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- The Victorian Bar Inc
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- Mr Ross Drinnan, Executive Member
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# Acknowledgement

The Law Council acknowledges the assistance of the Queensland Law Society, the Law Society of New South Wales and the Industrial Law Committee of the Law Council's Federal Litigation and Dispute Resolution Section in the preparation of this submission.

# Executive Summary

1. The Law Council welcomes the opportunity to provide a submission to the Attorney-General's Department in response to the Discussion Paper entitled *Improving protections of employees' wages and entitlements: Strengthening penalties for non-compliance* (**Discussion Paper**).

2. The Law Council acknowledges that underpayment by employers, whether as a result of genuine mistake or systemic exploitation, can significantly impact on the lives of underpaid workers. Employees, employers and the community at large all have a shared interest in ensuring the adequate protection of wages and entitlements.

3. The Law Council makes the following submissions in relation to a number of the questions raised in the Discussion Paper:

    (a) The Law Council is generally supportive of increased pecuniary penalties, particularly where employers deliberately or knowingly underpay employees.

    (b) A number of factors have been developed at common law in relation to the determination of the size of a pecuniary penalty. The level of penalty imposed upon a business should be determined by consideration of these factors and any material departure from this approach should only occur if it is underpinned by a clear and persuasive rationale.

    (c) Existing 'course of conduct' provisions should be maintained. However, the Law Council also recommends the inclusion of an express provision to clarify the penalty imposed for continuing or maintaining the breach.

    (d) The existing arrangements regulating the behaviour of lead firms/head contractors in relation to employees in their immediate supply chains have not been shown to be inadequate and are being utilised effectively.

    (e) Accessorial liability provisions could be expanded to also include situations in which a person is reckless as to whether their involvement contributes to a contravention of a workplace law. Should such an approach be implemented, it is important that it be clear as to the type of conduct that will be sufficient to prove a contravention of this type. Noting the serious penalties that are attached to a contravention, the Law Council suggests that it should be necessary to prove that the purported accessory was aware of the probable consequences of the conduct.

    (f) While criminal sanctions could play an important deterrent effect, they alone will not assist to alter the vast majority of cases of underpayment of wages or address the financial or other concerns of underpaid workers. The Law Council instead considers the adequacy of compliance and enforcement tools and resources available to regulators and the courts to be particularly relevant considerations.

# Background

4. The Law Council notes that the *Report of the Migrant Workers' Taskforce* (**Migrant Workers' Taskforce report**) was delivered in March 2019 and that it provided 22 recommendations including that criminal sanctions be introduced 'for the most serious forms of exploitative conduct, such as where that conduct is clear, deliberate and

systemic',[1] and that the 'Government consider whether the Fair Work Ombudsman requires further resourcing, tools and powers to undertake its functions under the *Fair Work Act 2009*'.[2]

5. The word 'theft' is usually used as a shorthand means of describing a type of deliberate and knowing criminal conduct. However, the phrase 'wage theft', 'has been used as an umbrella term to describe all kinds of underpayment' as noted in the Discussion Paper at page 2, encompassing genuine and unintentional mistakes in addition to deliberate, systemic and exploitative behaviour by employers. 'Wage theft' was also defined broadly by the Queensland Parliament's Education, Employment and Small Business Committee in its Report, *A fair day's pay for a fair day's work? Exposing the true cost of wage theft in Queensland*[3] as 'the underpayment or non-payment of wages or entitlements to a worker by an employer, encapsulating a range of activities that deny workers their legal entitlements'.[4]

6. The Law Council acknowledges that some stakeholders have opposed the indiscriminate use of the term 'wage theft'. Putting aside the terminology, the conduct that is in issue occurs when an employer fails to provide minimum wages or entitlements, and more commonly looks like:

    - unpaid hours or underpayment of hours;
    - unpaid penalty rates;
    - unreasonable deductions;
    - unpaid superannuation;
    - withholding of other entitlements; and
    - sham contracting and the misuse of Australian Business Numbers.

7. The Law Council recognises that this type of conduct is occurring. It occurs for a variety of reasons of increasing seriousness, ranging from: genuine mistake; inattention; refusing to check what is required; and deliberate and knowing breach. Unfortunately for some businesses, it has become their normal mode of operation to reduce labour costs in contravention of workplace laws in order to increase their profitability and that of their supply chain partners. Any consideration of increased or alternative penalties, including the potential to introduce criminal sanctions, ought to be carefully calibrated to reflect the different levels of seriousness of the conduct.

