National Retail Association

INDUSTRIAL RELATIONS CONSULTATION

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

1. About the National Retail Association

1.1. The National Retail Association Limited, Union of Employers (**NRA**) is an industrial association registered under the *Fair Work (Registered Organisations) Act 2009* (Cth) to represent the industrial interests of employers in the retail, fast food, quick service and affiliated industries.

1.2. Representing approximately 6,000 member businesses and 28,000 individual shop fronts nation-wide, the NRA's membership includes the full spectrum of Australian businesses, from small "mum-and-dad" businesses to major international corporate groups.

1.3. As an industrial association, the NRA has been a voice for its members since approximately 1921, and will continue to do so.

2. About these submissions

2.1. These submissions are made to the Department of Industrial Relations (**the Department**) with respect to the Industrial Relations Consultation (**the Consultation**) being undertaken by the Department pursuant to the announcement of the Minister for Industrial Relations (**the Minister**) on 19 September 2019.

2.2. These submissions deal with the first of two discussion papers issued by the Department for the purposes of the Consultation, specifically the paper entitled *Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance* (**the Discussion Paper**).

2.3. As an industrial organisation that represents employers, the NRA has historically taken what it considers to be a measured approach to the enforcement of non-compliance with industrial relations laws, calling for a balance between penalizing deliberate, calculated non-compliance as an anti-competitive practice whilst acknowledging that genuine mistakes do, in fact, occur.

2.4. This position has been reflected the NRA's involvement in various Wage Theft Inquiries held by the States of Queensland, Victoria, South Australia and Western Australia, and the NRA remains of the view that this balance must be struck in order for Australia's industrial relations system to be fair and just for all stakeholders.

3. Summary of submissions

3.1. In short, the view of the NRA is that the civil penalty structure under industrial relations laws ought **not** be the subject of further amendment, as:

(a) changes made to the civil penalty structure by the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth) (**VW Act**), particularly the creation of increased penalties for ***serious contraventions***, have yet to be considered or applied by the courts;

(b) the current penalty structure, pursuant to the amendments made by the VW Act, have prompted increased proactive compliance from the Australian business community;

(c) there is no evidence to indicate that Australian businesses consider the prospect of penalties under the *Fair Work Act 2009* (Cth) (**FW Act**) to be a "cost of doing business";

(d) the current discretion granted to the courts in relation to the calculation of civil penalties is the most appropriate approach to this issue having regard for the wide variety of businesses subject to regulation under the FW Act.

3.2. The view of the NRA is that criminal sanctions ought not be inserted into the FW Act unless those criminal sanctions attach **only** to the most egregious forms of deliberate and knowing non-compliance by employers. Consideration must be had for the inadvertent nature of the majority of non-compliance and the nature of the majority of Australian employers being small businesses.

Part 1: Civil penalties under the *Fair Work Act*

4. Current approach to determining penalties

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

4.1.1. The NRA is of the view that it is premature, in the current industrial relations framework, to contemplate additional increases to the civil penalty regime in the *Fair Work Act 2009* (Cth) (**FW Act**) beyond further indexation of the value of penalty units.

4.1.2. The NRA takes this view by noting that the provisions of the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (**VW Act**) in relation to ***serious contraventions*** have yet to be the subject of any judicial consideration or application.

4.1.3. In the absence of any indication of how the judiciary will apply these provisions to the most egregious forms of non-compliance, including the quantum of any penalty calculated thereunder, any view that the current penalty regime is insufficient to generate compliance with workplace laws is based only on incomplete information.

4.1.4. The NRA also notes that the period since the commencement of the VW Act has seen several major businesses voluntarily disclose non-compliance to the Fair Work Ombudsman (**the FWO**). The NRA submits that this spate of disclosures following the commencement of the VW Act is not mere coincidence, but a reaction to the provisions of that Act pertaining to ***serious contraventions***.

4.1.5. Through consultation with its members, the NRA is also aware that the provisions of the VW Act in relation to ***serious contraventions*** and franchisor liability prompted numerous significant businesses to undertake thorough reviews of their payroll and rostering practices. These processes were occurring even prior to the Act passing through Parliament.

