The Pharmacy Guild of Australia

Submission by Pharmacy Guild of Australia

to

Australian Government – Attorney General's Department

Discussion Paper

on

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

National Secretariat
Level 2, 15 National Circuit, Barton ACT 2600
PO Box 310, Fyshwick ACT 2609
P: +61 2 6270 1888 • F: +61 2 6270 1800 • E: guild.nat@guild.org.au
www.guild.org.au

The Pharmacy Guild of Australia

Introduction

The Pharmacy Guild of Australia (the **'Guild'**) is an employer association and welcomes the opportunity to respond to the Australian Government discussion paper (the '**DP'**) in respect of 'Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance'.

We appreciate the opportunity to comment on issues and questions that are raised in the discussion paper. It is our intention to focus on specific topics and questions that are relevant to the community pharmacy sector and our commentary will be based on the experiences of our members in their businesses.

About Pharmacy Guild of Australia

The Guild is a national employer industry association representing the owners of community pharmacies which are small businesses and which provide a range of professional health services to the community.

These owners of Australia's 5,700-plus community pharmacies need to strike a balance between running a successful small business and providing primary and preventive health care to their patients.

While many of the Guild's members are small businesses that employ 15 or fewer employees, these community businesses account for the employment of more than 60,000 full time, part time and casual employees directly.

As a federally registered industrial organisation, the Guild develops workplace policy and shapes public debate on major workplace relations issues. The Guild represents members' interests in test cases, award matters and inquiries before the Fair Work Commission including the provision of direct support and advice to their business operations.

National Secretariat
Level 2, 15 National Circuit, Barton ACT 2600
PO Box 310, Fyshwick ACT 2609
P: +61 2 6270 1888 • F: +61 2 6270 1800 • E: guild.nat@guild.org.au
www.guild.org.au

Guild's Position

In the following response by the Guild to the DP regarding the 'improving protections of employees' wages and entitlements, it is intended to make comment on the DP's proposed questions.

The Guild opposes underpayment and non-compliance with our workplace laws. No one working in Australia should be underpaid for their work. Employers take workplace laws seriously and want to see them observed for all employees, even where they fall well short of sound, balanced and effective regulation.

Employers through their respective organisations do not support the actions of the minority who, for whatever reason, underpay. Effective enforcement and compliance is supported by employers.

Yes, it appears as though Australia does have problems with underpayment of some employees by some employers. It is not clear how large a problem this is, nor is it clear how much greater the problem is than can be observed through complaints and actions from inspectors. Nor is it clear how underpayment may be changing or the direction of such change.

Underpayments can be at times complex and a multi-layered issue, and that there is an insufficient understanding of why it happens. Some measure of underpayments must stem from inadvertence or mistakes, some proportion from a level of ignorance that should not be sustained and some - hopefully a small proportion - from deliberate deprivation of entitlements. Without detailed research, it cannot be determined with any certainty what is driving the underpayment issue and this in turn should dictate a cautious approach supported by evidence-based outcomes to combat underpayment.

'Wage Theft' Terminology

The Guild does not or will not accept or adopt the 'wage theft' catchphrase, which we do not find useful in understanding and engaging in the complex and multi-layered issues that may cause underpayments occurring.

Complexity

Australia has one of the most complex workplace relations systems of any country. This complexity is not confined to litigation or an individual/business right. The regulation of day-to-day operations (eg rosters, hours of work) and pay within the Australian system is complex, and is spread across workplace instruments such as

awards, agreements and the national employment standards, which increases the complexity and thereby the risks.

Complexity is not an excuse for breaking the law, or for any employee not to receive what they are due, but it is a solid reason behind a number of instances where non-compliance has or is occurring. The complexity of our workplace relations system, in the Guild's option, does contribute to a level of non-compliance risk that:

(a) should not be acceptable, and

(b) needs to be taken into account in considering how compliance can be improved.

Current Changes – Visible impact

The latest changes in recent years were the amendments to the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017*, in direct response to underpayment concerns for some migrants and others in the community.

This 2017 legislation change clearly increased the liabilities and responsibilities of employers for making lawful payment, and increased potential penalties significantly.

This change by Parliament recognised and responded to underpayment in the contemporary Australian workplace relations landscape, through a range of measures which included higher penalties.

Until the impact of the 2017 changes are fully realised and whether or not the changes will have their intended effect, it should not be appropriate or merited to embark on any further increases in penalties.

These changes are too recent to have clarified these matters or have their full impact realised.

