Maurice Blackburn
Lawyers
Since 1919

Submission in response to the discussion paper "Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance"

October 2019

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Introduction

Maurice Blackburn Pty Ltd is a plaintiff law firm with 31 permanent offices and 31 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions.

Maurice Blackburn employs over 1000 staff, including approximately 330 lawyers who provide advice and assistance to thousands of clients each year. The advice services are often provided free of charge as it is firm policy in many areas to give the first consultation for free. The firm also has a substantial social justice practice.

Our Submission

We congratulate the Attorney General's Department (the Department) on the conduct of this consultation.

Maurice Blackburn has consistently argued that wage theft should be criminalised. The current regime of civil penalties is clearly not providing sufficient deterrence to prevent unscrupulous employers from stealing wages from their employees.

We know that many employers are doing the right thing. However the incidence of intentional, systemic wage theft is being exposed more regularly. We reject the notion from those that have been caught stealing the wages of their staff that the complexity of the award structure leads to wage theft – the vast majority of employers are able to handle this without issue, and we rarely hear stories of this complexity leading to wage overpayment.

We remind the Department that wage theft disproportionately impacts Australia's most vulnerable workers. Those who fall victim to wage theft most often work for businesses which attract and employ the most vulnerable workers. These may include workers from culturally and linguistically diverse backgrounds, those returning to the workforce following family responsibilities, early school leavers and students.

This vulnerability often places them at a distinct status disadvantage in negotiating appropriate employment conditions. This is typified by:

- Employee non-engagement with unions or other forms of workforce organisation;
- Employees not questioning inappropriate behaviours of employers through fear of retribution, being deported, or not being able to find alternative work; and
- Employees not seeking external information on entitlements.

Wage theft is also most rife in industries in which vulnerable workers are engaged. The prevalence in hospitality is well documented, as it is in retail (eg 7-Eleven and other franchise arrangements), cleaning, agriculture and transport. One particularly worrying trend is the rise of poor treatment of employees in the health, aged care and disability sectors. Chronic underfunding has led service providers to cut corners in order to stay in business.

The most marginalised workers are over-represented in poor working arrangements that leave them vulnerable to wage theft – such as in the gig economy and other precarious workplace arrangements.

It is important that Australian governments take a zero tolerance approach to wage theft – and we believe that the criminalisation of the most intentional, systemic, reckless or grossly negligent instances of wage theft would be a positive step in its eradication. It is also important that industrial organisations such as trade unions, who have historically been the natural enforcer of wage laws, be given appropriate prosecutorial powers in any new laws.

Responses to discussion questions.

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

   Maurice Blackburn submits that civil penalties need to be set at a level that provides an appropriate deterrent effect. The civil penalty regime protecting against wage theft, set out in the Fair Work Act, is obviously failing in that objective.

   There have been a number of high profile cases where the penalties imposed are manifestly inadequate to serve as any kind of deterrent, if imposed at all.

   - In the case of George Calombaris' MADE Group, the $200,000 'contrition payment' took the form of an enforceable undertaking, made with the Fair Work Ombudsman.[1] The paltry nature of the fine is stark when compared to the quantum of wage theft that had occurred, estimated at $7.8mil. Even the Coalition Industrial Relations Minister sees this fine as 'light'.[2]

   - In relation to Pizza Hit, respected journalist Adele Ferguson noted that: "*When a franchisee gets fines of a few thousand dollars for getting caught doing the wrong thing, it acts as little if any deterrence. Eleven Infringement Notices were issued to 11 franchisees, totalling $6300 in penalties for failing to provide pay slips, failure to record the name and number of the super fund, and not keeping records for seven years (eg. recording start and finish times)*".[3]

   Compounding this, the civil penalties currently available under the Fair Work Act for wage theft are low in comparison to other wrongs. The McKell Institute in its excellent report "Ending Wage Theft: Eradicating Underpayment in the Australian Workplace" uses the example of comparing penalties for wage theft to the penalties for cartel conduct. They write:

   > *"For instance, under the Competition and Consumer Act 2010 (Cth) (CCC), an individual guilty of cartel conduct faces a maximum penalty of 10 years in jail and/or fines of up to $420,000 per offence. This is over three times the maximum monetary penalty an individual faces for committing 'serious' wage theft, and more than thirty-three times the regular penalty for wage theft".*[4]

   The extent of the differences are inexplicable. The current system makes it easier (and cheaper) for unscrupulous employers to underpay employees than to engage in conduct which restricts competition.

