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IMPROVING PROTECTIONS OF EMPLOYEES' WAGES AND ENTITLEMENTS

**Response to Attorney-
General's Department
Discussion Paper**

October 2019



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Chamber of Commerce
and Industry**

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EXECUTIVE SUMMARY

Australia's workplace laws should be complied with at all times, whether by employers, employees, unions or employer organisations. Not liking the law, or considering it unbalanced or damaging to one's business, is no excuse for non-compliance with the law. No one working in Australia should be underpaid for their work.

Underpayment is complex, and driven by diverse factors. Australia has one of the most complex workplace relations systems of any country in the world. In an overly complex workplace relations system there is a fundamental difference between 'wage theft' and accidental underpayment of wages through unintentional mistakes, misinterpretations or miscalculations.

With the best will in the world, and substantial investment of money to get compliance right, mistakes can still be easily made across all industries and all sizes of business. When organisations such as the Red Cross, the ABC and Maurice Blackburn are caught underpaying, there is clearly something bigger at issue than just intentional 'theft' going on.

The cornerstone of sound and effective enforcement is information, both for employers and employees, and cooperation where possible between employers and regulators to identify and fix problems. It is important to recognise the value of supporting compliance, and not over extending the role of punishment and sanctions.

What's already been done?

With increased funding to one of the world's most effective workplace relations regulators, the Fair Work Ombudsman, and a recent tenfold increase in civil penalties for non-compliance, significant inroads have been made in the area of underpayment. These changes need time to have full impact and be properly assessed before any further changes are contemplated.

What else can be done?

There are a number of alternatives for improving compliance, without making underpayment in industrial laws subject to criminal penalties. These include:

- Introducing a major national promotional campaign to fill the information gap and properly educate all Australians about their workplace rights and obligations.
- Renaming and relaunching the Fair Work Ombudsman to end the confusion caused by its misapplied ombudsman title.
- Substantially increasing the number of Fair Work inspectors to ensure that more complaints can be acted on, more workplaces visited and more prosecutions pursued.
- Empowering customers through voluntary accreditation schemes, so as to empower and encourage consumers to look for and do business with operations that visibly commit to meeting their employment obligations.
- Genuinely tackling complexity in our workplace laws.
- Appropriately apply our current criminal laws, where genuine criminal theft has occurred.

Imposing Criminal Liability

It is already possible for underpayments to be subject to criminal sanction where the behaviour constitutes theft and falls within the types of offences already in existence at both a state and commonwealth level.

Introducing criminal penalties, incarceration or the imposition of criminal records for the underpayment of wages into our workplace relations system is not in the community's interest. It would have a number of significant negative consequences for employers, employees and the community more generally.

Placing employers at risk of imprisonment for underpayments would disincentivise businesses from actively self-reporting and rectifying errors; and act as a hand break on the creation of new businesses and the employment of staff. Imposing criminal penalties is likely to result in fewer temporary migrant workers speaking up and alerting authorities to non-compliant behaviour.

If, however, Parliament ultimately intends to still pursue incarceration, contrary to the position of employers, it should be confined to situations in which there is a systematic pattern of conduct, dishonesty and clear intent.

In addition our courts must retain the scope to impose pecuniary penalties rather than convictions or jail.

Further, if criminalisation is applied to some underpayments, this should be under the Federal system only – States should not be able to also apply separate criminal sanctions.

When Australian businesses are growing, creating more jobs and employing more people, the entire community benefits. ACCI therefore strongly urges caution against changes to our workplace compliance regime, such as the introduction of criminal sanctions for underpayment, that would make it harder to do business in Australia and for which there are better alternatives.

Contents

1	INTRODUCTION	1
1.1	Employer position	1
1.2	Scope of the challenge	2
1.3	Understanding underpayments	3
1.4	Migrant Workers' Taskforce	4
1.5	The Fair Work Ombudsman (FWO)	5
1.6	Usefulness of the "Wage Theft" concept	5
1.7	Complexity has consequences	5
1.8	This Submission	6
2	WHAT HAS ALREADY BEEN DONE	7
2.1	The 2017 Vulnerable Workers Package	7
2.2	What to make of this	10
2.3	Migrant Workers' Taskforce recommendations were premature	10
2.4	DP Question Part I-4: Influence on employer behaviour	11
2.5	DP Question Part I-5: Deterrent effects	12
2.6	Other measures to improve compliance	13
3	ALTERNATIVES TO FINES AND CRIMES	15
3.1	Introduction	15
3.2	Major national promotional campaign	16
3.3	Rename and relaunch the FWO	17
3.4	More inspectors	18
3.5	Focus on the lower paid	18
3.6	Focus on award covered employment	18
3.7	Legally reliable advice and audit from the FWO	19
3.8	Empower customers through voluntary accreditation	20
3.9	Explore what 'big data' might offer	20
3.10	Genuinely tackle complexity	21
4	CRIMINAL PENALTIES	26
4.1	DP Question II-1 – Which circumstances should be criminalised?	26
4.2	DP Question II-2 – Dishonesty and patterns of conduct	31
4.3	DP Question II-3 – Fault elements	35
4.4	DP Question II-4 – Accessorial liability and corporate criminal conduct	37
4.5	DP Question II-5 – Maximum penalties	38
4.6	DP Question II-6 – Unintended consequences	39
4.7	DP Question II-7 – Wider application?	41
4.8	Interaction with any state or territory laws	42
4.9	Should Australia also reintroduce criminal contempt / penal powers?	44
5	CIVIL PENALTIES	45
5.1	DP Question I-1 – Further increased fines?	45
5.2	DP Question I-2 – Alternative ways to calculate maximum penalties?	46

5.3	DP Question I-3 – Grouping Penalties?	48
6	ACCESSORIAL LIABILITY	50
6.1	Introduction	50
6.2	What’s already been done – Section 550	52
6.3	What’s already been done – Section 558A-C	54
6.4	How accessorial liability should be approached	55
6.5	DP Question Part I-7: Level of knowledge required for contraventions	56
7	SUPPLY CHAINS	60
7.1	How to approach supply chains	60
7.2	DP Question Part I-6: Existing approach to supply chains is adequate	63
7.3	DP Question Part I-8: Control and supply chain liability	64
7.4	DP Question Part I-9: Extension to contracting out / other business models	66
7.5	Practical issues for small business	66
7.6	Application to professional and representative advice	67
8	SHAM CONTRACTING	68
8.1	Background	68
8.2	DP Question I-8 - Additional contravention for more serious cases	69
8.3	DP Question I-9 - Recklessness defence	74
9	ABOUT THE AUSTRALIAN CHAMBER	79

1 INTRODUCTION

1.1 Employer position

1. Australia's employers, through their largest and most representative organisation, ACCI, oppose underpayment and non-compliance with our workplace laws. No one working in Australia should be underpaid for their work.
2. Many employers consider a number of the annual compulsory wage increases to be excessive particularly when markedly in excess of inflation, many think the world's highest minimum wages are a damaging regulatory option for our country, many experience a workplace relations system that is far more complicated and difficult than it needs to be to provide an effective safety net (and indeed that complexity is detracting from compliance), and many employers decry a lack of sufficiently reliable information on what they must and must not do. Many employers with experience managing operations in other comparable countries shake their head at the complexity and risks of employing and doing business in Australia.
3. However, none of these concerns render underpayment and non-compliance morally or legally legitimate, nor do they change the fact that the law needs to be observed. Employers take our workplace laws seriously and want to see them observed for all employees, even where they fall well short of sound, balanced and effective regulation.
4. Organised employers, through their representative organisations, do not support the actions of the minority who for whatever reason underpay. Effective enforcement and compliance is supported by employers.
5. In this submission ACCI, on behalf of employers, engages not only with the specific questions and topics raised in the Discussion Paper issued by the Attorney General's Department, *Improving Protections of Employees' Wages and Entitlements*, but more generally with what may be driving non-compliance and what can and should be done to improve compliance in Australia.
6. The central premises of this submission are:
 - a. There are genuine and pressing concerns regarding the incidence of underpayment / non-compliance with workplace laws in Australia, albeit in the absence of reliable data on whether this is a constant, worsening or alleviating problem.
 - b. Employers share these concerns, and must be an important voice in not only understanding the problem, but also informing Government's consideration of actions that will and will not be effective in addressing this problem (or in fact the multiple causes of non-compliance).
 - c. Significant actions have already been taken by the current government. Pecuniary penalties for non-compliance have already been increased significantly in response to high profile compliance problems.
 - d. These changes are still flowing through the system and their full impact to improve compliance have not yet been fully realised.
 - e. Further increases in fines will not improve compliance.

