28 October 2019

IMPROVING PROTECTIONS OF EMPLOYEES' WAGES & ENTITLEMENTS

NSW Business Chamber

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INTRODUCTION

Australian Business Industrial (ABI) and the NSW Business Chamber (the Chamber) welcomes the opportunity to provide a submission to the Attorney General's Department in relation to *Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance*.

ABI is a registered organisation under the *Fair Work (Registered Organisations) Act 2009*.

The Chamber is one of Australia's largest business support groups, with a direct membership of more than 20,000 businesses, providing services to over 30,000 businesses each year. Tracing its heritage back to the Sydney Chamber of Commerce, established in 1825, the Chamber works with thousands of businesses ranging in size from owner operators to large corporations, and spanning all industry sectors from product-based manufacturers to service provider enterprises.

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PART I: CIVIL PENALTIES IN THE FAIR WORK ACT

Current Approach to Determining Penalties

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

Pecuniary penalties are intended to have effect as both:

- a specific deterrent - that is, deterring the person who is penalised from re-engaging in the same or similar behaviour; and
- a general deterrent - that is, deterring others in society from engaging in the same or similar behaviour.

Assuming businesses operate rationally (as most do), if an increase in pecuniary penalties is legislated, the nature of the deterrence is likely to increase. However, there is not necessarily any direct ratio that applies between the increase in the quantum of penalties and the minimisation of future non-compliant behaviour. This is particularly the case if penalties are already high.

Given that non-compliance remains prevalent in some areas of workplace relations, we consider there to be merit in revisiting the adequacy of the penalties already in place to those areas, particularly where employers deliberately or knowingly underpay employees.

However, where there are already significant penalties for non-compliance, doubling the penalty does not necessarily double the deterrence. Therefore, any increase in penalties can only be justified if it can be shown that such increase will have a deterrent effect on the business in question.

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?

There are existing common law principles that dictate the quantum of penalty imposed (by reference to the maximum prescribed) for underpayments, including[1]:

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

[1] *Kelly v Fitzpatrick* [2007] FCA 108

- the need for specific and general deterrence.

These principles have established operation and have been developed following decades of criminal and civil prosecutions.

The principles sit side by side with other considerations pertaining to:
- treating a series of contraventions that arise out of a 'course of conduct' as one contravention[2]; and
- the 'totality principle' - which requires Courts to ensure that the total sum imposed as a penalty for multiple breaches is proportionate to the overall nature of the conduct involved[3].

Being unaware of any particular deficiencies with the currently existing (and well-established) sentencing principles, we do not believe there is a need to depart from those principles.

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?

Groupings of contraventions by reference to a course of conduct have the effect of ensuring that a single decision or single mental state is not penalised by effectively having numerous cumulative breaches apply, notwithstanding that they all relate to the one error or failure of decision making. This helps ensure proportionality of penalty. There is accordingly considerable merit in the 'course of conduct' provisions of the Fair Work Act.

Where a party is involved in an ongoing breach and decides to continue, or to maintain, that breach, any separate decision to continue or maintain the breach should attract further contraventions and further pecuniary penalties and ordinarily does so pursuant to the way in which the course of conduct provisions are typically applied by the Courts.

We do not consider there to be merit in eradicating the existing course of conduct provisions enshrined in section 557(1) of the Fair Work Act.

Fair Work Amendment (Protecting Vulnerable Workers) Act 2017

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?

While the Chamber and ABI have formed a preliminary view that these amendments, coupled with the FWO's education, compliance and enforcement activities, have positively influenced the conduct of businesses, given the relatively short period of time over which they have in effect, we are not yet in a position to form a final view.

We do not believe any further amendments to the Vulnerable Workers Act are warranted at this point in time.

[2] See section 557(1) of the FW Act
[3] *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) 145 ALR 36 at 53

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

While the Chamber and ABI have formed a preliminary view that new 'serious contravention' category in the Fair Work Act will have a sufficient deterrent effect on business, given it has only been in force for a relatively short period of time, we are not yet in a position to form a final view.

We do not believe any further amendments to the new 'serious contravention' category are warranted at this point in time.

Extending Liability

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

Franchisors and holding companies are already subject to liability for breaches of workplace laws in their franchisee/subsidiary networks, unless they can show they took reasonable steps to prevent the contraventions (s558B of the Act).

In this regard, it is worth identifying that the existing provisions of the Fair Work Act (s550 of the Act) extend liability for contraventions of the Act to those persons that have:

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

It is commonplace for the Fair Work Ombudsman to prosecute 'accessories' in relation to breaches of the Act, with approximately 90% of Fair Work Ombudsman prosecutions against companies in 2016 also involving prosecutions against a named individual[4].

Whilst the vast majority of these accessorial liability prosecutions have related to individuals working within a business that has breached the Fair Work Act, the Fair Work Ombudsman has successfully relied upon accessorial liability provisions to achieve successful outcomes in supply chains. Two prominent examples relate to trolley collection services conducted by small trolley collection businesses, where the Fair Work Ombudsman relied upon accessorial liability provisions to secure an Enforceable Undertaking with Coles with respect to trolley collectors in 2014[5]; and Woolworths's entry into a Compliance Partnership in 2017[6].