   Maurice Blackburn submits that the Department, when considering the appropriate levels of penalties available through the Fair Work Act, should start with ensuring that those penalties are commensurate with other penalties for corporate misconduct.

[1] https://www.abc.net.au/news/2019-07-24/george-calombaris-master-chef-judge-fine-too-light/11341096
[2] https://www.smh.com.au/politics/federal/i-think-that-s-light-porter-criticises-200k-fine-for-wage-theft-20190724-p52a65.html
[3] https://www.smh.com.au/business/companies/wage-fraud-pizza-hut-hit-with-fines-20170127-gtzrbx.html
[4] https://mckellinstitute.org.au/app/uploads/McKell-Ending-Wage-Theft.pdf, p.28

While Maurice Blackburn applauds this focus on the existing levels of penalties, we would argue that increases in the civil penalty regime are pointless as a stand alone solution. In order to have the appropriate deterrent effect, increased penalties need to be introduced along with:

i. A greater focus on compliance/policing. A penalties regime will only be as successful as its enforcement. To this end, we encourage the Department to consider the degree to which they are satisfied that the Fair Work Commission, and the Fair Work Ombudsman are adequately resourced to investigate and police corporate behaviours.

   Alongside this, it is important that the process for employees to report systemic wage theft is simple and well known. The act of calling out poor corporate conduct needs to be encouraged and rewarded. Whistleblowers need to be protected and rewarded, not vilified and victimised.

ii. A focus on expediency. Maurice Blackburn supports worker advocates' call for the prompt return of stolen wages, into the pockets of the workers, to be the focus.

   There appears to be a common misconception that the repayment of stolen wages is the same as a fine – that being forced to repay entitlements is the punishment. This is not the case.

   Maurice Blackburn encourages the Department to focus on developing a regime where the provision of worker entitlements comes first, followed by the imposition of fines.

   We note that the McKell Institute recommends the mandatory charging of interest, as a way to encourage employers to force expediency on the part of employers.[5] We believe this is worthy of further consideration.

iii. Increased civil penalties should be one part of a holistic civil/criminal regime aimed at deterring wage theft. A parallel criminal sanction is important. For more detail on this, please refer to our response to Discussion Question 12.

Maurice Blackburn submits that the current penalties regime is obviously failing its objective of deterring wage theft. Increasing the penalties to be more in line with those applicable to other forms of corporate misconduct would be a desirable outcome of this process.

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.

It is important to remember that we are only referring to case of clear, deliberate and systemic wage theft – not accidental or inadvertent underpayments.

Maurice Blackburn believes that, in order for a penalty regime to have an appropriate deterrent effect, the quantum of any civil penalty for wage theft should reflect:

- The dollar value of the underpayment,

[5] Ibid, p.29

- The revenue of the entity,
- The timeframe over which the theft occurred, and
- The impact on the victims (the exploitation of the most vulnerable workers should be seen as more unconscionable).

The type of wage theft should not be a factor. For example, the non-payment of penalty rates, the failure to pay correct superannuation, the failure to adhere to award requirements etc should be seen equally as wage theft. The scale and impact of the wage theft should be more important than the form of wage theft.

The admittance and acceptance of fault, plus evidence of genuine contrition, should serve as mitigating factors.

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?

As the Discussion Paper makes clear:

> *For example, if a company engages in a course of conduct that contravenes a single term of a modern award in respect of ten employees, the court can group these ten contraventions so as to attract a single penalty. The system effectively makes individual breaches concurrent, meaning that the maximum penalty that can be ordered against the company will be 300 penalty units (currently $63,000), rather than the 3000 penalty units ($630,000) that could have been awarded if the contraventions against each employee were applied separately.* (p.3 & 4)

Maurice Blackburn believes that the Act should continue to leave it to the court's discretion as to whether a 'grouped' fine or a 'per contravention' fine is more appropriate for that case, based on the criteria listed in our response to Discussion Question 2.