DP Question Part I: Civil penalties in the Fair Work Act

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

As indicated previously, the Guild has the opinion that the Protecting Vulnerable Workers Act amendments have not yet had sufficient opportunity to influence employer behaviour where necessary.

The changes have not yet realised their intended effect and an evaluation of these impacts, and cases under these provisions have not reached a stage to make any reliable conclusions as to whether they can or will influence employer's behaviour.

Again, the new 'serious contravention' category in the Fair Work Act has not yet had time to realised the deterrent effect that was clearly intended by the 2017 amendments.

The Guild is of the opinion that the introduction of serious contraventions, and the tenfold increase in potential penalties to more than $630,000 will have a significant deterrent effect as more decisions are made under those provisions and as employers have an opportunity to hear of their application to real world cases.

In addition to the 2017 changes in legislation and the increased penalties, there have been other significant efforts to improve compliance that need to be understood prior to considering any further increases to potential penalties such as the extra funding for the Fair Work Ombudsman (the '**FWO**'), expansion of the Fair Work Commission's Workplace Advice Service, improvements to the FWO services, Award review process and general publicity around the issue.

- *Should penalties for multiple instances of underpayment across a workforce and over time continue to be 'grouped' by 'civil penalty provision', rather than by reference to the number of affected employees, period of the underpayments, or some other measure?*

The Fair Work Act currently deems two or more contraventions of certain civil remedy provisions to be one contravention, where the contraventions are committed by the same person out of a course of conduct by that person. The course of conduct provisions in s 557(1) of the Fair Work Act apply only to contraventions of the provisions listed at s 557(2).

Sham Contracting

The Guild is strongly opposed to sham contracting being the deliberate misrepresenting of an employment relationship as a contractual relationship.

Sham contracting disadvantages both the legitimate employer and the genuine independent contractor who are forced to compete against businesses whose wages, tax and other costs are reduced through unlawful means.

Nevertheless, it is important to remember that independent contracting is a legitimate and legal method of engagement, whereas addressing sham contracting should not undermine or erode this essential practice.

The majority of businesses seek to 'do the right thing' and classify workers appropriately.

Where there are circumstances in which contracting arrangements have been misused through the deliberate disguising of an employment relationship as a contractual relationship or "sham contracting", the Fair Work Act does contain provisions to address this behaviour.

The current regulatory framework works effectively to appropriately target those who would seek to avoid their obligations in relation to pay and conditions under the Fair Work Act, and the consequences for breaching these provisions are already significant.

- *Should there be separate contraventions for more serious or systemic cases of sham contracting that attracts higher penalties? If so, what should this look like?*

The Guild supports laws and penalties being applied against individuals and businesses that deliberately evade their legal obligations. The Fair Work Act already specifically prohibits sham contracting.

Where a business has been found to have entered into a sham arrangement, the current penalties available under the Fair Work Act reflect the seriousness of the offence and serve as an appropriate general and specific deterrence. The Fair Work Act allows the courts to impose a maximum penalty of $63,000 per transgression for corporations and $12,600 for individuals.

DP Question Part II – Criminal Sanctions

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

The Guild believes that there may be particular circumstances, particularly where there are systematic and deliberate actions of significant scale that eventuate in the underpayment of wages that should be considered to attract criminal penalties. There are a multitude of other instances of underpayments that can occur that are inadvertent, unintentional and there are clear attempts to the employer to rectify immediately upon being made aware. In these instances, criminal penalties are less appropriate or necessary. State and Territory criminal laws already set out stealing and theft-related offences.

The Guild contends that the 'clear, deliberate and systemic' underpayment conduct which is outlined in the Migrant Worker Taskforce Report that recommended new criminal sanction is in fact behaviour which already constitutes a criminal offence under various existing federal and state criminal laws. Consequently, no new offence is needed.

The Guild opposes any changes to the current workplace relations framework which would result in criminal liability including the imposition of custodial sentences for clearly inadvertent accidental non-compliance except where it could be clearly demonstrated beyond reasonable doubt that a business and/or individual has intentionally, systematically, deliberately and planned evasion of their legal obligations.

The Guild does not condone the conduct of any business and/or individual who intentionally evades their legal obligations. However the actions of a few should not tarnish entire industries; damaging reputations and increasing pressure on governments to do more including potentially criminalising certain types of conduct.

However, the imposition of criminal liability for contraventions is not a step that should be taken lightly and it will not improve compliance as may be intended.