- f. Adding criminal penalties to the system will not improve compliance.
- g. There are other, alternative measures available to government that will deliver better outcomes and see even more employees paid lawfully and correctly.

1.2 Scope of the challenge

- 7. Australia has an underpayment problem. 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 (how much of the iceberg we cannot see), nor is it clear how underpayment may be changing or the direction of such change.
- 8. There is an absence of reliable data on the extent of underpayment, how many employees are underpaid, to what extent, in which industries, by region, business size etc, and in relation to which award provisions / which hours or rosters. One of the first questions to consider should be how we could better understand this problem, where it is happening and what is driving it (noting that this is likely to be complex and multi-causal). It would seem that improved data is a necessary foundation for any significant change of policy and practice if (a) any new approach is to be effective, and (b) unintended consequences are to be avoided.
- 9. The only key data that ACCI could source focuses on the proportion of underpayments that come to light and are subject to queries or complaints to the FWO. Data from the annual reports of the FWO indicates that the work of the inspectorate and the level of monies recovered has been roughly stable since the commencement of the Fair Work Act:¹

	Total Recovered	For # employees	Finalised Investigations	Calls	Website Visits
2009-10	\$26,195,656	16,088	21,070	1,108,648	2,905,874
2010-11	\$26,000,000	17,360	22,523	825,000	2,400,000
2011-12	\$33,600,000	11,923	28,412	772,409	3,600,000
2012-13	\$24,000,000	17,434	26,574	615,905	10,300,000
2013-14	\$23,000,000	15,483	25,650	595,000	11,000,000
2014-15	\$22,300,000	11,000	18,030	468,754	13,300,000
2015-16	\$27,300,000	11,158		415,862	15,398,115
2016-17	\$30,600,000	17,000	26,917	385,745	16,328,246
2017-18	\$29,600,000	13,000	27,074	376,224	16,756,865
2018-19	\$40,204,976	17,718	29,130	383,206	17,846,171

- 10. In a period of increasing media attention there is however a clear perception of a growing underpayment problem, or an increasingly pervasive one. However we need to be cautious in leaping to a conclusion that this is an exacerbating problem, or that more needs to be done in law.

¹ Monies recovered in 2018-19 appears higher largely due to the matter involving MADE Establishment, which involved the employer self-reporting and back-paying employees over \$7.8 million.

11. We know from law and order debates across decades that governments are increasingly cautious in responding to calls for more law and higher penalties, which have often proven ineffective.
12. Such caution should be employed in this instance, and Australia will need to be smarter, more creative and more courageous if we are to genuinely reduce the frequency and levels of underpayment. We may need to look at some of the fundamentals of our workplace relations system and safety net, and in particular the time may have come to genuinely tackle its complexity.

1.3 Understanding underpayments

13. ACCI understands underpayment to be complex and multi-causal, and that there is an insufficient understanding of why it happens. Why for example does this happen in as well resourced an organisation as any in the country?

Report reveals ‘systemic and cultural failure’ by the ABC over staff underpayments

By ZOE SAMIOS
MEDIA BUSINESS REPORTER
Follow [@zoeram93](#)

8:27PM OCTOBER 20, 2019



Findings by the CPSU report include that ABC leadership was alerted to the underpayments on multiple occasions by staff and union and failed to act Picture: AAP

14. Some measure of underpayments must stem from inadvertence or mistakes, some proportion from a level of ignorance that should not be sustained and some (small) proportion in deliberate deprivation of entitlements. Without research, we cannot know with any certainty what is driving underpayment and this should dictate caution and a bias towards evidence based, sequential efforts to combat underpayment.
15. Understanding the causes and drivers of underpayment is an area in which further research could usefully be commissioned by Government, outside of specific remedial actions and outside of the politicised and reputational risks raised by a parliamentary inquiry. Consideration could be given as part of compliance and settlement of matters with the FWO (perhaps under an Enforceable Undertaking) for employers to work with independent researchers to better understand how underpayment happens and what more could be done to address it.
16. If government were moved to gather empirical evidence to delve deeper into this area, ACCI would examine what our network could do to assist, but would want to see a cautious approach to additional law and obligation in advance of research to inform effective policy.

17. From the experience of our network, ACCI sees securing workplace relations compliance as essentially a function of three (3) Ps:
 - a. **Policing.**
 - b. **Penalties.**
 - c. **Promotion.**
18. Australia has already taken more than sufficient action on the second P, 'Penalties', through the Vulnerable Worker changes of 2017 (see Section 2). It is policing and promotion that should bear the primary burden of further tackling non-compliance, and it is these measures that can yield genuine and material improvements (see Section 3).

1.4 Migrant Workers' Taskforce

19. Government commissioned the Taskforce as part of its response to serious underpayments within the subset of employment that is performed by migrant and visa holders. Employers had an opportunity to engage with the Taskforce but did so in relation to migrant employment and through a migration rather than workplace relations lens. We are concerned that various of the Taskforce recommendations address workplace relations / Fair Work Act matters and may have not been developed with sufficient engagement from the workplace relations policy community.
20. ACCI did not engage with the taskforce in relation to the employment of Australian citizens and migrants, and we are very concerned that the veracity of applying its recommendations to employment generally be properly considered and not taken as a given. We recognise that the Government signalled broad intentions in regard to the Taskforce recommendations prior to the election, however with respect, ACCI is of the view that the Migrant Workers Taskforce:
 - a. Failed to sufficiently take into account what had already been done in the 2017 Vulnerable Workers Package, and the time that would be required to realise the beneficial impact of the 2017 changes.
 - b. Was only premised upon and understood to be tackling migrant underpayment and not underpayment generally.
 - c. Recommendations should only stand for consideration in relation to the underpayment of migrants and visa holders and not more generally. This means that the Taskforce recommendations should properly only apply in relation to the employment in Australia of those who are not citizens or residents (i.e. visa holders).
 - d. Was solely made up of government agencies and representatives and lacked any representation of business, unions or the wider workplace relations policy community beyond government.
 - e. Seems to favour importing known regulatory approaches from other areas of law without sufficient regard to the nature and practice of workplace relations.
 - f. Paid insufficient regard to the interests, capacities and circumstances of smaller businesses, which constitute a significant proportion.

- g. Considered only enterprises that employ migrants (which is logical, but dictates that its work and recommendations cannot stand for authority on how to approach compliance more generally).
21. Ultimately employers urge considerable caution in proceeding to implement what has been recommended by the Taskforce. Its recommendations should be treated as opening up matters for discussion and evaluation rather than as specific measures for implementation.

1.5 The Fair Work Ombudsman (FWO)

22. ACCI would like to emphasise upfront that in tackling underpayments Australia has a world's best practice regulator that goes to substantial lengths to work with employers and employees to support compliance. We welcome that the FWO strives for continuous improvement and engagement with both claimants and respondents, and brings this to bear on compliance.
23. At issue in responding to the discussion paper is what the FWO is asked to do, its powers and scope of responsibilities. Also at issue we say is community wide awareness of the FWO, and the number of boots it can put on the ground to tackle underpayment (see Section 3).

1.6 Usefulness of the “Wage Theft” concept

24. ACCI will not be adopting the ‘wage theft’ slogan, which we do not find useful in understanding and engaging with the complex and multi-causal range of phenomena that may drive underpayments.
25. Linked to our overarching observation that not enough is known about what drives non-compliance, we particularly caution against any assumption that all instances or even a majority of them constitute deliberate or wilful underpayment. Adopting the language of ‘wage theft’ risks a fundamental failure to engage with the extent to which the complexity of how we regulate work in Australia contributes to some measure of overall underpayment, particularly for smaller businesses.