8. The compliance regime under the *Fair Work Act 2009* (Cth) (**Fair Work Act**) should take into account the complexity of the Australian workplace relations system, appreciating that many breaches of workplace laws relating to underpayments are not intentional. They are often a result of the complexity of Australia's workplace relations system and the difficulties that employers and payroll systems have in complying with the many provisions in the vast number of awards and enterprise agreements that are in force.

9. It is important when considering changes to the Fair Work Act that employers are encouraged to investigate and voluntarily disclose any underpayments and take steps to rectify them in a timely and effective manner. Changes that may act as a

[1] Australian Government, Report of the Migrant Workers' Taskforce (March 2019) rec 6 <https://www.ag.gov.au/industrial-relations/industrial-relations-publications/Documents/mwt_final_report.pdf>.
[2] Ibid rec 10.
[3] Education, Employment and Small Business Committee, Parliament of Queensland, *A fair day's pay for a fair day's work? Exposing the true cost of wage theft in Queensland* (Report No 9, 56th Parliament, November 2018).
[4] Ibid 22.

disincentive to employers to investigate potential underpayments and report and rectify these, may not ultimately be to the benefit of employees.

## Temporary migrant workforce

10. While these issues are not exclusive to the temporary migrant workforce, it appears to be so prevalent to that section of the labour market that it would seem to be an important starting point. The Migrant Workers' Taskforce report and the findings of the Migrant Worker Justice Initiative's *National Temporary Migrant Worker Survey* provide empirical evidence that migrant workers are overrepresented in systemic wage underpayment and exploitative practices in a range of industries.[5] The Fair Work Ombudsman's inquiry into 7-Eleven also highlights the instances of migrant workers being vulnerable to exploitative labour practices.[6]

11. The scale of the problem is significant both in terms of the number of exploited workers and in monetary terms. The findings of the *National Temporary Migrant Worker Survey* indicated that almost half (46 per cent) of the migrant workers surveyed earned $15 per hour or less when at the time of the survey, the statutory minimum wage was at least $17.70.[7]

## Why the issue needs to be addressed

12. Business and employer groups, employees and their representatives as well as the community at large all have a shared interest in maintaining labour standards. Businesses and employers who comply with their obligation to pay wages and entitlements should not be placed in the disadvantaged position of having to compete against businesses who undercut prices for competitive advantage or personal gain.

13. The role of the community as a whole (and in particular, the shared interest of farmers) in discouraging exploitation is explored by Stephen Clibborn.[8] Clibborn focuses on co-regulation and the 'negotiated interdependence between regulators and societal organisations' in the approach to addressing exploitative conduct in 'a single complex community system to establish the conditions by which stakeholders orientate and connect with one another in their own interests and in the interests of the system as a whole'.[9]

14. It is this interdependence and shared interest which ought to underpin a range of measures to improve protection of employees' wages and entitlements.

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[5] See Australian Government, Report of the Migrant Workers' Taskforce (March 2019); Bassina Farbenblum and Laurie Berg, Migrant Worker Justice Initiative, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey* (November 2017). See also, Bassina Farbenblum and Laurie Berg, Migrant Worker Justice Initiative, *Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages In Australia* (October 2018).
[6] Fair Work Ombudsman, *Identifying and addressing the drivers of non-compliance in the 7-Eleven network* (Report, April 2016).
[7] Bassina Farbenblum and Laurie Berg, Migrant Worker Justice Initiative, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey* (November 2017) 5, 35.
[8] Stephen Clibborn, 'It takes a Village: civil society regulation of employment standards for temporary migrant workers in Australian horticulture' (2019) 42(1) *University of New South Wales Law Journal* Volume 242.
[9] Ibid 250, 252.

# Part I: Civil penalties in the Fair Work Act

## Current approach to determining penalties

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

15. Pecuniary penalties act as both general and specific deterrents, intended to deter the general public from engaging in non-compliant behaviour, whilst also deterring those who are already non-compliant from continuing that behaviour.

16. The Law Council does not have a view on the specific level of increase to the existing civil penalty regime that would best generate compliance with workplace laws. However, given that non-compliance remains prevalent in some areas of workplace relations, the Law Council considers there to be merit in some increase to penalties in those areas, particularly where employers deliberately or knowingly underpay employees.

17. However, the Law Council notes that there are often diminishing returns to raising pecuniary penalties and that there will likely become a point at which increasing the penalties further will have muted impacts. If businesses understand that there are already significant penalties for non-compliance, doubling the penalty is unlikely to double the deterrence. In the Law Council's view, the perception that there is a high likelihood of being caught is more likely to deter non-compliance than the size of the penalty.