To extend liability under the Fair Work Act further down a supply chain may have unintended consequences, such as finding companies or persons unrelated to the employer in breach of the Fair Work Act.

[4] See speech of former Workplace Ombudsman Natalie James of 4 November 2016 - https://www.fairwork.gov.au/about-us/news-and-media-releases/speeches/archived-speeches
[5] https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/january-2019/20180109-coles-eu-4th-annual-report-media-release
[6] https://www.fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/october-2017/20171011-woolworths-pcd-trolley-collectors-release

Given that the existing provisions have been utilised in some circumstances to hold broader supply chains to account, we are of the view that the current provisions are adequate and are being utilised effectively.

Should actual knowledge of, or knowing involvement in, a contravention of a workplace law be a 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?

Where parties are associated with a contravention, but do not directly engage in the contravention themselves, some limit needs to be placed on the extent to which such parties are exposed to liability. This is because:

- the obligation to pay employees ultimately rests with the employer itself as opposed to the variety of other persons or businesses the employer has contact with; and
- the further removed a party becomes from the employment relationship, the less due diligence they are likely to perform regarding whether a particular employer is remunerating employees in accordance with relevant workplace laws.

The goal of regulation should accordingly be to prohibit improper conduct on the part of those non-employers who are associated with a contravention only where discernible culpability exists. That is, the regulation should focus on parties that have clearly acted with a disregard for the law as opposed to those who have acted inadvertently.

We consider the Fair Work Act's accessorial liability provisions should be limited to contraventions where a party:

- is knowingly involved in the contravention (as is presently the case); or
- is reckless as to whether their involvement contributes to a contravention (which is not expressly the case presently).

The imposition of a liability for reckless contributions to contraventions is additional to the existing regulatory regime but supports the objects of the Fair Work Act, which (amongst other things) seek to guarantee a safety net of enforceable minimum terms and conditions of employment.

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?

NSW businesses should only be held accountable for matters over which they have actual control.

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?

Further extending accessorial liability provisions to a broader range of business models presents a real risk that entities will be held liable for matters that fall well outside their control.

Sham Contracting

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?

Businesses that engage in sham contracting arrangements already face maximum penalties of up to $63,000 for a corporation or $12,600 for any individual who is found to have been involved in the breach. However, where sham contracting is found to be part of the underlying business model the maximum penalties are significantly greater, being $630,000 for a corporation and $126,000 for individuals.

The current legislative framework provides the courts with a level of discretion when determining the penalty to be imposed on businesses that engage in sham contracting. By introducing a separate contravention for serious or systemic cases of sham contracting, this will adversely impact on the ability of the courts to consider the particular circumstances of each case when imposing a penalty as the amount of discretion allowed will be significantly reduced due to serious or systemic sham contracting being moved to a separate contravention.

If a new contravention category were to be introduced, the maximum penalty that may be imposed under the existing contravention must also be reviewed and arguably reduced as the potential seriousness of the sham contracting in the existing contravention would be significantly lower than it currently is. As a result, separate contraventions for serious or systemic cases of sham contracting will not be any more beneficial than the current legislative framework as these types of cases are already dealt with more severely than other cases of sham contracting due to the discretion of the judges.

We do not believe that separate contraventions for serious or systemic cases of sham contracting will provide any additional protection to employees than the legislative framework currently in force.

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

Subsection 357(2) imposes an obligation on the person to prove that they:

- did not know; and
- were not reckless as to whether;

the contract was a contract of employment rather than a contract for services.

The fact that the individual is required to prove that they did not act knowingly and were not reckless imposes a significant hurdle in satisfying Subsection 357(2) of the Fair Work Act and thus provided businesses with protection if an inadvertent mistake is made.

The recklessness defence provides a legitimate defence for employers who have unintentionally misrepresented to an individual that a contract of employment, which the individual is, or would be, employed under is a contract for services.

The recklessness defence in subsection 357(2) of the Fair Work Act should not be amended.

PART II: CRIMINAL SANCTIONS

Current approach to criminal sanctions as part of the enforcement framework

In what circumstances should underpayment of wages attract criminal penalties?

Imposing criminal penalties on owners/managers of businesses where an underpayment has occurred will have potentially unintended and detrimental consequences to businesses around Australia.

Underpayment of wages is an inherently monetary-based malfeasance which is entirely rectifiable by reference to monetary compensation payments.

Deterrence can also be implemented by way of significant pecuniary penalties, particularly in cases where intentional underpayments arise.

In these circumstances, imposing additional criminal penalties of imprisonment are unnecessarily onerous and take steps beyond those required to rectify underpayment breaches.

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

Considerations governing whether an underpayment was part of a systematic pattern of conduct and/or dishonest is already contained in the common law.

When imposing civil penalties for an underpayment, the courts already take into account whether an underpayment is deemed to have been systematic and/or deliberate.

What kind of fault elements should apply?

We do not support the introduction of criminal penalties for underpayments.

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 do not support the Criminal Code being applied to accessorial liability and corporate criminal responsibility.

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

The maximum penalty for an individual and for a body corporate should be no more than the pecuniary penalties set out in the civil test.

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

We do not support the introduction of criminal penalties for underpayments.

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

We do not support the introduction of criminal penalties for underpayments and by extension do not support any additional criminal penalties being introduced for matters that are currently not deemed a criminal offence.