1.7 Complexity has consequences

26. Australia has one of the most complex workplace relations systems of any country. This complexity is not confined to litigation and individual rights, to collective bargaining, or to what organisations can or cannot do. The regulation of day to day work, rosters, hours and pay in Australia is mind-numbingly complex, and is spread across awards, agreements, the national employment standards etc which increase the complication and risks. With the best will in the world, and substantial investment of money to get compliance right, mistakes are still made, regularly, across all industries and all sizes of business. When organisations such as the ABC and Maurice Blackburn are caught underpaying, there is clearly something more than intentional ‘theft’ going on.
27. Complexity is not raised as any form of excuse for breaking the law, or for any employee not to receive what they are due, but it is a reason behind a large number of instances of non-compliance. The complexity of our workplace relations system is, in ACCI’s view, contributing to a level of risk of non-compliance that (a) should not be acceptable, and (b) needs to be taken into account in considering how compliance can be improved (such as in this review).
28. This complexity raises a range of considerations, including:

- a. Relieving complexity in favour of simpler, more effective regulation (and clearly the trend and currents in Australia have been against any fundamental simplification of workplace relations for some time, and this arises as a consideration separate to the current review).
- b. Ensuring that the law is better explained, and that community awareness of rules, their complexity and the need for expert advice, is increased (see Section 3).
- c. Ensuring that investigation, enforcement and compliance is genuinely sensitive to the risks of inadvertently getting things wrong, and that enforcement works positively with industry and individual employers to respond to questions and promote getting it right in more instances.

1.8 This Submission

29. This submission is in **8 sections**:

Section 1 introduces and outlines the submission.

Section 2 charts what has already been done to improve compliance with our workplace relations laws, in particular through previous, very recent increases in penalties against employers and powers for the FWO.

Section 3 outlines ACCI's ideas to better combat non-compliance, as superior and more effective alternatives to further increasing fines and imposing new criminal offences.

Section 4 addresses the recommendation from the Migrant Workers' Taskforce to introduce criminal penalties for the first time for some subset of underpayments. This includes not only critiquing the proposal but also engagement with how fault elements might apply to any new criminal offence that may be created.

Section 5 addresses the recommendation from the Migrant Workers' Taskforce for even higher civil penalties / fines. This includes not only critiquing the recommendation but also (in the alternative) engaging with how an in relation to what even higher fines may be applied.

Sections 6 & 7 addresses proposal the recommendation of the Migrant Workers' Taskforce to add to the existing accessorial liability provisions of the *Fair Work Act 2009* in relation to supply chains.

Section 8 addresses proposal the recommendations of the Migrant Workers' Taskforce in relation to sham contracting and the recommendations of the Black Economy Taskforce.

30. We address the specific questions in the Discussion Paper in appropriate sections by topic.

2 WHAT HAS ALREADY BEEN DONE

31. The starting point in considering whether any further measures should be taken, and what form they might take, must be **acknowledging and properly taking into account of what has already been done** to improve compliance with Australia's minimum wages and workplace laws. In the case of compliance with the Fair Work Act, the relevant changes to the law are recent.

2.1 The 2017 Vulnerable Workers Package

32. The primary additional measure of recent years was the package of amendments in the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017*, which was a direct response to concerns for the underpayment of some migrants and others (the 'Vulnerable Workers' Package').

33. These amendments:

- a. Introduced a higher scale of penalties (up to 10 times the current amount) for a new category of 'serious contraventions' of prescribed workplace laws
- b. Expressly prohibited employers from unreasonably requiring employees to make payments (i.e. 'cash-back' arrangements)
- c. Strengthened the evidence gathering powers of the FWO to ensure that the exploitation of vulnerable workers can be properly investigated and
- d. Introduced stronger provisions to make franchisors and holding companies responsible for breaches of the Fair Work Act in certain circumstances where they are culpable for the breaches.²

34. The Explanatory Memorandum to the 2017 Bill was explicit on what the vulnerable workers changes were designed to do:

In summary the proposed amendments will more effectively deter unlawful practices including those that involve the deliberate and systematic exploitation of workers. It will also ensure the Fair Work Ombudsman has adequate powers to investigate and deal with serious cases involving the exploitation of vulnerable workers and the deliberate obstruction of its investigations.³

35. This legislation, which is barely two years old, very clearly increased the liabilities and responsibilities of employers for lawful payment, and increased potential penalties significantly. The Vulnerable Workers Package was also an explicit and extensive response to high profile underpayments such as those by 7-Eleven.

36. Through the 2017 Vulnerable Workers Package, Parliament has already recognised and responded to underpayment in contemporary Australia, through a range of measures which include higher penalties.

² <https://ministers employment.gov.au/cash/turnbull-government-delivers-stronger-protections-vulnerable-workers>

³ Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, Explanatory Memorandum, p.ii

37. It is not at all true to think that Australia is tackling a contemporary problem with outdated powers and sanctions; we are tackling a problem using updated powers and penalties which we have not yet realised the true impact of.

2.1.1 The full effect of 2017 amendments has not been realised

38. Welcoming the passage of the 2017 amendments, the then Minister for Workplace Relations was very clear on why they had been pursued and the intended effect sought by Government:

“The strengthened penalties contained in this Bill will act as a significant deterrent to unlawful practices. They will also ensure that the small minority of unscrupulous operators think twice before ripping off workers.” (emphasis added) ⁴

39. The 2017 changes may well realise their intended effect, in time. However at this point:
- a. They have not been allowed sufficient time to realise their intended impact.
 - b. They have yet not flowed through into sufficient prosecutions, penalties and reporting to:
 - i. Function as any form of additional deterrent.
 - ii. Provided a clarified body of law or judicial approach that can be have communicated to employers.
 - iii. Have any impact on the thinking of employers.
40. Until the impact of the 2017 changes is realised and we know whether or not they will have their intended effect, it is not appropriate or merited to embark on any further increases in penalties.
41. Why does any government or parliament increase penalties for breaching the law (or make a step or structural increase, considering that with penalty units, the monetary value of penalties automatically increases annually)?
- a. Putting to one side motivations such as societal vengeance or retribution, the principle motivation must lie in the signal effect the application of higher penalties send to other employers.
 - b. The purpose of increased penalties must be to ensure there is a more effective deterrent to the behaviour you are seeking to regulate, and that the wider population of those you are seeking to regulate (in this case employers) gets a clear signal that the consequences of non-compliance will be harsher.
42. The Vulnerable Workers Package is too recent to have clarified these matters or realised its full impact.
43. Any positive impacts on employer behaviours are still being realised, and any signal effects have not yet flowed on to employers. Legislative signals in workplace relations don't travel at the speed of light or sound, they travel at the speed of investigations, then prosecutions, then litigation, then determination. The 2017 changes are still flowing through.

⁴ “Turnbull Government delivers stronger protections for vulnerable workers” Media Statement, Senator the Hon Michaelia Cash, 4 September 2017

2.1.2 The cases have not yet flowed through

44. ACCI member organisations have told their members about potential penalties being increased tenfold, and we have briefed them on the remaining elements of the 2017 Vulnerable Workers Package. However, employers have not yet seen sufficient other employers subject to higher penalties (and indeed losing their houses and businesses) to appreciate the existing sanctions regime.
45. Simply put, there have not yet been sufficient cases to conclude whether the 2017 changes have had sufficient effect, and whether there is any case for even higher penalties.
 - a. Looking at the FWO website, by far the majority of cases subject to media releases during the month immediately preceding this submission relate to conduct predating the 2017 penalty increases, or conduct that includes underpayment preceding 2017.
 - b. Directions are still being sought from the Federal Court in relation to alleged underpayments dating from April 2017 to April 2018.⁵
 - c. Proceedings commenced in September 2016 are still subject to appeal in the High Court.⁶
 - d. The very high profile matters that have dominated recent headlines, including those relating to George Columbaris' businesses relate to conduct prior to the commencement of the Vulnerable Workers Package.
 - e. The new powers the FWO gained in the 2017 Vulnerable Workers Package at this point remain largely untested / their impact not yet fully realised.
46. This is in no way a criticism of the FWO, prosecutions take time to be properly prepared and prosecuted. However, it is an inescapable reality that we have insufficient factual testing of the 2017 changes to reach any conclusions on their efficacy and adequacy, or on whether there is:
 - a. Any basis for financial penalties to be further increased.
 - b. Any fundamental failure of existing civil penalties that would justify the introduction of criminal penalties.
47. With due respect to the Migrant Workers' Taskforce, ACCI is of the view that a number of its recommendations were premature and not validly available to it on the available evidence.
48. In particular the Taskforce seems to have paid insufficient regard to the regulatory response of government to increase penalties, as a review of pages 61-64 of the Taskforce report indicates. The Migrant Workers' Taskforce seems to have merely noted the 2017 Vulnerable Workers Package without taking into proper consideration its efficacy, how this should be assessed and when.
49. With respect this compromises the Migrant Workers' Taskforce recommendations, and requires that they be contextualised and re-evaluated.