**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.**

18. The Law Council notes that there are already several common law principles that can be applied in determining the quantum of penalty to be imposed, by reference to the maximum prescribed. When determining what penalties to impose, the following factors have been considered by the courts in previous cases:

    - the nature and extent of the conduct which led to the contraventions;
    - the circumstances in which that conduct took place;
    - the nature and extent of any loss or damage sustained as a result of the contraventions;
    - whether there has been similar previous conduct by the respondent;
    - whether the contraventions were properly distinct or arose out of the one course of conduct;
    - the size of the business enterprise involved;
    - whether or not the contraventions were deliberate;
    - whether senior management was involved in the contraventions;
    - whether the party committing the contraventions has exhibited contrition;
    - whether the party committing the contraventions has taken corrective action;
    - whether the party committing the contraventions has co-operated with the enforcement authorities;
    - the need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements; and

- the need for specific and general deterrence.[10]

19. These principles have been developed following decades of criminal and civil prosecutions. They operate in conjunction with other considerations, such as: treating a series of contraventions that arise out of a 'course of conduct' as one contravention,[11] and the 'totality principle' which requires Courts to ensure that the total sum imposed as a penalty for multiple breaches is proportionate to the overall nature of the conduct involved.[12] The Law Council suggests that any material departure from this approach should only occur if it is underpinned by a clear and persuasive rationale.

20. Regarding the question of whether levels of culpability or fault should influence the penalty imposed, the Law Council is of the view that both are important considerations. The Law Council supports treating cases of clear culpability and knowing breaches more seriously, reflected by proportionately greater penalties. This is already the approach under existing common law sentencing principles referred to above.

21. In the Law Council's view, caution should be exercised before automatically adjusting the size of a penalty by reference to the size of a business. The level of penalty imposed upon a business should be determined not only with regard to the size of the business, but also with regard to the level of culpability or fault or knowledge of a breach, and the impact of a penalty upon business profitability.

**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?**

22. The purpose of grouping penalties for multiple instances of a single contravention of a provision is to ensure that a single non-compliant decision is not disproportionately penalised based on the number of breaches that transpire as a result. The Law Council is of the view that, in such a scenario, the 'course of conduct' provisions set out in section 557 of the Fair Work Act help to ensure that the penalty is proportionate to the contravention, given that breaches that transpire relate to a single error.

23. In the Law Council's view, the situation is different where a party is involved in an ongoing breach and decides to continue, or to maintain, that breach. The Law Council recommends that in such cases, a separate decision to continue or maintain the breach should attract further contraventions and further pecuniary penalties. The Law Council supports maintaining the existing 'course of conduct' provisions enshrined in section 557 of the Fair Work Act. However, the Law Council also recommends the inclusion of an express provision to clarify the penalty imposed for continuing or maintaining the breach.

[10] See, eg, *Kelly v Fitzpatrick* [2007] FCA 1080.
[11] *Fair Work Act 2009* (Cth) s 557(1).
[12] *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) 145 ALR 36, [53].

## Extending liability

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

24. Franchisors and holding companies are already subject to liability for breaches of workplace laws in their franchisee/subsidiary networks if it can be shown that they knew or could reasonably be expected to have known that the contravention by the franchisee or subsidiary would or was likely to occur, unless they can show they took reasonable steps to prevent the contraventions.[13]

25. One option to alter existing arrangements would be to remove the requirement to prove any level of knowledge by the franchisor/holding company. In other words, to remove the requirement to prove that the franchisor or subsidiary knew that the contravention would or was likely to occur. This would make their liability akin to that of an employer, imposing strict liability, although still subject to a defence of having taken 'reasonable steps'. Those in favour of such a change argue that it would give franchisors and holding companies a greater incentive to ensure that the conduct of their franchisees/subsidiaries was lawful, and avoid a current difficulty that arises in trying to prove that they 'knew' what was being done. The question of imposing liability on a franchisor or holding company for the transgressions of their franchisees and subsidiaries (subject to the defence) is a policy issue about which minds will differ. It is not an option supported by the Law Council at this time. Section 558B was introduced relatively recently and the changes it was intended to bring about to increase compliance by franchisees and subsidiaries have not yet been shown to be ineffective.