4.1.6. With the above in mind, the NRA submits that:

(a) the current penalty regime, following the commencement of the VW Act, is sufficiently punitive, despite being untested, to drive compliance for major businesses;

(b) this is demonstrated through increased voluntary disclosures to the FWO; and

(c) any further reform of the civil penalty regime, in circumstances where the effects of the reform implemented via the VW Act have yet to be fully realised through consideration and application by the judiciary.

4.2 What are some alternative ways to calculate maximum penalties?

4.2.1. Part 1 of the Discussion Paper traverses numerous alternative methods of calculating penalties adopted under other legislation, including under the *Competition and Consumer Act 2010* (Cth) and the *Taxation Administration 1953* (Cth).

4.2.2. The Discussion Paper also makes the following observation:

> "*These examples highlight that general comparisons between penalty regimes in the Fair Work Act and other legislation can be useful, but that the objectives of the relevant legislation and the kinds of behaviours and businesses they regulate can – and do – vary widely.*
>
> *In addition, it is important to consider other unintended consequences of changing the penalty structure. For example, overly prescriptive calculation methods may limit the broad discretionary powers conferred on the courts by the Fair Work Act.*"

4.2.3. The NRA respectfully agrees with this observation as a basis for avoiding any changes to the methodology of calculating penalties under the FW Act.

The Australian business environment

4.2.4. It is essential that any proposed legislative or regulatory reform of Australia's industrial relations system consider the nature of the businesses that are subject to the provisions and subordinate instruments of the FW Act.

4.2.5. Although significant media attention is levelled against major corporations when non-compliance occurs, it must be remembered that as at the end of the financial year 2017/18:

(a) 2,313,291 business operated in Australia;

(b) of these, only 877,744 employed any employees;

(c) of those businesses that had employees, 93.8% employed fewer than 20 employees; and

(d) only 6.17% of businesses that had employees employed 20 or more employees.[1]

4.2.6. Consequently, any method of calculating penalties based on the comments of ACCC Chairman Mr Rod Sims as traversed on page 5 of the Discussion Paper would be woefully disconnected from the reality of the makeup of the Australian business environment.

4.2.7. It should be noted that only 2,191 businesses[2], or approximately 0.09% of all Australian businesses, are listed on the Australian Stock Exchange, and as such any method of calculating penalties aimed at having a direct impact on share prices would be heinously prejudicial to the overwhelming majority of Australian businesses.

4.2.8. Rather, the process by which penalties are set needs to allow the judiciary to have sufficient discretion to both address the special needs and circumstances of small and medium businesses whilst at the same time enabling the judiciary to impose sufficiently severe penalties on major institutions to allow for effective general and specific deterrence.

The current level of discretion

4.2.9. Section 546(1) allows a court to order a person (including a body corporate) to pay a pecuniary penalty "that the court considers is appropriate".

4.2.10. This provision allows the court a wide-ranging discretion to take into consideration any matter which may mitigate or aggravate the quantum of any penalty to be imposed, to achieve a result that is best suited to the circumstances of the case, the objects of the FW Act, and the interests of justice.

4.2.11. The broad discretion conferred on the judiciary by section 546 has resulted in the development of jurisprudence which assists in guiding members of the judiciary.

4.2.12. The seminal case in this respect appears to be *Kelly v Fitzpatrick*[3], at paragraph [14] of which Tracey J adopted the following non-exhaustive list of relevant factors for the assessment of pecuniary penalties (as identified by Mowbray FM in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7 at paragraphs [18] to [55]):

(a) the nature and extent of the conduct that led to the contraventions;

(b) the circumstances in which that conduct took place;

(c) the nature and extent of any loss or damage sustained as a result of the contraventions;

(d) whether the contraventions were properly distinct or arose out of the one course of conduct;

(e) the size of the business enterprise involved;

(f) whether or not the contraventions were deliberate;