⁵ <https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/september-2019/20190926-barry-cafe-litigation-media-release>

⁶ <https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/september-2019/20190919-fwo-files-special-leave-application-in-marland-mushrooms-case>

2.2 What to make of this

50. The Vulnerable Workers' Package represented what may have been the biggest single uprating of penalties in the history of Australia's industrial relations legislation, and the 2017 amendments also addressed other matters impacting on compliance such as record keeping and franchising.
51. The Vulnerable Workers' Package represented a significant crack down and increase of liabilities and risks for underpaying employers, many would say with cause. As set out in the preceding, the intended effect of the 2017 package has not yet been fully realised, and the impact on employer behaviours, and on underpayment in Australia has not yet crystallised.
52. ACCI considers, and the Government should conclude in this review, that there is not sufficient basis for a further uprating of penalties or crossing the Rubicon into criminalising underpayments. In this regard, ACCI does not support the recommendations of the Migrant Workers' Taskforce, nor their implementation.
53. Government should not further increase penalties beyond the very significant increases already made through the Vulnerable Workers Package in 2017.
 - a. There is not yet a sufficient evidentiary basis to properly evaluate the impact of the 2017 changes (i.e. it is too soon to know whether what has already been done has worked).
 - b. There are not yet sufficient prosecutions using the increased powers and penalties of 2017 to:
 - i. Have flowed through into any real behavioural signals to employers. This means Government cannot sufficiently know what the impact on employer behaviours will be of further increasing penalties or fundamentally changing them to introduce criminal elements into a long standing civil system.
 - ii. Evaluate how the preceding, very recent increases in fines may or may not have changed employer behaviours.
 - iii. To know whether any changes are needed or whether any additional penalties are required / justifiable / will be efficacious in securing increased compliance beyond those increased very recently.
54. As set out in Section 3, there are multiple further alternative options, without increasing penalties or imposing new ones, that can and should be pursued in preference to, and that will be more effective than, increasing penalties or fundamentally changing the nature of compliance.

2.3 Migrant Workers' Taskforce recommendations were premature

55. ACCI is therefore of the view that, with respect, the Migrant Workers Taskforce failed to sufficiently take into account what had already been done in the 2017 Vulnerable Workers Package, and the time that would be required to realise the impact of the 2017 changes, before recommending even further penalty increases.

- a. The Taskforce held only two roundtables with invited interests, and both were held some months prior to the passage of the 2017 amendments.⁷ There were also direct meetings with various interests.
 - b. The research / reports considered by the Taskforce predate the 2017 changes.⁸ So evidence said to justify higher fines seems to predate perhaps the most significant single development in compliance in our industrial relations history.
 - c. Whilst the final taskforce report was provided to government in 2019, much of its work seems to have been undertaken as the 2017 changes were made or just coming into force. The Taskforce cannot have properly considered the sufficiency of the 2017 increases in penalties.
56. Government need look no further than the Taskforce's Final Report to properly evaluate and contextualise its recommendations for higher penalties and moving into criminal penalties:

Measuring the impact of legislative changes

The amendments contained in the Protecting Vulnerable Workers Act apply prospectively (i.e. to breaches that occur after the commencement of the amendments on 15 September 2017 (and 27 October 2017 in relation to the provisions relating to franchisors and holding companies). It may take some time to see the full impact of the amendments.⁹

57. We want to particularly highlight the last statement by the Taskforce “*It may take some time to see the full impact of the amendments*”.
58. The Taskforce was right. It will take time to see (and by implication properly assess) the full impact of the 2017 amendments. Where the Taskforce erred was in recommending a further uprating of penalties (and recommending criminalisation) without allowing sufficient time for the full impact of the 2017 Vulnerable Workers' amendments to be realised.
59. The effect of what has already been done needs to more fully ‘flow through’ into decisions, into penalties and into reporting before any further penalty increases should be considered. To do otherwise would be akin to pumping more of a medicine into a vein straight after the preceding dose because a doctor does not instantly see the desired drug reaction in the patient.
60. Just as a patient with a fever does not instantly recover when treated, employers are not going to change behaviours immediately after the law is changed and penalties increased. The risks of unintended consequences / side effects when proceeding in advance of sufficient evidence should be obvious.

2.4 DP Question Part I-4: Influence on employer behaviour

61. The Discussion Paper asks the following on the 2017 Vulnerable Workers Package:

⁷ Migrant Workers Taskforce (2019) Final Report, pp.134-35

⁸ Migrant Workers Taskforce (2019) Final Report, Appendix C

⁹ Migrant Workers Taskforce (2019) Final Report, p.64

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?

62. **As set out above**, the amendments effected by the Protecting Vulnerable Workers Act have not yet had sufficient opportunity to influence employer behaviour.
63. They have not yet realised their intended effect, and cases under these provisions do not yet allow the workplace relations policy community / Government to make any reliable conclusions as to whether they can or will influence employer behaviour.
64. In fact the position must be based on evidence and intention to date, that the Vulnerable Workers Package will work as intended and will materially impact to reduce non-compliance. The onus should be on those advancing further penalties to prove the changes to date have not been effective.

2.5 DP Question Part I-5: Deterrent effects

65. The Discussion Paper then asks, also on the 2017 Vulnerable Workers Package:

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

66. Again, the new¹⁰ 'serious contravention' category in the Fair Work Act has not yet realised the deterrent effect clearly intended when making the amendments in 2017.
67. ACCI and its members are of the firm view 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.
- a. The existing penalty regime, post 2017, already contains risks of such gravity and liability that it can change behaviours amongst that proportion of employers that are open to deterrence from non-compliance (which excludes those who already actively strive for compliance with the law, and any small minority motivated by genuinely bad faith or extreme risk taking).
 - b. Employers can already lose their houses, businesses and savings, under the existing penalties regime. This is significant – potentially a game changer on compliance - but the law has not yet flowed through into a sufficient body of decisions to have a significant signal effect to employers.
68. In light of the preceding, and given that there has not yet been a sufficient opportunity for the intended effects of the preceding changes to be realised, the case has not been sufficiently made out for a further increase in pecuniary penalties (Section 5) or for making a fundamental change the system to introduce criminal penalties (Section 4).

¹⁰ Late 2017.

2.6 Other measures to improve compliance

69. In addition to the 2017 changes to legislation / increased penalties, there have been other significant efforts, comparatively recently, to improve compliance in Australia that may serve to improve compliance that also need to be properly understood and taken into account prior to considering any further increases to potential penalties (and that are germane to the matters raised in the Discussion Paper).

70. **Extra funding:** The FWO received \$20.1m in additional funding at the time the Migrant Workers' Taskforce was established.¹¹

71. **More advice:** The 2019-2020 Budget also contained additional funding for compliance advice to employers:

*The Government has recently announced it will be making it easier for small and family businesses and Australian workers to understand the country's industrial relations law with free legal advice. The \$1.4 million expansion of the Fair Work Commission's Workplace Advice Service (WAS) will provide both employers and employees with access to free legal advice on workplace issues. It is expected this service will provide Australia's 3.3 million small and family businesses with a reliable source of information for matters relating to the workplace and employer responsibilities. Those in rural and regional areas who have limited support services will particularly benefit from the additional support.*¹²

72. **Continuous improvement by the FWO:** The FWO is also continuously improving its services, and the effectiveness of its promotional, information and enforcement activities. Continuous learning and refinement in the regulator and how it works with claimants and business needs to be recognised.

73. **Award reviews:** The Australian workplace relations system remains breathtakingly complex, and the risks of unintended non-compliance in Australia are far higher (and are unacceptably higher) than they should be, and that this is contributing to some proportion of underpayments.

74. However, awards have been subject to a process of continuous review and refinement since 2009, and across this time 'modernised' national awards have largely replaced the complicated system of dual federal and state coverage that developed across the 20th Century. One of the key driving considerations in these reviews has been improving the simplicity, clarity and enforceability of awards. Thus, at least in theory, awards have been subject to revision with a mind to being more comprehensible and enforceable, and this is germane to understanding the wider trends impacting on compliance.

75. **Industry efforts:** ACCI members, both Chambers of Commerce and Industry Associations are actively advising their members on the importance of compliance and the risks of non-compliance. This includes facilitating opportunities for FWO staff to address groups of individual employers.

76. **Media publicity:** Finally, the greater media attention paid to non-compliance is likely to be having some impact on employers and employees considering their circumstances and seeking advice.