26. Alternatively, an extension of liability under the Fair Work Act for operators in a supply chain could envisage imposing liability on head contractors in a supply chain in respect of the conduct of companies or persons unrelated to that entity but engaged by that entity. Those who contend in favour of such an extension identify that head contractors in a supply chain often have a large degree of control over prices and the method of work of those that contract to them (particularly where the contractors are small businesses) and that such head contractors would be less likely to impose unreasonable terms or accept tenders for work at prices below that which could generate enough income to pay minimum rates if they were legal liable for any resulting underpayments. This too is a policy question about which minds may differ. The Law Council does not support this option. It notes in this regard that section 550 of the Fair Work Act already extends liability for contraventions of the Fair Work Act to those persons that have:

    - aided, abetted, counselled or procured the contravention;
    - induced the contravention, whether by threats or promises or otherwise;
    - been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
    - conspired with others to give effect to the contravention.

27. Pursuant to that provision any person, including a head contractor, can be found to be liable for a contravention if it can be shown that they knew of the contravention and were involved in it in some manner. That could include a situation where a head contractor enters into a contract with a supplier at a rate that the head contractor knows will be insufficient to pay minimum rates to those who will be employed to do that work.

[13] *Fair Work Act 2009* (Cth) s 558B.

28. It is commonplace for the Fair Work Ombudsman to prosecute 'accessories' in relation to breaches of the Fair Work Act, with approximately 90 per cent of Fair Work Ombudsman prosecutions against companies in 2015 also involving prosecutions against a named individual.[14] Whilst the vast majority of these accessorial liability prosecutions have related to individuals working within a business that has breached the Fair Work Act, the Fair Work Ombudsman has successfully relied upon accessorial liability provisions to achieve successful outcomes in supply chains. Two prominent examples relate to trolley collection services conducted by small trolley collection businesses, where the Fair Work Ombudsman relied upon accessorial liability provisions to secure:

    - an Enforceable Undertaking with Coles Supermarkets Australia Pty Ltd with respect to trolley collectors in 2014;[15] and
    - Woolworths Group Ltd's entry into a Compliance Partnership in 2017.[16]

29. These examples demonstrate that the existing provisions have been utilised in some circumstances to hold broader supply chains to account. In the Law Council's view, the current provisions have not been shown to be inadequate and are being utilised effectively.

**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?**

30. Direct or indirect knowledge is already a factor in determining whether to extend liability to another party, and determining whether their contravention should be treated in the same way as an actual contravention.[17]

31. Common law principles have been established to determine accessorial liability.[18] They include that:

    - a person must have engaged in some conduct which 'implicates or involves' him or her in the contravention, so that there is a 'practical connection' between the person and the contravention;
    - in order for a person to have been knowingly concerned in a statutory contravention, that person must have been an intentional participant, with knowledge of the essential elements constituting the contravention. However, it is not necessary that a person with knowledge of the essential elements making up the contravention also know that those elements do amount to a contravention;
    - an accessory does not have to appreciate that the conduct involved is unlawful;

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[14] Natalie James and Janine Webster, 'Regulation of Work and Workplaces: The Fair Work Ombudsman's Role in the Development of Workplace Law' (Speech, Australian Labour Law Association National Conference, Friday 4 November 2016).
[15] Fair Work Ombudsman, 'Coles' trolley collectors report' (Media Release, 9 January 2019) <https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/january-2019/20180109-coles-eu-4th-annual-report-media-release>.
[16] Fair Work Ombudsman, 'Fair Work Ombudsman compliance partnership with Woolworths a new benchmark in supply chain governance' (Media Release, 11 October 2017) <https://www.fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/october-2017/20171011-woolworths-pcd-trolley-collectors-release>.
[17] *Fair Work Act 2009* (Cth) s 550(2)(c).
[18] *Fair Work Ombudsman v South Jin Pty* Ltd [2015] FCA 1456.

- actual knowledge of the essential elements constituting the contravention is required, and imputed or constructive knowledge is insufficient;
- the conclusion that a person has actual knowledge of the elements of a contravention by reason of that person's knowledge of suspicious circumstances coupled with a deliberate failure to make enquiries which may have confirmed those suspicions requires consideration of the person's knowledge of the matters giving rise to the suspicion, the circumstances in which the person did not make the obvious enquiry and the person's reasons, to the extent that they are known, for not having made the enquiry; and
- the requisite actual knowledge must be present at the time of the contravention.