---

[1] Derived from Australian Bureau of Statistics, 2019, *Counts of Australian Businesses, including Entries and Exits, Jun 2014 to Jun 2018*, 'Table 13: Businesses by employment size range; June 2014 – June 2018', time series spreadsheet, cat. no. 8165.0, viewed 21 July 2019, https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/8165.0June%202014%20to%20June%202018?OpenDocument

[2] ASX, 2019, *ASX listed companies as at Thursday October 24 11:56:47 AEDT 2019*, accessed 24 October 2019, https://www.asx.com.au/asx/research/ASXListedCompanies.csv

[3] (2007) 166 IR 14; [2007] FCA 1080

(g) whether senior management was involved in the contraventions;

(h) whether the party committing the contravention had exhibited contrition;

(i) whether the party committing the contravention had undertaken corrective action;

(j) whether the party committing the contravention had cooperated with the enforcement authorities;

(k) the need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements; and

(l) the need for specific and general deterrence.

4.2.13. This jurisprudence has been relied on extensively by the FWO in proceedings seeking the imposition of pecuniary penalties and has been consistently applied by the courts in the determination of penalties.[4]

4.2.14. It has also been noted, however, that whilst the above factors are a convenient "checklist", they are not mandatory considerations, [5] nor are they the only matters to which the court may have regard.

4.2.15. Any assertion that allowing members of the judiciary to retain their current level of discretion would result in "softer" penalties for small businesses would be disingenuous, given that the highest penalties on record for contraventions of the FW Act are:

(a) $644,000 against a fruit market operator in Victoria[6]; and

(b) $444,100 against a café in Albury, New South Wales[7].

4.2.16. It should be noted that the lack of a significant penalty order against a major corporate employer is primarily due to the lack of any proceedings commenced against such an employer by the regulator.

4.2.17. It should also be noted that the mere fact that an employer may not be able to pay a substantial penalty is not itself determinative of the size of the penalty to be imposed, but is simply one of the many factors the court may take into account. Burchardt J observed in *Fair Work Ombudsman v Mhoney Pty Ltd & Anor*[8], the setting of penalties "*… is not a matter of crafting orders that [the employer] will necessarily be able to pay.*"

Is there any evidence that the current method of calculating maximum penalties are insufficient to deter non-compliance by larger businesses?

4.2.18. Despite public outcry that penalties under the FW Act are insufficient to deter non-compliant conduct by major corporations, the NRA respectfully submits that there is no evidence to support such a contention.

4.2.19. This is by and large because the FWO has not to date engaged in significant legal proceedings against a major employer for contraventions of the FW Act.

4.2.20. When the FWO commences legal proceedings, it primarily does so against small or medium businesses. Indeed, the business referred to at paragraph 4.2.15(b) above employed only ten employees.

4.2.21. The largest cohort employees in relation to whom the FWO has commenced legal proceedings to date is 114, in the matter of *Fair Work Ombudsman v Hu (No. 2)*.[9]

4.2.22. There is nothing to suggest, as appears to be asserted at page 5 of the Discussion Paper in relation to breaches of the Australian Consumer Law, that major businesses view existing penalties as "a cost of doing business" in relation to contraventions of the FW Act.

---

[4] See, for example, *Fair Work Ombudsman v Westside Petroleum Retail 1 Pty Ltd & Ors* [2019] FCCA 2784 at paragraphs [58] to [78]; *Fair Work Ombudsman v Yenida Pty Ltd & Anor* [2018] FCCA 1342 at paragraph [82]; *Fair Work Ombudsman v Rum Runner Trading Pty Ltd & Anor* [2018] FCCA 1129 at paragraph [82].
[5] *Fair Work Ombudsman v Lifestyle SA Pty Ltd* [2014] FCA 1151 at paragraph [74]
[6] *Fair Work Ombudsman v Mhoney Pty Ltd & Anor* [2017] FCCA 811
[7] *Fair Work Ombudsman v Rupee Enterprises Pty Ltd & Anor* [2016] FCCA 3456
[8] Supra, note 6 at paragraph [80]
[9] [2018] FCA 1034

4.2.23. On the contrary, the NRA submits that the current level of penalties, including the increased penalties introduced by the VW Act, have resulted in increased self-auditing and self-reporting, and consequently increased compliance, by major employers.