¹¹ Migrant Workers Taskforce (2019) Final Report, p.91

¹² <https://www.employment.gov.au/budget-2019-20>

77. This is not to argue that existing levels of non-compliance are acceptable or that no more needs to be done, however:
- a. Government has already acted and the impact of these actions needs to be realised before more action is taken.
 - b. Section 3 provides a set of additional ideas that should be pursued prior to any consideration of additional penalties or embarking on criminalisation.

3 ALTERNATIVES TO FINES AND CRIMES

3.1 Introduction

78. ACCI sees securing workplace relations compliance as essentially a function of three (3) Ps:
- a. **Policing.**
 - b. **Penalties.**
 - c. **Promotion.**
79. Australia has already taken more than sufficient action on the second P, 'Penalties', through the Vulnerable Worker changes of 2017. It is Policing and Promotion that should bear the primary burden of further tackling non-compliance, and it is these measures that can yield genuine and material improvements for Government looking to do more in this area going into 2020.
80. The clear question begged by ACCI opposing increasing penalties or pursuing criminalisation of some underpayments is the alternative. If not higher fines and criminal convictions, what would ACCI have government do to better tackle underpayments?
81. ACCI advances the below alternative ideas / directions to do more to address non-compliance with Australia's minimum wages and other laws on terms and conditions of employment. These should be pursued as alternatives to further increasing penalties or introducing criminal offences.
82. However, were government to determine that (for example) it wished to create a new form of criminal offence, this would not preclude properly advertising the national enforcement body and relaunching it with a more meaningful name.
83. Unashamedly, many of these ideas call on government to spend money to better support and encourage compliance, rather than simply increasing penalties against employers. In light of community concern, and the apparent extent of problems in compliance, the time has come for government to use more of its resources to tackle underpayments, particularly in regard to better informing Australians on rights and obligations.
84. We recognise that government wishes to sequence its consideration of the various recommendations from the Migrant Workers' Taskforce, across a series of discussion papers. However, some of the matters to be canvassed in subsequent papers need to be viewed as superior alternatives to the measures that are canvassed in the immediate discussion paper.

3.2 Major national promotional campaign

85. First and foremost, a substantial national brand recognition / information gap is compromising and reducing employment compliance in Australia. Too few Australians know that:
- a. There are minimum wage obligations, that differ by industry and job, and by when work is performed.
 - b. Employment rights and obligations are astoundingly complex in this country and a great deal can, and very commonly does, go wrong.
 - c. There are substantial penalties for employers getting this wrong.
 - d. Far less is open to employers and employees to reasonably agree than common sense and a fair go might indicate.
 - e. There are common misunderstandings on compliance obligations that are not only inaccurate, but can get small employers in particular into serious trouble.
 - f. There is an expert, user focussed agency of government which gives advice and takes action to enforce wages entitlements.
 - g. Employees querying their wages enjoy substantial protections, and cannot be sacked or punished.
86. Whatever a household name is, the FWO sits at the very opposite end of the spectrum. Most working Australians have very little understanding of their workplace rights or where to go for information and enforcement. There is a genuine information gap that urgently needs to be bridged, and Government should invest in bridging it.
- a. Too many Australians do not know enough about employment obligations.
 - b. Too many Australians have no idea what the FWO is or what it offers.
87. To our knowledge there has never been a major national information campaign on workplace compliance or advertising / promotion of what government does to support compliance. Given the apparent extent of non-compliance, it is definitely time for one.
88. There is an urgent requirement for a significant ongoing national government advertising campaign to increase the familiarity of Australians with:
- a. Their rights to minimum wages.
 - b. Where to go for information and support.
89. The targets for such advertising would include employees, young people, migrants, parents and employers. The goal would be more Australians checking their pay, or what they are paying people.
90. Australia needs to complement top down measures (compelling employers to get this right) with bottom up or demand driven measures which will see more employees and employers checking pay and raising small concerns before they become major ones. This is not employers trying to shirk

responsibility, it is simply a recognition that pressures to get this right need to come from multiple directions. Complex problems demand multi-part solutions.

91. **Media diversity:** ACCI acknowledges that such an approach would have been more straightforward in the era of traditional media in which there were, for example, only 5 TV stations. In reality the single national 'campaign' we propose might in practice be implemented as multiple efforts across traditional and new media channels appropriate to each target population segment (e.g. newer media to get to young people).
92. **Migrants:** Part of this might be targeted efforts 'in language' targeting key ethnic communities with particular vulnerabilities to underpayment. Again, specialist advice would direct the campaign and media strategy appropriate to particular audiences.

3.3 Rename and relaunch the FWO

93. Directly linked to the promotional campaign is Recommendation 10 of the Migrant Workers' Taskforce:

It is recommended that the Government consider whether the Fair Work Ombudsman requires further resourcing, tools and powers to undertake its functions under the Fair Work Act 2009, with specific reference to:

- c) *whether the name of the Fair Work Ombudsman should be changed to reflect its regulatory role¹³*

94. This should be taken up with urgency. The FWO is a time and wages / industrial relations inspectorate, not any form of ombudsman (it is not an independent body where complaints about government can be directed, or any form of independent citizen advocate to government).
95. The ombudsman title was completely misapplied by previous governments and in 2019 creates confusion amongst those it is designed to serve and work with. This confusion is exacerbated by the amorphous slogan of 'fair work' which serves to mislead across various dimensions of our workplace relations system.
96. ACCI has a clear answer to the question raised by the Taskforce. The FWO urgently needs to be renamed and a relaunch of the inspectorate with a new name should be concomitant with (or the driver of) the major national advertising campaign proposed above. Put another way, a brand refresh should be accompanied by / progressed via the major national promotional campaign.
97. ACCI wishes to simply advance the campaign concept for now, not get into the specific rebranded title. However we do note that generally our fellow OECD countries have far less sloganistic and more meaningful names for their inspectorates. For example New Zealand simply has its 'Labour Inspectorate', which in the vernacular, simply does what it says on the box.¹⁴
98. There is also the well understood and long standing concept of "Wage Line", which continues to be used in some Australian states. Some may see this as a bit old fashioned or bureaucratic sounding,

¹³ Migrant Workers Taskforce (2019) Final Report, p.92

¹⁴ <https://www.employment.govt.nz/resolving-problems/steps-to-resolve/labour-inspectorate/>

but it seems a clearer and simpler presentation of what the inspectorate does that could better resonate with the Australian public.



3.4 More inspectors

99. There is no point in bumping up penalties if there are not sufficient police on the beat to address complaints and turn them into investigations and prosecutions. In terms of signal effects to a subset of employers that may knowingly underpay or that takes risks, if there is not sufficient belief that they are likely to be caught, then incentives or signals towards the desired behaviours will always be insufficient.
100. More inspectors would make a real difference. Rather than further inflate employer liabilities, the government should run more people out / put more boots on the ground to work with more employers and employees to support getting this right.
101. ACCI reiterates our previous calls for additional funding to the FWO for the hiring of at least 50 more inspectors, to ensure that more complaints can be acted on, more workplaces visited and more prosecutions pursued.

3.5 Focus on the lower paid

102. The resources of the FWO will always be finite, even were ACCI's call for additional inspectors to be taken up. It would seem logical and merited that greater effort be directed to those on lower minimum rates of pay than those on higher rates.
103. Consideration could be given to enshrining what the FWO already does to some extent in law, and for example directing the FWO to not attempt to recover underpayments for anyone at or approaching the High Income Threshold.

3.6 Focus on award covered employment

104. Linked to the preceding, compliance might also be focussed on the application of award rates to award covered employment, with less application or even no application to above award rates of pay or those contained in enterprise agreements.
105. For example, the FWO could direct its attention and resources solely to cases in which pay is below the level of the modern award applicable to the employment concerned. Actions to enforce additional amounts or arrangements agreed to in specific workplaces would need to be pursued by individuals or organisations.

106. There may be pros and cons to this and further engagement and consideration would be required, but of we are to have a regulator with finite resources confronting a significant problem it will need to focus its efforts and resources.