32. Under the current law to find that a person is an accessory and so liable to be penalised as if they contravened the legislation:

    (a) Constructive or imputed knowledge is not enough – actual knowledge is required.[19]

    (b) A failure by the accessory to make enquiries is not of itself sufficient to establish liability. Actual knowledge may, however, be inferred in some cases where there were suspicious circumstances and the person made no enquiries;[20]

    (c) The law recognises a principle, sometimes referred to as 'wilful blindness', where the person in truth knows the relevant fact but deliberately chooses not to have the fact confirmed.[21] However, not every deliberate failure to make enquiry which will support the inference of actual knowledge.[22]

    (d) The difference between wilful blindness and a lack of actual knowledge due to a failure to make reasonable inquiries has been expressed as follows:

> *A thing may be troublesome to learn, and knowledge of it, when acquired, may be uninteresting or distasteful. To refuse to know any more about the subject or anything at all is then a wilful but a real ignorance. On the other hand, a person is said not to know because he does not want to know, where the substance of a thing is borne in upon his mind with a conviction the full details or precise proofs may be dangerous, because they may embarrass his denials or compromise his protests.*[23]

    In the former circumstance, the person will not have actual knowledge of the matter. In the latter circumstance, the person does have that knowledge but deliberately refrains from asking questions or seeking further information in order to maintain a state of apparent ignorance. The latter is not a circumstance of constructive or imputed knowledge, but of actual knowledge reduced to minimum by the person's wilful conduct.[24]

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[19] *Young Investments Group Pty Ltd v Mann* [2012] FCAFC 107, [11].
[20] *FWO v South Jin Pty Ltd* [2015] FCA 1456, [231]-[232]; *FWO v Blue Impression Pty Ltd* [2017] FCCA 810.
[21] *Pereira v Director of Public Prosecutions (Cth)* (1988) 63 ALJR 1, 3-4; 82 ALR 217, 220.
[22] *ASIC v ActiveSuper Pty Ltd (in liq)* (2015) 235 FCR 181, [402]-[403].
[23] Lord Sumner in *The Zamora (No 2)* [1921] 1 AC 801, 812-813.
[24] *ASIC v ActiveSuper Pty Ltd (in liq)* (2015) 235 FCR 181, [403]; *FWO v South Jin Pty Ltd* [2015] FCA 1456, [232].

(e) It has been held in a different context that where a respondent fails to make inquiries and learn the truth they may still be liable where it can be shown that an ordinary, decent person with knowledge of the same facts would have known what they were doing was improper. In *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Limited* the Full Court held that the test is not one to be applied from the point of view of the 'morally obtuse'.[25] The Court noted at paragraph 106 that proof of actual knowledge is required, but said:

> *If circumstances are such as to indicate to an ordinary, decent person that the relevant facts exist, that may be open as an evidential conclusion.*

33. This demonstrates that under the current law some uncertainty arises in particular fact scenarios as to whether a purported accessory is liable where the evidence demonstrates that they 'should have' known but chose not to find out. A recent factual example is *FWO v Hu*, involving mushroom pickers where the regulator was unable to prove that some of the alleged accessories knew that the employees had been engaged as casuals (and so entitled to the higher casual rates).[26]

34. This difficulty could be addressed by making clearer the circumstances in which accessorial liability arises. The Law Council considers that the Fair Work Act's accessorial liability provisions could be expanded from the current position of contraventions arising where a party is knowingly involved in the contravention to also include where a person is reckless as to whether their involvement contributes to a contravention (which is currently not expressly the case). The imposition of liability for reckless contributions to contraventions is additional to the existing regulatory regime but supports the objects of the Fair Work Act, which, amongst other things, seeks to guarantee a safety net of enforceable minimum terms and conditions of employment.[27]

35. What amounts to 'reckless' conduct is something that Courts interpret differently depending on the context and purpose of the legislation. In some contexts it may be proven where a person is aware of the *possibility* of a contravention and there is an indifference as to the consequences, combined with conduct which makes the person involved in the contravention.[28] In other contexts it is held to mean where a person is aware of the *probable consequences* of their actions and is indifferent as to the consequences.[29] In the view of the Law Council, if the provision was to be expanded to include reckless conduct it would be useful to be clear as to which of those two will be sufficient to prove a contravention. Noting the serious penalties that are attached to a contravention, the more conservative second approach would be the Law Council's preferred approach, namely that it will need to be proved that the purported accessory was aware of the *probable consequences* of the conduct.

[25] [2017] FCAFC 74, [99]-[106].
[26] *FWO v Hu* [2019] FCAFC 133.
[27] *Fair Work Act 2009* (Cth) s 3.
[28] *Aubrey v R* [2017] HCA 18, [49].
[29] *R v Nuri* [1990] VicRp 55; see too the discussion in *Maritime Authority of NSW v Rofe* [2012] NSWSC 5, [24]-[25].