Conclusion as to current methodology of calculating maximum penalties

4.2.24. In NRA's respectful submission, there is nothing to indicate that the current level of civil penalties capable of being levelled under the FW Act in its current form, or the methodology adopted by the courts to calculate those penalties, require revision or alteration.

4.2.25. It is the view of the NRA that the current paradigm – that the judiciary ought to retain the full discretion which they have to date enjoyed with respect to the imposition of pecuniary penalties under the FW Act – ought not be altered.

4.3 Whether multiple instances of the same contravention ought to be "grouped"

4.3.1. Section 557 of the FW Act currently deems multiple contraventions of a civil penalty provision to be a single contravention if:

(a) they are committed by the same person; and

(b) they arose out of a course of conduct by the person.

4.3.2. In the absence of this provision, each individual contravention with respect to each individual employee would be subject to a separate and distinct civil penalty.

Example

An employer contravenes clause 13.2 of the *Fast Food Industry Award 2010* by paying a casual loading of 23% instead of 25%. This contravention affects five employees over five pay periods.

Under section 557	Without section 557
Single contravention Maximum penalty: - for an individual = $12,600 - for a body corporate = $63,000	25 contraventions (5 employees x 5 pay periods) Maximum penalty: - for an individual = $315,000 - for a body corporate = $1,575,000

4.3.3. The grouping of contraventions in this fashion is the only fair and just method of treating contraventions of the FW Act and its subordinate instruments for the purposes of calculating penalties.

4.3.4. This is because in the overwhelming majority of cases underpayments arise because of errors made when payroll systems are initially set-up by employers, or where errors are made in periodic updates to these payroll systems.

4.3.5. As can be seen from the above example, a relatively small error in a payroll system, in the absence of the application of section 557, results in the employer being liable to a maximum penalty which grossly exceeds the scale of the contravention.

4.3.6. The concept of a "course of conduct" under section 557 of the FW Act has not to date been the subject of significant examination by the courts, and generally the courts have not seen fit to consider non-compliant payroll processes to be anything other than a single course of conduct.

4.3.7. However, the concept of a "course of conduct" may be flexible enough to allow the courts to "un-group" contraventions where it is capable of being demonstrated that each individual contravention required a positive act by the employer.

4.3.8. For example, if an employer manually altered an employee's pay each pay period resulting in underpayments to the employee, then it is at least arguable that each such alteration is not a "course

of conduct" but a separate action by the employer allowing each contravention, in each pay period, to be treated as separate and distinct.

Effect of VW Act to be considered

4.3.9. Before engaging in any review or revision of the existing civil penalty structure under the FW Act, it is necessary to consider the full extent of that structure. The NRA respectfully submits that it is not possible for a full understanding of the existing penalty structure to be achieved, and any such review or revision is premature.

4.3.10. The VW Act was introduced, in part, to:

> "*… address concerns that civil penalties under the Fair Work Act are currently too low to effectively deter unscrupulous employers who exploit vulnerable workers … The [VW Act] will increase relevant civil penalties to an appropriate level so that the threat of being fined acts as an effective deterrent to potential wrongdoers.* "

4.3.11. The VW Act achieved this by the introduction of ***serious contraventions*** in section 557A, which allows a court to determine that a contravention which is part of a deliberate and systematic pattern of non-compliant conduct is a ***serious contravention*** attracting penalties up to $630,000 per contravention for a body corporate, and $126,000 for an individual.

4.3.12. This means that the maximum penalty able to be imposed on a body corporate for a single ***serious contravention*** under section 557A is a mere $14,000 less than the highest penalty ever imposed under the civil penalty structure as it existed prior to the commencement of the VW Act.

4.3.13. The changes made by the VW Act in this regard cannot be disregarded in any contemplation of a change to the existing civil penalty structure of the FW Act, particularly as these provisions were designed to address substantially the same concerns as are being ventilated in the Discussion Paper.