4. 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 does not appear that the amendments coupled with the FWO's activities have sufficiently influenced employer behaviour. However, when the FWO publicly commences prosecution, this appears to have greater impact. Furthermore, Union right of entry needs to be strengthened to allow education and empowerment of vulnerable workers.

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

In our submission the 'serious contravention' category in isolation is unlikely to have a sufficient deterrent effect. Again, Union right of entry needs to be strengthened to allow education and empowerment of vulnerable workers.

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

Recommendation 10 of the Education and Employment References Committee report on their inquiry into the exploitation of workers in the cleaning industry[6] serves as a useful, broad overview of potential changes to the Fair Work Act, aimed at reducing the occurrence of corporate breaches in worker entitlements, including wage theft. It reads as follows:

> *Recommendation 10*
>
> *The committee recommends that for consistency the Fair Work Act 2009 be amended to extend the protections for vulnerable workers from franchise arrangements to other business models such as subcontracting and labour hire arrangements.*
>
> *In particular the committee recommends that the Fair Work Act 2009 be amended so that a person (whether an individual or a corporate entity) should be liable for an employer's contravention of the National Employment Standards, an industrial instrument, the rules concerning the payment of wages or the keeping of records, or the prohibitions on sham contracting, where the person:*
>
> - *has a significant degree of influence or control over the employer's affairs, or over the wages or employment conditions of the relevant employee(s);*
> - *knew or could reasonably be expected to have known that the contravention (or a contravention of the same or a similar character) would occur; and*
> - *cannot show that they have taken reasonable steps to prevent a contravention of the same or a similar character.*
>
> *The committee recommends that the amendment specify that whether a person has significant influence or control over wages or employment conditions should be determined by reference to the substance and practical operation of arrangements for the performance of the relevant work.*
>
> *The committee further recommends that the amendment specify that person should be deemed to have significant influence or control if it sets or accepts a price for goods or services, or for the use of property, at a level that practically constrains the capacity of the relevant employer to comply with its obligations.*

Maurice Blackburn believes that the tenor of the above recommendation is instructive, and recommendations it to the Department for consideration.

[6]https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/ExploitationofCleaners/Report, p.51

7. Should actual knowledge of, or knowing involvement in, a contravention of a workplace law be the decisive factor in determining whether to extend liability to another person or company? If not, what level of knowledge or involvement would be appropriate? Would recklessness constitute a fair element to an offence of this type?

We submit that knowing involvement has been an unnecessary high threshold to meet. An example of this is the inability to extend liability to franchisors, such as 7-Eleven, for the liability of franchisees engaging in systemic underpayment, even when the franchisor manages all payroll for the franchisee. Recklessness may not be a sufficiently compelling element in such a circumstance. A more appropriate test would be that the party, due to its extent of control, should have known of the contravention and therefore is taken to be involved. Maurice Blackburn notes the recommendation of the Black Economy Taskforce in relation to the recklessness defence, as detailed on page 10 of the Discussion Paper. We agree that 'could not reasonably be expected to know' seems sensible as a way to reduce employers' capacity to abrogate liability.

8. 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?

Please refer to our response to Discussion Question 6. We agree with the direction of Recommendation 10 of the Senate Committee's report in this matter.

9. 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

In our experience, there are a number of business models where wage theft is rife, yet those who should be held responsible – either in full or in part – are able to abrogate their liability through the adoption of that business model.

Maurice Blackburn encourages the Department to take these business models into consideration when reviewing the current accessorial liability provisions.

i. Wage theft in the gig economy

Maurice Blackburn has argued for some time that there is a growing prevalence of workers who are suffering wage theft due to the dubious nature of the employment relationship under which they work.

The distinction between employees and independent contractors arose in the 19th century as a means of determining whether one person should be liable for the torts of another.[7]

[7] See ACE Insurance Ltd v Trifunovski (includes Corrigendum dated 18 November 2011) [2011] FCA 1204 (25 October 2011) Perram J at [25] and ACE Insurance Limited v Trifunovski [2013] FCAFC 3 (25 January 2013) Buchannan J at [14].