# Part II: Criminal Sanctions

## Current approach to criminal sanctions as part of the enforcement framework

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

36. The Law Council notes that the criminalisation of underpayments may give rise to additional general deterrence, given that individuals involved in a contravention may become concerned about breaches affecting their own personal liberties. The criminalisation of underpayments is likely to have a further deterrent effect where companies or persons are not concerned about pecuniary penalties, because they intend to claim insolvency in the event of penalties being enforced against them and because pecuniary penalties have no substantial impact on the profitability of the company. It is important to appreciate that civil penalties arise against an employer on a strict liability basis: there is no need to prove that the employer intended to underpay the workers or did so knowingly or recklessly. Criminal sanctions will not be appropriate for contraventions that were not intentional and knowing. Criminal sanctions may be suitable in very serious cases where the contraventions are repetitive or systematic, and the individual concerned has actual knowledge of the contravention or is reckless as to the contravention.

37. However, the Law Council is of the view that the introduction of criminal sanctions not be seen as the means by which underpayment issues can be addressed. While criminal sanctions could play an important deterrent effect, they alone are not going to assist to alter the vast majority of cases of underpayment of wages. Instead, the Law Council suggests that more resources must firstly be directed to enforcing current laws and this, as reflected in the recommendations of the Migrant Workers' Taskforce report, also includes an educational element to ensure that workers are aware of their rights and further, are able to adequately and easily access legal recourses. The Law Council would be reluctant to see the introduction of new criminal offences while under-resourcing of the agencies with the power to prosecute under existing offences remains an issue.

38. An alternative option as a 'first step', having regard to the matters raised above regarding resourcing of the Fair Work Ombudsman, and noting that the *Migration Act 1958* (Cth) (**Migration Act**) already contains a criminal offence regime with respect to the employment of temporary migrant workers, might be the introduction of additional offence provisions within the offence regime at part 2, division 12, Subdivision C, of the Migration Act (Offences and civil penalties in relation to work by non-citizens). Such provisions would need to be appropriately drafted to address the kinds of deliberate, systemic and exploitative conduct contemplated by Recommendation 6 Migrant Workers' Taskforce report. The Law Council, notes, however, that this would only address offences in one section of the labour market.

39. Should the addition of criminal sanctions as part of the enforcement framework be preferred by the Government, the Law Council wishes to highlight several important factors that should be taken into consideration by the Government:

    (a) Underpayment of wages is an inherently monetary-based malfeasance which is largely rectifiable by monetary compensation payments. Deterrence can also be implemented by way of significant pecuniary penalties, particularly in cases where intentional underpayments arise. In these circumstances, imposing additional criminal penalties of imprisonment, other than perhaps in

the most egregious of cases, may be unnecessarily onerous and go beyond what is required to rectify underpayment breaches.

(b) Currently, Fair Work Act prosecutions proceed on the basis that a court must be satisfied on the balance of probabilities that an underpayment has occurred. The establishment of a criminal penalty will also require a shift of the burden of proof currently applicable. To satisfy a criminal conviction, the court must be satisfied beyond a reasonable doubt, and *mens rea* would need to apply as is typically the case in most criminal statutory provisions. This may have the unintended consequence of making convictions more difficult to secure and prosecutions less likely to be pursued or reach successful outcomes.

(c) The Fair Work Ombudsman currently only takes legal action in cases of strategic value and whilst it offers a limited mediation service between aggrieved employees and employers, most employees are left to take action themselves. Therefore, in addition to increased funding for the regulator, there is a need for tools to assist aggrieved employees to take legal action quickly and simply, simplification of the legal processes for such action and for greater resourcing to be provided to the courts to facilitate these outcomes in a timely manner.

(d) The Federal Circuit Court of Australia is currently largely reliant on the services of volunteer mediators in assisting to resolve minor wage claims in the court. Further, anecdotal reports suggest that employees often have difficulty in accessing court forms. There is often considerable delay in the Federal Circuit Court's ability to deal with matters – it is not uncommon for underpayment actions to take more than 2 years to resolve. In the context of these issues and the conduct which is sought to be addressed, there is a case to be made for a dedicated industrial panel in the Court along with the appointment of additional judges. The Law Council also strongly supports the appointment of additional judges to the Federal Court of Australia with expertise in industrial and employment law, noting that questions arising in this area are at times complex and, if not commenced in that Court, are not uncommonly are appealed to that Court.