4.3.14. Due to the relatively recent commencement of section 557A of the FW Act, there is as yet no decision of a court applying its provisions to a particular case. Although the court has noted these amendments in judgements made since the commencement of these provisions, the facts of the various cases before the court prohibit the application of section 557A to those cases.

4.3.15. On 19 October 2019, O'Sullivan J of the Federal Circuit Court remitted the matter of *Fair Work Ombudsman v IE Enterprises Pty Ltd & Anor*[10] to the Federal Court of Australia for the express purpose of the superior court applying the untested provisions of section 557A to that case in the absence of any other superior authority.[11]

4.3.16. Although ***serious contraventions*** are still subject to grouping under section 557 of the FW Act, section 557A means that each contravention so grouped is, in egregious circumstances, subject to ten times the penalty that would otherwise be applicable.

4.3.17. The NRA respectfully submits that in the absence of any judicial application of the provisions of section 557A of the FW Act, it is premature to engage in any further revision of the civil penalty structure of the FW Act.

4.3.18. Certainly, such a review cannot proceed with a complete understanding of the current civil penalty structure until at least such time as the Federal Court of Australia hands down its decision in the matter of *IE Enterprises*, and then only if the court in that matter determines to apply the provisions of section 557A to the circumstances of that case.

4.3.19. The NRA therefore affirms its view that until such time as a superior court has considered and applied the provisions inserted into the FW Act by the VW Act, any revision to the civil penalty structure under the FW Act out of a concern for its adequacy as an effective deterrent of non-compliant behaviour is manifestly premature.

[10] [2019] FCCA 2952
[11] Ibid at paragraph [31]

5. Effect of the VW Act

5.1 Have the amendments made by the VW Act, coupled with the FWO's education, compliance and enforcement activities, influenced employer behaviour? In what way?

5.1.1. As alluded to at paragraph 4.1.4 above, since the introduction of the VW Act there have been numerous voluntarily public disclosures of non-compliance with the FW Act by major employers.

5.1.2. The NRA notes that these public disclosures appear to have a snowball effect, with the disclosure of how an underpayment came to occur by one employer causing other businesses to examine their own practices to ensure that they are not subject to the same form of non-compliance.

5.1.3. Conversely, the FWO's statements during Senate estimates that "voluntary" fines through contrition payments in enforceable undertakings are likely to increase[12] have, in the view of the NRA, the inevitable effect of discouraging visible rectification of non-compliance with the FW Act.

5.1.4. It can therefore only be concluded that the spate of public disclosures of non-compliance by businesses is in reaction to the provisions of the VW Act, and not because of enforcement action by the FWO.

5.1.5. The NRA also observed among its members, even while the VW Act will progressing through Parliament, an increased focus on ensuring that payroll, rostering, and associated processes are compliant with the FW Act and any applicable industrial instrument. This focus has not slackened since the commencement of the VW Act.

5.1.6. The NRA is therefore of the view that the amendments made by the VW Act have had a significant effect in encouraging employers to focus their attention on ensuring that their employment practices are compliant with applicable law.

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

5.2.1. It is the view of the NRA that the observed change in behaviour by employers in relation to compliance, as traversed at 5 above, is linked expressly to one of two provisions of the FW Act following the commencement of the VW Act:

(a) section 557A – Serious contravention of civil remedy provisions; and

(b) section 558B – Responsibility of responsible franchisor entities and holding companies for certain contraventions.

5.2.2. The NRA notes that, among its membership, these provisions appear to be the primary impetus behind reinvigorated proactive compliance activities by employers.

5.2.3. It is the view of the NRA that the prospect of these provisions being brought to bear on employers has already had a significant deterrent effect.

5.2.4. The extent to which this deterrent effect will persist will depend largely on how these provisions are interpreted and applied by the courts as and when they become relevant to any particular case.