Over the years the Courts have developed various common law tests in order to distinguish independent contractors from employees. Presently the common law test applied by the Courts is set out in the High Court decision in *Hollis v Vabu*.

These tests have often been criticised for their complexity, uncertainty in application, and ability to be manipulated in order to achieve a desired outcome.

The ambiguity in the common law test has led to a number of legal disputes over the rights and entitlements of workers that turn on the application of a test, the results of which cannot be predicted with certainty.

Maurice Blackburn submits that some gig economy businesses are attempting to exploit this uncertainty by wrongly classifying workers as independent contractors to avoid industrial obligations they would have if they utilised more traditional employment relationships.

Maurice Blackburn believes that the definition of 'employee' should be extended by federal legislation to be broader than the present definition at common law.

International experience can help inform this process.

In August 2018 the Supreme Court of California handed down a decision adopting the 'ABC test' for determining whether workers were independent contractors or employees. The case follows other jurisdictions in America also adopting the ABC test.

According to the 'ABC test', in order for a worker to be an independent contractor all three of the following criteria must be satisfied:

> a) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;
>
> b) that the worker performs work that is outside the usual course of the hiring entity's business; and
>
> c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.[8]

If the worker does not satisfy all three criteria then he/she is deemed to be an employee.

Maurice Blackburn believes that the above test should be inserted into industrial and other legislation that uses the common law definition of employee as a means of determining whether a worker is an employee or contractor. It would thereby also assist in determining whether a platform or entity is an employer or engager of contracted work.

Maurice Blackburn further believes that the above test should apply *in addition to* the common law definition so that if a worker meets either test they will be classified as an employee.

[8] Dynamex Operations West, Inc. v. Superior Court of Los Angeles

There is likely to be significant overlap between the ABC test and the common law definition. However, Maurice Blackburn believes that the ABC test is simpler to apply, is likely to apply to many dependent contractors and would remove some of the ambiguity caused by the common law definition.

The ABC test is also likely to cover a larger number of workers than the common law definition which would give a greater number of workers access to the protections and rights in the Fair Work Act including collective bargaining rights.

Maurice Blackburn has long argued that the Fair Work Commission should be given the power to arbitrate pay and conditions for independent contractors. This would reduce the incentive to classify workers as independent contractors and therefore reduce misclassification in the on-demand economy.[9]

Maurice Blackburn believes these are worthwhile courses of action, and worthy of consideration by the Department.

ii. Wage theft within franchise arrangements.

Many of the high profile cases of wage theft have occurred under franchising arrangements.

Currently there are two instruments aimed at regulating the franchising industry, both administered federally, namely Australian Consumer Law ("ACL") and the Franchising Code of Conduct ("the Code") under the *Competition and Consumer Act 2010* (Cth).

The ACL has jurisdiction to deal with unfair terms in franchise agreements and any misleading, deceptive or unconscionable conduct against franchisees. However, as with other types of litigation, it is often not entered into because of the costly and lengthy nature.

The Code regulates the conduct of franchising participants towards each other, usually through franchise agreements. The ACCC regulates the Code and investigates alleged breaches.

Maurice Blackburn has previously argued:[10]

- That a positive obligation should be placed on the franchisor to ensure its franchisees are upholding the legislative requirements of workplace law – including the proper payment of wages. This positive obligation should be articulated in the Code of Conduct; and

- That a Funder of Last Resort process should be embedded and mandated in the Code of Conduct. Under this, the franchisor should bear responsibility for unpaid entitlements if the franchisee cannot do so.

It is clear that any solution should be based on capturing the poor conduct of franchisors, not franchisees or workers who are left largely powerless under the current wage theft regime.

[9] This change may also require an amendment to the Competition and Consumer Act 2010 (CC Act) to exempt independent contractors who engage in collective bargaining in the Fair Work Commission from the anti-competitive conduct provisions of the CCA.