3.7 Legally reliable advice and audit from the FWO

107. The FWO works extensively to support employers in complying with workplace laws. However, periodically employers complain of insufficient certainty and reliability of FWO advice. As the application of the law to particular circumstances has become more complex, there is a growing demand from employers for clear and reliable declarations of what they must pay (or do or not do).
108. Scope should be explored for some form of legally reliable advice or ruling to be added to the Fair Work Act, which employers could formally seek from the FWO and which would then be reliable as a defence in any subsequent claims. Specifically, consideration should be given to employers being able to seek a ruling (as it done on tax) on the proper application of an award on a particular matter, or a particular roster.
109. ACCI recognises that there may be legal constraints on the making of such advice in a reliable form, and as such would at this point refine this proposal as follows:
- a. A scoping study / report should be commissioned into other areas of law and practice, in Australia and in comparable legal systems, in employment law and other areas of law, in which those regulated can seek reliable rulings or declarations from regulators (or other bodies) which if followed will be reliable as defences of their actions to comply with their legal obligations. This would include identifying any impediments or considerations raised by making binding rulings available in workplace relations.
 - b. Employer representatives should be invited to further articulate what their members would like to see from such a system, what it would need to deliver to be attractive to employers / support improved compliance, and to offer employers for pilot testing and focus group input.
 - c. A report should be prepared for Government on options for such a declaratory or ruling based approach to be introduced to better support workplace relations compliance.
110. Additionally consideration might be given to services such as:
- a. 'Review my roster' which would allow an employer to run their roster by the FWO and validate the rates applied for particular patterns of hours, without triggering compliance activities.
 - b. Accredited auditing providers, who would be able to audit and certify employer compliance, and for this to be relied upon by the FWO. Consideration should be given to registered organisations of employers being able to play such a role, whilst at all times the choice of accredited audit provider would remain with the business concerned (who might be able to pick from a list of accredited auditors).

3.8 Empower customers through voluntary accreditation

111. Neither policing nor penalties can in isolation have a significant effect in this area. Attitudinal and community change is needed – and to be more positive and constructive than simply pejorative ‘pile on’ type negative assumptions about businesses and their motivations.
112. Consumers should be empowered and encouraged to look for and do business with operations that visibly commit to meeting their employment obligations. So rather than the big stick of penalties, there should be support for industry driven accreditation models in which businesses want to self-identify (with suitable controls on actual sound conduct) as ‘paying the award’.
113. For example, an industry might be encouraged and supported to develop a visible and well publicised logo or badge signifying each year that certain measures are being taken to ensure compliance, and that the business has committed to a best practice approach, including on any complaints or concerns that may be raised.
114. In turn dining, shopping or doing business with badged businesses may be encouraged.
115. Industry can drive some of this, but resourcing is an issue, as is the confidence and incentives employers have to participate. This should be the role of the FWO, lending support to / partnering appropriate accreditation programs driven by industry.
116. ACCI has three very specific recommendations:
 - a. **Require the FWO to support / partner with industry driven accreditation:** Subdivision A of Division 2 of Part 5-2 of the *Fair Work Act 2009* should be amended to make one of the FWO’s functions cooperation with and support for industry driven accreditation schemes.
 - b. **Fund the FWO to support accreditation:** The FWO be given provision in the budget to work with industry to pilot / roll out a form of accreditation that employers are taking measures to ensure they comply with wages and other obligations. This might initially be pursued in one or more of the priority industries or regions, and would see the FWO inject seed funding and work with organisations of employers to develop a trusted and viable accreditation scheme.
 - c. **Review where and how legislation may need to change.** Following some period of cooperation between the FWO and industry, consideration should be given to areas in which legislation may need to be changed to recognise and reward industry accreditation. Specifically, if government directs and funds the FWO to partner with industry driven accreditation schemes there should be a review after two years of its effectiveness and how the Fair Work Act might be changed to support accreditation.

3.9 Explore what ‘big data’ might offer

117. ACCI has been struck by the data matching starting to be undertaken in the wake of the roll out of single touch payroll. In particular, we have noted that the ATO is sending emails to employers where superannuation payments have not been made, or do not seem to have been made in full from looking at trends in economy wide data.¹⁵

¹⁵ <https://www.abc.net.au/radio/programs/am/tax-office-is-targets-bosses-who-hold-back-super-guarantee/11610364>

118. At some point in the medium to long term, the innovations of 'big data' may facilitate a fundamentally different approach to enforcement and compliance in Australia and for data on payroll and tax which is held by government to trigger questioning of employers on whether pay has been correctly made.
119. The analysis of whole of workforce data for Australia may become possible with big data analytics and this may allow the successors of the current FWO to take a very different approach to compliance based on trends and analysis of data sets well beyond current capacities.
120. This may not arise until the 2020s or 2030s, but in the future technology may offer the prospect of completely changing what government can do to ensure compliance with our workplace laws.
121. ACCI suggests that with an eye to the longer term and what a very different approach to data and matching may offer, that government should commission a research and report on:
 - a. What options Big Data may offer to contribute to improved compliance with Australia's workplace relations laws (now and in the medium to longer term).
 - b. What data is held through the ATO and other sources that could contribute to improved compliance in the future.
 - c. Any privacy or other considerations that may be raised.
122. Consideration could be given to bodies such as www.data61.csiro.au / www.nitca.com.au contributing to further working up such a concept / a research proposal, in cooperation with the FWO and the ATO. Alternatively, the Government (through the FWO) might let a tender to examine and report on how Big Data might contribute to improving workplace relations compliance.
123. Note, ACCI is proposing that Australia consider a world leading approach in understanding what technology may offer in combatting non-compliance with minimum wage laws. Employers are not in any way conceding in raising this that:
 - a. Data matching or analytics should be used or fundamentally change compliance.
 - b. There should be any linking of data not presently possible under Australian law.

3.10 Genuinely tackle complexity

124. Finally, and perhaps as significantly as any of the other recommended measures, it is time to genuinely tackle the complexity of the rules for employment and the calculation and application of minimum wages in Australia.
125. Complexity is not an excuse for non-compliance, but it is an explanation for many, and it is a key factor contributing to too many persons working in Australia being underpaid.

126. The role complexity plays in non-compliance and the need to address complexity in the system was recognised by former Fair Work Ombudsman, Natalie James, who this year said:

“The sheer number of different pay rates and payments triggered by a range of factors makes it very challenging to capture and systemise those events and ensure that workforces are appropriately paid.

While complexity is no excuse for non-compliance, especially by large and established businesses, surely we must ask: if the system is so complex that large organisations are unearthing these legacy underpayments, is it not time to really take a look at the system?”

127. The complexity of the Australia’s employment system should not be accepted as a given nor a necessity for Australians enjoying appropriate standards of living and fair treatment. Our OECD economy counterparts in the UK, the EU, New Zealand, the US, Canada, Japan etc enjoy comparable or superior standards of living and retirement, and enjoy rights and freedoms at work without myriad, highly detailed and overlapping regulations that are difficult to comprehend, apply and comply with.

128. Employees and employers in these countries don’t have to be initiated into a specialist caste of initiated cognoscenti to understand and apply employment rules, as they do in Australia.

- a. Comparable countries don’t pay different rates determined by whether an employee in a café or restaurant is putting down or picking up plates.
- b. Comparable countries don’t need or attempt to generate 90 page guides or summaries to help employers apply 99 page awards.
- c. Comparable countries don’t have workplace legislation the size of a phone book, plus 122 modern awards setting out thousands of separate minimum wages, plus national employment standards that confusingly overlap with awards.
- d. Comparable countries don’t generate 30 different applications or scenarios (such as penalties and overtime) for each classification, of which there are thousands.
- e. Comparable countries don’t chop and change employment rules multiple times across a decade, as we have in Australia.

129. To further complicate matters, our workplace laws are so unclear that much of the law is left to interpretation, for example in the Broadcast, Recorded Entertainment and Cinema Award 2010 the difference between four grades of pay is put down to a person’s level of ‘maturity’ – a highly subjective assessment, which employers are asked to undertake without any further guidance. This lack of clarity often leads to dispute which are frequently lodged in the Fair Work Commission under s 739 over things as basic as the interpretation of meal breaks, entitlements to overtime and classifications. In 2018-2019 alone there were over 1,500 disputes lodged under section 739 of the Fair Work Act.

130. Our workplace laws have so many layers and intersecting requirements that have been developed and changed so many times over a number of decades that they are really only understood by an exclusive club of IR specialists, peak union officials and barristers.

131. To expand on some of the above examples about complexity, take the example of a level 1 food and beverage attendant, who is over 20 years of age, working as a casual under the Restaurant Industry Award 2010. When most people consider what a casual employee might be paid, they might assume there would likely be the regular casual rate, and potentially a higher rate for weekends / public holidays or late night work.
132. This would of course be incorrect. Using the FWO's Pay Calculator, which generated a 25 page 'pay rates summary', it is apparent that there are 19 possible rates of pay for a level 1 food and beverage attendant, over 20 years of age, working as a casual employee. This does not include allowances, which would alter the pay rate even further.