[12] Patty, A (2019) 'Ombudsman admits Calombaris 'contrition payment' may not have been enough', *Sydney Morning Herald*, 23 October 2019 (Accessed 24 October 2019) https://www.smh.com.au/business/workplace/ombudsman-admits-calombaris-contrition-payment-may-not-have-been-enough-20191023-p533mj.html

6. Extending liability

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

6.1.1. In NRA's view, the current accessorial liability provisions in sections 550 and 558B are sufficient to adequately regulate the behaviour of lead firms or head contractors in relation to employees in their immediate supply chains.

6.1.2. Under section 550, a person (including a body corporate) is "involved in" a contravention if the person:

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

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

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

(d) has conspired with others to effect the contravention.

6.1.3. In the recent matter of *Fair Work Ombudsman v Hu & Anor (No. 2)*[13] the FWO was unsuccessful in attempting to apply section 550 to the operator of a mushroom farm who, unwittingly, engaged a labour hire company who provided workers under non-compliant working arrangements.

6.1.4. The FWO's failure in this argument was due to the fact that the FWO could not demonstrate that the farm operator knew the details of the employment arrangements engaged in by the labour hire company.[14]

6.1.5. In an observation which potentially has significant implications for the scope of section 550, Rangiah J noted:

> "*… where the accessory has knowledge of a system of non-compliance, proof of actual knowledge of each individual instance of non-compliance may not be necessary. In that situation, proof of the accessory's knowledge of the system of non-compliance may be a sufficient means of establishing the accessory's liability: see* Mobilegate *at [172].*"[15]

6.1.6. His Honour's reference to *Mobilegate* refers to *Australian Communication and Media Authority v Mobilegate Ltd A Company Incorporated in Hong Kong (No. 8)*[16], at paragraph [172] of which Logan J remarked:

> "*It will be sufficient to prove accessorial liability in respect of the corporate contraventions if [the Regulator] proves that [the Eighth Respondent] was aware that IMP and on its behalf [the Third Respondent] were employing a system of operations whereby fictitious profiles were being created to the end that each third party consent to the use of the premium shortcode would be procured by a message which was deceptive because of the employment of a fictitious profile. Proof of knowledge at a more detailed level of abstraction is not, in my opinion, essential."*

6.1.7. These case demonstrate that section 550 of the FW Act, as it currently stands, is sufficiently broad to capture an individual or body corporate within the supply chain who:

(a) knows that their supplier operates under a non-compliant system; and

(b) is concerned in that non-compliant system as a knowing beneficiary of it.

6.1.8. These provisions capture, for example:

(a) businesses which actively seek out suppliers who operate under non-compliant systems to obtain a competitive advantage;

---

[13] [2018] FCA 1034
[14] Ibid at paragraphs [170], [256] and [266]
[15] Ibid at paragraph [213]
[16] [2010] FCA 1197

(b) businesses which engage in joint ventures (or similar arrangements) with suppliers to be supplied with labour in accordance with a non-compliant system; and

(c) businesses which are aware of their supplier's non-compliant system and choose to be a silent beneficiary of the competitive advantage that the non-compliant system enables.

6.1.9. In the NRA's view, this is an appropriate level of accessorial liability.

6.1.10. To extend the accessorial liability provisions further to require businesses to make proactive inquiries of the employment practices of their suppliers causes a number of commercial issues to arise, specifically:

(a) whether privity of contract between employer and employee allows the details of that employment arrangement to be disclosed to a third party;

(b) whether the disclosure of employment arrangements to a third party infringes on the employer's obligation of confidentiality and/or privacy towards their employees;

(c) whether the disclosure of employment arrangements to a third party may inadvertently result in the disclosure of proprietary information or confidential information not relevant to the employment arrangement.

6.1.11. It should also be considered that requiring businesses to engage in an inquisitorial process *vis a vis* other businesses in their immediate supply chain may have unintended consequences, namely a negative impact on business and investor confidence, particularly from foreign businesses. This may have negative implications for the economy generally and for employment growth in particular.

6.1.12. With respect to section 558B, its recent enactment and lack of judicial consideration prevent a fulsome examination of its effect. However, NRA has noted an increased focus on compliance among the franchisor networks within its membership, which tends towards a conclusion that the provision is already acting as an effective regulator of franchisor behaviour.

6.2 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?