[10] https://www.aph.gov.au/DocumentStore.ashx?id=26876526-f184-47fb-a2be-b767b5cfbf55&subId=566187

A national licensing scheme for franchises could be a reasonable policy consideration. Such a scheme could track whether any individuals have been in breach under the scheme or any other industrial law:

- Whether the franchisor is of good character and judgement;
- Compliance with industrial laws, including work, health and safety laws;
- The number of franchisees engaged by them;
- The number of employees engaged by their franchisees;
- Relevant industrial agreements which govern employees of franchisees; and
- Compliance with ATO requirements.

It is important to ensure that in any changes to regulation regarding franchise arrangements, the onus is on the franchisor to ensure compliance, due to the high degree of control franchisors have in the franchise relationship.

Once again, Maurice Blackburn believes these are worthwhile courses of action, and potentially worthy of further consideration by the Department.

iii. Wage theft within labour hire arrangements

Many labour hire operators operate outside employment frameworks and routinely exploit workers. They are effectively invisible to legal and regulatory regimes.

While a number of States are now implementing labour hire licensing schemes[11], there is still the outstanding issue of how federal laws intersect with these schemes, while other States and Territories continue to be without a framework at all.

We note that the Senate Standing Committees on Education and Employment agrees that the licensing of labour hire arrangements would assist in the reduction of wage theft and other inappropriate employer behaviours.

In the report from their inquiry, they make the following observation[12]:

> *…the committee is persuaded by evidence indicating that fragmented employment arrangements with convoluted labour hire based supply chains work to generate conditions that are demonstrably high risk for illegal behaviour that exploits workers.*

Recommendation 13 of their inquiry into the exploitation of general and specialist cleaners working in retail chains for contracting or subcontracting cleaning companies[13] reads as follows:

> *Recommendation 13*
> *The committee recommends that the Government, in consultation with all states and territories, establish a national labour hire licensing scheme.*

[11] See, for example, https://www.worksafe.qld.gov.au/news/2018/regulation-of-the-labour-hire-industry-in-queensland; https://economicdevelopment.vic.gov.au/inquiry-into-the-labour-hire-industry; https://www.sa.gov.au/topics/business-and-trade/licensing/labour-hire/labour-hire-licence

[12] https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/ExploitationofCleaners/Report, p.60

[13] Ibid, p.60

Maurice Blackburn believes these are worthwhile courses of action, and worthy of consideration by the Department, as a means for reducing the likelihood of wage theft in such arrangements.

iv. Wage theft through illegal phoenix activity

The ATO's website[14] tells us that:

> *… illegal phoenix activity is particularly prevalent in major centres in building and construction, labour hire, payroll services, security services, cleaning, computer consulting, cafés and restaurants, and childcare services. We also see it in regional Australia in mining, agriculture, horticulture and transport. There is an emerging trend in intermediaries who promote or facilitate illegal phoenix behaviour.*

A recent report[15] estimated that illegal phoenix activity has cost individuals between $31 million and $298 million in unpaid entitlements, including unpaid wages.

A 2017 paper released by the Federal Government suggested that the incidence of illegal phoenix activity was on the rise with more people terminated because of their employer's insolvency, making them more reliant on the Fair Entitlement Guarantee scheme[16]

A draft bill[17] is currently before the parliament which will, if passed, increase both criminal and civil consequences for those who engage in wage theft via illegal phoenix activity.

Whilst this is a good start, Maurice Blackburn believes there is more that can be done to improve the situation for workers, through:

- Better screening of corporate directors,
- Better education for directors about the consequences of illegal phoenix activity, and
- Targeting phoenix activity in corporate groups – such that surviving entities become responsible for the debts and worker entitlements of the liquidated entity.

Maurice Blackburn submits that the Department, through this inquiry, could make similar recommendations.

10. 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?

Maurice Blackburn does not believe that a separate contravention should be necessary.