There is no suggestion that errors should be without consequence. Nevertheless it appears in a majority of underpayment claims/cases that the conduct has arisen through a simple mistake, error and/or miscalculation of a workplace instrument entitlement. Therefore in these circumstances an entirely different sentencing/sanctioning protocols should be applied including a focus on education and quality improvement.

If the Parliament ultimately intends to pursue the criminalisation of underpayments of wages and entitlements contrary to what employers say is evidence and merit then it is critical that a distinction be drawn between deliberate and systematic non-compliance with workplace regulation and genuine accidental mistakes and oversights, which are often immediately corrected upon discovery.

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

A single ad hoc breach, or a simple case of inadvertent behaviour, which leads to an underpayment situation relating to wages and/or entitlements should not expose a person to incarceration.

Incarceration should be reserved for those whose behaviour demonstrates a clear desire to wilfully and intentionally not comply with the workplace laws but also when there is evidence indicating a clear pattern of complicit behaviour and where the motivation of parties contributes to high levels of non-compliance.

A systematic and deliberate pattern of conduct/behaviour which leads to the underpayment of wages and/or entitlements should be a key consideration for any new offence.

- *What kind of fault elements should apply?*

If the Discussion Paper's proposed new offence purpose is to "target only the most serious and culpable underpayment cases - rather than unintentional mistakes or miscalculations" then the only appropriate fault element to apply in such cases would be intention.

A number of reasons may lead to underpayment occurring such as interpretation of an award, enterprise agreement or the NES provisions. In such circumstances, an employer will deliberately apply the interpretation that is believed to be correct, however at a later date, the employer may find that an alternative interpretation is the correct one. Therefore, limiting the underpayment offence to intention will ensure that where a person has an honest belief that they are operating in accordance with the law they will not be captured by any new offence.

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

Fixing a penalty is discretionary and should be within the court remit to apply, and is acknowledged by the courts that it is ''not an exact science" in determining the amount.

A maximum penalty should reflect the seriousness of the conduct, allowing for a comparison between the worst possible case and that what the court is asked to consider in the matter.

The Guild supports the notion that an employer who underpays workers 'brazenly and systematically' should suffer a penalty that is commensurate to the magnitude of the breach.

The Guild is of the opinion that it should remain up to the court to decide that a fine is more appropriate even if imprisonment is a specified criminal penalty for underpayment.

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

Moving to add criminal offences/penalties to the Fair Work Act raises numerous practical difficulties and risks significant perverse unintended consequences which are both serious and foreseeable, and weigh in favour of a cautious, merited and appropriately confined approach.

These unintended consequences will have negative impacts on both employees and employers and could be on the hiring of visa workers, a decrease in self-reporting and/or proactive compliance, or a disincentive to hire people completely.

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

The introduction of criminal liability for underpayment of wages and entitlements currently exists on the assumption that only employers ever seek to evade legal obligations.

This clearly disregards employee behaviour and forgets the very real circumstances that employees may consider there to be an advantage to seeking to be engaged outside of the current legal framework such as through “cash-in-hand” and “off the books” arrangements or deliberate and misleading information to an employer that could obtain a position of contract by deception.

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

The Fair Work Act imposes significant penalties on employers where they breach civil penalty provisions. Failure to pay employee wages and entitlements correctly can potentially result in an individual receiving a $12,600 penalty or a business a $63,000 penalty per contravention.

The *Fair Work (Protecting Vulnerable Workers) Act 2017* amended the Fair Work Act to introduce a higher scale of penalties for a new category of ‘serious contravention’ of prescribed workplace laws’. In such cases, the penalties were increased to $126,000 for an individual and $630,000 for a corporation. In addition, the amendments also provided the FWO with stronger powers for the collecting of evidence in investigations.

It is the Guild’s view that it would be inappropriate at this time to make any further changes to the civil penalties regime in the Fair Work Act until the effects of the

Vulnerable Workers legislation changes have had sufficient time to flow through and there has been sufficient case law to conclude whether these changes have had sufficient effect and therefore whether there is any case for even higher penalties.

Amending the current approach to the calculation of maximum penalties could also potentially have the unintended consequence of over-deterring small business so much so that they may avoid engaging in particular activities - such as the hiring of staff - out of fear of breaching the Fair Work Act.

As such, the Guild opposes any further increases to the existing civil penalty regime at this time without substantive evidence that an increase in penalties is necessary.

Scott Harris

Workplace Relations and Small Business Policy, National Manager

Pharmacy Guild of Australia