6.2.1. In short, yes.

6.2.2. It is difficult to contemplate a lesser *mens rea* which would deliver a just and equitable outcome whilst still maintaining a reasonably balanced industrial relations system.

6.2.3. As a matter of business efficacy, businesses need to be able to freely contract and to manage their businesses in such manner as they deem appropriate. It is not appropriate (and indeed, in some cases, highly undesirable) for businesses to be required to inquisit each and every other entity which they have a commercial arrangement.

6.2.4. Any such 'inquisition' of the employment practices of other businesses will likely be attended by significant additional cost, which will further adversely affect the attractiveness of doing business in Australia. It would also impose a significant cost impost on existing Australian businesses.

6.2.5. It should be noted that as the Commonwealth is a national system employer, increasing the *mens rea* would require third parties to inquisit the employment practices of the Commonwealth and its constituent departments. It would also require the Commonwealth to expend what are likely to be significant taxpayer resources to inquisit the employment practices of tenderers.

6.2.6. As the case law supports the contention that knowledge of a non-compliant system may be sufficient to give rise to accessorial liability, the NRA does not perceive a particular need for any variation to the current requirements of the accessorial liability provisions of the FW Act.

7. Sham contracting

7.1 Should there be a separate contravention for more serious or systematic cases of sham contracting?

7.1.1. It is the view of the NRA that a separate contravention for more serious or systematic cases of sham contracting is **not** necessary.

7.1.2. This is because sham contracting, when it occurs, results in a conclusion that the erstwhile contractor was, in fact, an employee, and was consequently entitled to the rights afforded to employees.

7.1.3. This therefore means that in almost every case, a sham contracting arrangement will carry with it contraventions of the National Employment Standards, an applicable modern award or enterprise agreement, or the National Minimum Wage Order.

7.1.4. Each of these is capable of being considered a ***serious contravention*** in its own right pursuant to section 557A of the FW Act, even if the prohibition against sham contracting is itself not within the ambit of this provision.

7.1.5. A non-compliant system of sham contracts would be a matter taken into consideration by a court in determining whether the employer had engaged in a "systematic pattern of conduct" under section 557A(1).

7.1.6. In this paradigm, the NRA does not consider a separate contravention for serious or systematic cases of sham contracting to be necessary.

7.2 Should the recklessness defence in subsection 357(2) of the Fair Work Act be amended?

7.2.1. In the view of the NRA, the recklessness defence of subsection 357(2) ought **not** be amended.

7.2.2. In practical terms, the defence of "was not reckless" carries with it a higher standard of conduct than "not know(ing), and could not reasonably be expected to know" as proposed in the Discussion Paper.

7.2.3. In order for an employer to demonstrate that they were not reckless, the employer must demonstrate that they gave at least some consideration to the terms of the arrangement. This imposes an objective standard on employers in order to access the defence.

7.2.4. Actual knowledge, however, is subjective, and whether an employer could not reasonably be expected to know the true nature of the relationship is also subjective having regard for the facts of the individual case. An amendment to the defence of this nature may give employers an incentive to take lesser, rather than greater, measures to ensure compliant contracting.

Part 2: Criminal sanctions

8. Matters for discussion in relation to criminal sanctions

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

8.1.1. The feedback that the NRA has received from its members is that criminal sanctions should only be applied to underpayments of wages and entitlements where:

(a) the underpayment arises out of a systematic pattern of conduct by the employer; and

(b) the employer knowingly and deliberately engaged in that systematic pattern of conduct; and

(c) the pattern of conduct engaged in by the employer was attended by:

(i) dishonesty; or

(ii) the unconscionable exploitation of a particular vulnerability possessed by the employee or class of employees affected.

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

8.2.1. The NRA is of the view that if criminal sanctions are to be levelled against employers who underpay their employees, the conduct of the employer must:

(a) be part of a systematic pattern of conduct; and

(b) the employer's engagement in that systematic pattern of conduct was deliberate and dishonest.

8.2.2. Criminal sanctions ought not be levelled against employers who make innocent mistakes in trying to administer the complex (and at times nonsensical) provisions of industrial instruments.