[14] https://www.ato.gov.au/General/The-fight-against-tax-crime/Our-focus/Illegal-phoenix-activity/The-economic-impact-of-potential-illegal-phoenix-activity/

[15]https://www.ato.gov.au/uploadedFiles/Content/ITX/downloads/The_economic_impacts_of_potential_illegal_Phoenix_activity.pdf

[16] Australian Government, Treasury and Department of Employment *Reforms to Address the Corporate Misuse of the Fair Entitlements Guarantee Scheme: Consultation paper* May 2017

[17] https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/TLABIllegalPhoenixing)

The first priority should be to achieve clarity around what is and what is not a sham contracting arrangement. This will entail:

- The adoption of the ABC Test (see above) or similar to set legislative parameters around who is and who is not an employee.
- Enabling test cases aimed at determining in practice who is and who is not an employee, and under what circumstances. Maurice Blackburn believes that the government seriously consider funding unions, and appropriately resourcing the Fair Work Ombudsman to undertake sufficient test cases to achieve clarity.
- Reviewing international test case outcomes.

Once this certainty is achieved, if an activity has been determined to be sham contracting, yet a platform persists, it should attract penalties.

Penalty regime should not be different to those by which traditional work arrangements are regulated.

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

As stated earlier, Maurice Blackburn notes the recommendation of the Black Economy Taskforce in relation to the recklessness defence, as detailed on page 10 of the Discussion Paper. We agree that the removal of the recklessness provision, and the substitution of 'could not reasonably be expected to know' seems sensible as a way to reduce employers' capacity to abrogate liability.

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

Maurice Blackburn is of the opinion that wage theft should be criminalised. We believe that this would provide a necessary additional deterrent to civil penalties.

We believe that the number of jurisdictions (including the Commonwealth) which are currently exploring the best mechanism to implement criminal penalties for wage theft shows that support for this move is increasing.

We further note that high profile Australians who have been directly engaged in the rectification of serious wage theft have also recommended this course of action. For example, Professor Allan Fels, who was tasked with correcting the wrongs perpetrated by 7-Eleven has agreed that:

> *There should be the real prospect of jail sentences ... in sustained, substantial and intentional cases*[18]

Maurice Blackburn endorses the perspective of the McKell Institute that:[19]

[18] https://www.smh.com.au/politics/federal/employers-could-face-jail-over-wage-theft-under-new-laws-20190724-p52ad5.html
[19] https://mckellinstitute.org.au/app/uploads/McKell-Ending-Wage-Theft.pdf, p.28

> *… we believe that it is most appropriate for jail sentences to be reserved for intentional, reckless or grossly negligent instances of wage theft. Whilst all instances of wage theft should result in some form of sanction, a tiered system of penalties is most appropriate, with employers who make an inadvertent mistake remaining subject to civil penalties…… Consequently, we recommend that States should amend their relevant criminal code to make the intentional, reckless or grossly negligent instances of wage theft a criminal offence.*

Maurice Blackburn submits that the Department should draw on the outcomes of similar inquiries in Queensland and Victoria in developing a legislative scheme which will effectively criminalise wage theft in Australia.

In the drafting of any legislative scheme, it is important that its application be broad so as to encapsulate new and emerging methods of engagement, such as the gig economy and other business models described in our response to Discussion Question 9.

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

Maurice Blackburn notes the discussion on fault elements and attributing criminal liability on page 12 of the Discussion Paper. We trust that the Department will actively seek out the perspectives of criminal law firms, and consumer advocacy groups that work with the criminal law, in determining the most appropriate provisions to recommend for inclusion.

14. What kind of fault elements should apply?

As per our response to Discussion Question 13.

15. 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?

We submit that due to the particular nature of employment and control exercised by an employer over an employee, separate legislation should be created for this purpose.

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

A Wage Theft Act could have parallels with some workplace health and safety legislation. For example, categories could take a form as follows:

Category 1 – reckless or intentional conduct in relation to wages (highest category)

The category one offence would criminalise reckless conduct by an employer or engager, where either intentionally or recklessly, the employer or engager engages or engaged in conduct that results in an individual or group of workers being underpaid.

A pecuniary penalty of up to $1,000,000 and/or 10 years imprisonment would be appropriate for this conduct contrary to this offence.