Possible pay rates: Level 1, Casual employee, over 20 years

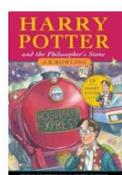
Hours	Rate	Allowance	Rate
Hourly Rate	\$25.08	Meal allowance	\$13.38 for a meal
Saturday	\$30.09 per hour	Laundry reimbursement	reimbursement of the demonstrated costs of laundering special clothing
Sunday	\$30.09 per hour		
Public holiday	\$50.15 per hour, with a minimum payment of 2 hours	Working away from usual workplace - travelling time allowance	payment at the ordinary pay rate for the time occupied in travelling between the employer's place of business and work or between the employee's residence and work
Late night - Mon to Fri - 10pm to 12am	\$25.08 per hour plus \$2.27 per hour or part of an hour		
Early morning - Mon to Fri - 12am to 6am	\$25.08 per hour plus \$3.41 per hour or part of an hour		
Overtime - Mon to Fri - first 2 hours	\$30.09 per hour	Special or protective clothing reimbursement	reimbursement of the cost of purchasing special clothing such as coats, dresses, caps, aprons, cuffs
Overtime - Mon to Fri - after 2 hours	\$40.12 per hour		
Overtime - Saturday - first 2 hours	\$35.11 per hour	Working away from usual workplace - country or seaside work involving 80km or more of travel	payment for transport to and from the workplace
Overtime - Saturday - after 2 hours	\$40.12 per hour		
Overtime - Sunday	\$40.12 per hour		
No meal break - Mon to Fri - 6am to 10pm	\$35.11 per hour, from 6 hours after starting work until the meal break is given or the shift ends		
No meal break - Saturday / Sunday	\$40.12 per hour, from 6 hours after starting work until the meal break is given or the shift ends		
No meal break - Public holiday	50% of the ordinary rate plus the appropriate public holiday rate per hour, from 6 hours after starting work until the meal break is given or the shift ends		
No meal break - Late night - Mon to Fri - 10pm to 12am	\$35.11 per hour plus \$2.27 per hour or part of an hour, from 6 hours after starting work until the meal break is given or the shift ends		
Mon to Fri - midnight to 6am	\$35.11 per hour plus \$3.41 per hour or part of an hour, from 6 hours after starting work until the meal break is given or the shift ends		
No meal break - Overtime	50% of the ordinary rate plus the appropriate overtime rate per hour, from 6 hours after starting work until the meal break is given or the shift ends		
Working through a meal break - Mon to Fri - 6am to 10pm	\$35.11 per hour, from the time the meal break was scheduled to start until it's given or the shift ends		
Minimum break after overtime	overtime rates until a break of 8 hours is given		

To further complicate matters in relation to an employee working under the Restaurant Industry Award 2010:

- a. A level 1 food and beverage attendant is allowed to clear plates from tables, but is not allowed to take plates out to customers.
 - b. A level 2 food and beverage attendant is allowed to clear plates, and can also take plates out to customers.
133. This means that if, for example, a café gets particularly busy and a level 1 employee helps out by taking a plate out to a customer (either by direction or initiative), that employer may then be required to pay that employee the level 2 rate. The Award does not provide any guidance as to at what point that level 1 employee will be entitled to the higher level 2 pay rate. Is it after taking out one plate to a customer, or multiple? Is it for the hour in which they did it, or their entire shift? Does it make a difference if the employer directs them to take out the plate, or they do it at their own initiative? At a difference of almost \$1 per hour, acting on mistaken assumption can quickly add up to an underpayment.

134. The Restaurant Industry Award is not alone in its complexity about pay rates:
- a. The Hospitality Industry (General) Award 2010 is 99 pages. The FWO Pay Guide for this award is **90 pages**.
 - b. The Building and Construction General On-site Award 2010 is 147 pages. The FWO Pay Guide for this award is **103 pages**.
135. Further, in addition to pay rates and entitlements in one Award, employers must also be across the matter of whether any of their other employees are covered by one of the other 122 Modern Awards, as well as the employment conditions in the Fair Work Act, which contains over 214,000 words, and over 800 sections.

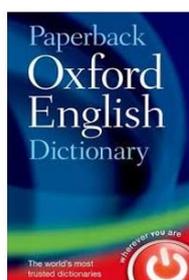
The Fair Work Act 2009



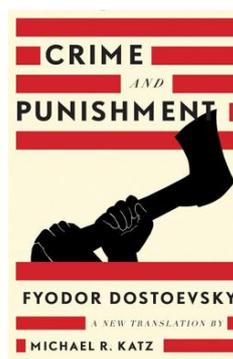
77,325 words



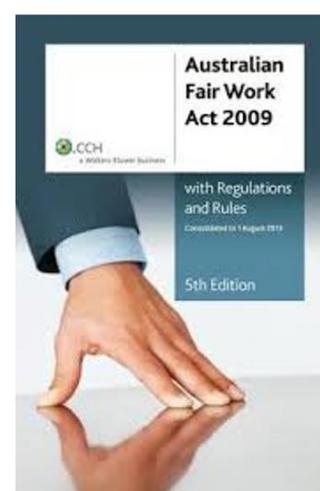
159,581 words



171,476 words



211,591 words



Over 214,000 words
800 sections
122 Modern Awards

136. **How to tackle complexity:** A useful first step would be to understand complexity and question it. We advance the following for government consideration:
- a. A Discussion Paper as part of the current review process that invites submissions on where our system is complex, how this complexity impacts on compliance, and what may be done to address and reduce this complexity without creating unfairness or disadvantage
 - b. A commissioned review of Australian law and practice against other OECD countries for comparable work (commissioned by Government).
 - i. For example, you could take a waiter and a shop worker in Australia, New Zealand, the UK, France, Canada and the US and compare the level of regulation, the number of different instruments, wage points etc and different minimum wages they work under. In addition you could compare the relative wage rates in purchasing power terms between these comparable jobs in the different countries.
 - ii. ACCI would be pleased to further develop this into a more fleshed out proposal for international benchmarking and critique of our system.

Yes, employers do also overpay

This is a suitable point in this submission to bust an absolute myth that does the rounds in relation to compliance. This is the claim that “you never hear about employers overpaying anyone”.

In fact we do. Fifty percent of clients audited by the Australian Payroll Association have made overpayments to their employees.¹⁶ ACCI members field calls from employers daily that realise they have over paid and are seeking advice on their options.

It is regularly the case that having reviewed scope to recover overpayments and taking into account the personal and organisational implications and limited employer rights, recovery is not pursued.

However, overpaid employees are not cause for a FWO media release and are generally not considered by the media as newsworthy more generally, so overpayment of employees it is not a matter which is as widely publicised.

This is a union talking point that should be disregarded in this review.

¹⁶ <https://smartcompany.com.au/finance/payroll-managers-confused/>

4 CRIMINAL PENALTIES

4.1 DP Question II-1 – Which circumstances should be criminalised?

137. Page 13 of the Discussion Paper poses the following question:

In what circumstances should underpayment of wages attract criminal penalties?

138. ACCI does not believe that there are any circumstances in which the underpayment of wages should attract criminal penalties, incarceration or the imposition of a criminal record.

4.1.1 Theft under Australian Criminal Laws

139. State and territory criminal laws already set out offences related to stealing and theft. For example, under the *Crimes Act 1958* (Vic) in Victoria a person can be jailed (section 74). Section 72 defines theft as circumstances in which a person dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.

140. Another example is section 94(b) of the *Crimes Act 1900* (NSW) which provides that a person who 'steals any chattel, money or valuable security from the person of another' shall be liable for imprisonment. There are a range of other more specific offences such as larceny by bailee (section 125).

141. In South Australia section 134 of the *Criminal Law Consolidation Act 1935* (SA) provides that a person is guilty of theft and can face imprisonment if they deal with property:

(l) dishonestly;

(m) without the owner's consent; and

(n) intending -

(i) to deprive the owner permanently of the property; or

(ii) to make a serious encroachment on the owner's proprietary rights.

142. Therefore, it is already possible for underpayments to be subject to criminal sanction where the behaviour constitutes theft and falls within the types of offences already in existence at a state level.