8.2.3. Criminal sanctions ought only be levelled against employers who deliberately seek to undermine the safety net created by the FW Act and the modern awards system.

8.2.4. As such, whether an underpayment arises because of a systematic pattern of conduct and/or because of an employer's dishonesty ought not be a matter of 'weight', but an essential element of any criminal offence.

8.3 What kind of fault elements should apply?

8.3.1. Having regard for the above submissions, NRA is of the view that the fault elements of any criminal offence ought to be:

(a) actual knowledge that the conduct, or systematic course of conduct, was non-compliant; and

(b) attended by either:

(i) dishonesty; or

(ii) unconscionability.

8.3.2. This would minimize the exposure to criminal sanctions of businesses which act on the basis of a genuine (or "innocent") mistake or error.

8.3.3. It may be appropriate to allow that where an employer has been subject to previous enforcement action, the employer is "deemed" to have had actual knowledge that their conduct was non-compliant.

8.4 Should the Criminal Code be applied in relation to accessorial liability and corporate responsibility?

8.4.1. The NRA is of the view that it is appropriate for Part 2.5 of the Criminal Code[17] to be applied in relation to accessorial liability and corporate responsibility for any criminal sanctions under the FW Act.

8.4.2. This would accord with criminal provisions in other Commonwealth legislation, such as section 6AA of the *Competition and Consumer Act 2010* (Cth), section 2A of the *Taxation Administration Act 1953* (Cth), and the various criminal offences created under the *Corporations Act 2001* (Cth).

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

8.5.1. The NRA is of the view that an individual ought not be subject to imprisonment except where the individual is recidivist. For the purposes of determining recidivism, only past criminal sanctions ought to be taken into account.

8.5.2. That is, any criminal offence should be punishable only by a fine for a first offence, and punishable by imprisonment only on subsequent offences.

8.5.3. The maximum fine capable of being levelled for a criminal offence ought to be no more than the maximum penalty capable of being applied for a ***serious contravention*** under section 557A of the FW Act.

8.5.4. The maximum term of imprisonment capable of being imposed for a criminal offence ought to be no more than two (2) years' imprisonment.

8.5.5. This is to have regard for the many and varied nature of the businesses that are subject to regulation by the FW Act. It is the NRA's view that taking guidance on criminal penalties from other legislation directed specifically at corporations (such as the *Corporations Act 2001* (Cth)) fails to appreciate that the overwhelming majority of Australian employers are small businesses.

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

8.6.1. NRA is concerned that imposing criminal sanctions for wage underpayment will result in less transparency when businesses identify such underpayments.

8.6.2. At present, businesses are generally willing to disclose to the FWO when they identify wage underpayments, notwithstanding the risk of civil prosecution. Introducing the risk of potential criminal sanctions is likely to discourage this level of transparency.

8.6.3. This transparency is necessary to allow the FWO to understand the issues that are causing underpayments in each industry, which in turn allows for a more strategic application of resources.

8.6.4. Discouraging such transparency may result in the FWO being forced to determine its operations without the best possible intelligence about the Australian employment market. This would likely have a significant adverse impact on the effectiveness of the FWO as a regulator.

8.6.5. This might be mitigated by legislative provision granting immunity from criminal sanctions if an employer self-discloses wage underpayments to the regulator.

8.6.6. This would also in turn likely increase proactive compliance efforts by businesses, thereby increasing the effectiveness of the FW Act as a regulatory scheme as a whole.

[17] *Criminal Code Act 1995* (Cth) Schedule

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

8.7.1. The NRA is not aware of any other serious types of non-compliance or exploitation within Australia's industrial relations system that is not already otherwise dealt with by other legislation.

Lindsay Carroll
Deputy Chief Executive Officer
National Retail Association

Alexander Millman
Senior Advisor
National Retail Association

Phone 1800 RETAIL (1800 738 245)
Visit www.nra.net.au
Email info@nra.net.au
Level 3, 67 St Pauls Terrace, Spring Hill 4000

National Retail Association