Category 2 – multiple failures to comply and make payment of wages (medium category)

The category two offence would criminalise a failure by an employer or engager to comply with relevant industrial instruments, superannuation laws in a systemic failure to pay wages.

An appropriate pecuniary penalty for this offence would be $300,000.

Category 3 – individual failure to comply and pay wages (lowest category)

The category three offence criminalises an employer or engager's failure to pay wages without a reasonable excuse. This simple offence is applicable to employers and engagers who are unsure of their obligations and fail to pay wages as a result of their ignorance.

An appropriate pecuniary penalty for this offence would be $100,000.

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

We note that the ACTU has expressed concern[20] that a focus on criminalisation may distract from the real focus, which is to ensure that workers are repaid what's owed to them in the most expeditious manner. We believe that the risk of this unintended consequence may be lessened if:

- The legislative scheme provides for strict liability offences, with various penalties dependent on the nature of the wage theft; and
- That the process for bringing a claim of wage theft is victim-focused. This might take the form of ensuring that workers have clear and simple ways to make their experience of wage theft known to investigators, that industrial organisations are given standing to prosecute wage theft, and that whistleblower protections are in place.

Maurice Blackburn reminds the Committee of the importance of ensuring that appropriate processes for **wage recovery** must be considered as part of any review of wage theft.

We submit that the Department should satisfy themselves that wage recovery rules under Australia's industrial relations legislative framework are fit for purpose.

[20] See for example https://www.smh.com.au/politics/federal/union-leader-says-libs-might-criminalise-wage-theft-for-marketing-reasons-20190906-p52opg.html

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

Maurice Blackburn brings two matters to the attention of the Department:

i. Non-payment or under-payment of superannuation as a form of wage theft

Maurice Blackburn believes that the underpayment or non-payment of superannuation should attract the same community abhorrence and derision as the underpayment or non-payment of wages.

Maurice Blackburn suggests that there are three core reasons that companies are able to use the non-payment or under-payment of superannuation as a corporate strategy. They are:

- That the law does not make it unlawful to not pay super. There is no legislated obligation on employers to pay super.
- Current laws do not perceive superannuation to be part of an employee's salary; and
- Corporate greed.

Whilst it is not possible to legislate against corporate greed, Maurice Blackburn submits that the Department could advocate for legislative changes that would assist in negating the other two issues noted above.

Firstly, the Superannuation Guarantee Act (SG Act) should clearly reflect that superannuation is part of an employee's salary. The extensions of this include:

- Employers should be required to pay superannuation at the same time as wages and salary, rather than continuing with the status quo of allowing up to four months for the funds to be lodged.

- Maurice Blackburn sees the continuation of the ability for employers to offset superannuation against salary sacrifice arrangements as counter to the desired outcomes of reducing super theft.

- Defining superannuation as 'deferred wages' would add additional means for recourse, through Fair Work and court processes.

- Maurice Blackburn suggests that the Fair Work Commission may potentially be the better forum for resolving these issues than the ATO. Consideration could be given to a separate Division of the FWC being created to deal with these matters given the apparent inability of the ATO to efficiently administer recovery on behalf of employees.

Secondly, that the SG Act should be amended to empower individuals and their union to be able to pursue unpaid superannuation payments directly from the employer, including compensation if loss is sustained because insurance cover is not in place due to the non-payment of super.

ii. Wage Theft as Anti-Competitive Behaviour.

The McKell Institute has recommended that:[21]

> *The Australian Law Reform Commission should be asked to investigate how to establish wage theft as an anticompetitive practice as well as options for private enforcement of breaches of competition law.*

We believe this is worthy of consideration.

The Background information, spelled out on page 2 of the Discussion Paper notes that:

> *Wage underpayment and employee exploitation deny employees their legal entitlements and have the further effect that there is not a level playing field for employers, such that the overwhelming majority of employers who are trying to do the right thing are competing against those that underpay or exploit workers.*

The assurance of a level playing field is crucial in encouraging employers to do the right thing by their employees. The McKell Institute's innovative recommendation has the potential to greatly assist in this process.

[21] https://mckellinstitute.org.au/app/uploads/McKell-Ending-Wage-Theft.pdf, p.29