143. In addition at the federal level, the *Criminal Code 1995* (Cth) already provides that a body corporate may be found guilty of any offence in the Criminal Code, including those punishable by imprisonment. In particular, section 12.2 of the Criminal Code provides that if a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or with his or her actual or apparent authority, the physical element must also be attributed to the body corporate.

144. As the Migrant Workers Taskforce Report also noted,¹⁷ the *Migration Act 1958* already includes a number of criminal offence provisions targeted at employers to deter illegal work. These provisions

¹⁷ Migrant Work Taskforce Report, 2018 page 68 – 70.

are aimed at non-compliant employers and labour suppliers who allow illegal work, or refer a person for illegal work. Illegal work includes unlawful non-citizens working and lawful non-citizens working in breach of conditions attached to their visas.

145. In addition, where behaviour is criminal in nature the FWO already has a referral process in place with the Federal Police which enables the Ombudsman to refer criminal matters to the police for investigation, including in relation to actual theft of wages.¹⁸ For example, just in August this year, the FWO referred the case of Chang Ming Liu to the Federal Police after its investigation indicated that the treatment of staff was potentially criminal in nature.¹⁹ We see no reason why similar arrangements could not also be put in place with state and territory based law enforcement agencies.
146. As a result ACCI strongly contends that the 'clear, deliberate and systemic' underpayment conduct which the Migrant Worker Taskforce Report recommended be targeted with 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.

4.1.2 Criminal liability in workplace relations law

147. ACCI strongly opposes any changes to the current workplace relations framework, which would result in criminal liability including the imposition of custodial sentences for non-compliance.
148. ACCI does not condone the conduct of the relatively small number of businesses and individuals who intentionally evade their legal obligations. The poor actions of a few sadly reflect on entire industries, damaging reputations and increasing pressure on governments to do more including potentially criminalising certain types of conduct.
149. 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.
150. As recently highlighted by the Office of Industrial Relations in the Queensland Wage Theft Inquiry (Qld Inquiry), there is a long-standing principle that criminal laws have no place in an industrial context.²⁰ ACCI considers such a major departure from traditional civil remedy provisions relating to underpayment issues would constitute a regressive development which would reverse more than a century of modernisation in workplace laws, returning our system to approaches analogous to the nineteenth century when debtor prisons existed.
151. Characterising underpayments as a criminal offence akin to theft will only serve to set a disastrous precedent in our workplace laws where any behaviour that does not completely accord with the law can suddenly be considered criminal in nature. It may sound far-fetched but if underpaying someone becomes a criminal offence then so too could the misuse of sick leave (an activity which surveys suggest almost 1 in 5 employees in engage in every year) as a form of 'time theft'. The same could also be said for workers who falsely report their time sheet or who falsely inflate their mileage claims.
152. It is also likely that the risk of a custodial sentence and higher penalties will discourage people from participating in decision making or taking on responsibility for essential functions within an organisation and will push non-compliance by persons operating 'outside the system' even further underground or to the lowest possible levels. Where a significant penalty or imprisonment is imposed, this may also result in the business ceasing to operate (e.g. because the financial penalty

¹⁸ Fair Work Ombudsman, Our Policies, <https://www.fairwork.gov.au/about-us/our-policies>, accessed 24 October 2019.

¹⁹ Nine news, Queensland man faces servitude charge, 23 August 2019.

²⁰ Briefing paper – Department brief by the Office of industrial Relations, June 2018, page 27

affects the viability of the business or because key personnel are serving custodial sentences) with the effect that wider number of employees may lose their jobs or be less likely to recover unpaid entitlements.

153. Further in 2009 the Council of Australian Governments (COAG) developed guidelines to assist in achieving a nationally-consistent and principles-based approach to the imposition of personal criminal liability for directors and other corporate officers as a consequence of a corporate offence. Whilst these guidelines are not concerned with circumstances where directors and individuals may be held criminally liable directly or where they personally commit an underpayment or some other offence, principles referenced within the guidelines are worthy of consideration.
154. They are worthy of consideration in the context of establishing criminal liability for contraventions in relation to a failure to provide employee entitlements strictly in accordance with the complex letter of the law that characterises Australia's workplace relations system. In particular, among the COAG principles referenced in the guidelines is the principle that:

The imposition of personal criminal liability on a director for the misconduct of a corporation should be confined to situations where:

(a) there are compelling public policy reasons for doing so (for example, in terms of the potential for significant public harm that might be caused by the particular corporate offending);

(b) liability of the corporation is not likely on its own to sufficiently promote compliance; and

(c) it is reasonable in all the circumstances for the director to be liable having regard to factors including:

i. the obligation on the corporation, and in turn the director, is clear;

ii. the director has the capacity to influence the conduct of the corporation in relation to the offending; and

iii. there are steps that a reasonable director might take to ensure a corporation's compliance with the legislative obligation.²¹

155. The guidelines provide the following examples of underlying offences where compelling public policy reasons may exist for imposing liability on directors and non-compliance will create a real risk of serious public harm, such as:
- a. death or disabling injury to an individual;
 - b. serious damage to the environment and/or serious risk to public health and safety;
 - c. conduct likely to undermine confidence in financial markets; or
 - d. conduct that would otherwise be highly morally reprehensible (e.g. serious offences under child protection or animal welfare legislation).

²¹ COAG Meeting Communique, 7 December 2019

156. Failures to provide employment entitlements strictly in accordance with industrial relations legislation do not give rise to significant public harm of the nature described above. This has the implication that a person could be sent to jail for a contravention even in circumstances where the impact of the contravention upon the individual employee or former employee is not significant.
157. Sentencing must balance real and symbolic acts. Responding to public perception around the issues of underpayments by introducing criminal sentences is largely symbolic. Public pressure has catalysed calls for retribution against offending employers through the introduction of criminal liability. However, symbolically introducing criminal liability for employer non-compliance is unlikely to achieve the real or practical aims of general and specific deterrence.
158. The use of the prison system should be reserved for the most grave and threatening offenders, those who must be incapacitated to reduce harms to society.
159. By definition, an employer found to have not met their legal wages and entitlement obligations under the Fair Work Act would be a 'white collar criminal' who is non-violent and who poses no physical threat to society. In taking away a persons' liberty and segregating them from their fellow citizens, a court is acknowledging that the offender has not only committed a serious crime, but that they are at risk of doing so again and that re-offending constitutes a sufficient threat to the public that incarceration is the only option. People found guilty of murder, rape, assault, burglary should expect to spend time in custody as they represent a threat to the public, the same cannot be said for employers who underpay their employees.
160. The general and specific deterrence aims of punishment can be equally achieved through other means. There are other less expensive and extreme penalties than criminal liability and incarceration (and this submission recalls existing financial penalties and identifies options to further encourage compliance).
161. This is not to suggest that errors should be without consequence but in the overwhelming number of cases of underpayments the conduct has arisen through mistake, error and/or miscalculation, and in these circumstances entirely different sentencing / sanctioning protocols should be applied if offenders are unlikely to pose a physical threat to the community.
162. In addition, exposing employers to the general prison population is unlikely to achieve any rehabilitation goals, with research suggesting that incarceration actually leads to around 40% of prisoners being re-imprisoned within two years of release from prior offending.²²
163. In addition, given the significant funding issues faced by our prison systems through Australia, with the Australian Productivity Commission revealing the cost of incarceration being on average \$292 per day (around \$106,000 per year)²³, appropriate alternatives to incarceration should always be considered first where appropriate.
164. Accordingly ACCI does not believe that there are any circumstances in which the underpayment of wages should attract criminal penalties, incarceration or the imposition of a criminal record.

²² Jason Payne, *Recidivism in Australia: findings and future Research*, Australian Institute of Criminology, Research and Public Policy Series, no. 80 Canberra, 2007.

²³ Productivity Commission, *Report on Government Services 2015, 'Corrective Services'*, Chapter 8, Volume C

165. That said, as a general proposition, whenever the legislature creates new offences, it should take care and use precise terms to ensure that it does not criminalise conduct that was not intended to be caught by the proposed provisions.
166. If the Parliament ultimately intends to pursue the criminalisation of underpayments of wages and entitlements contrary to what employer 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 mistakes and oversights, which are often immediately corrected upon discovery. That is, mistaken conduct or otherwise reasonable conduct should not be prosecuted under any circumstances as a criminal offence.
167. Employers are underpaying workers due to “fundamental misunderstanding” about awards and enterprise agreements, which can operate simultaneously in a workplace and have intersecting legal requirements leading to genuine mistakes and accidental payroll errors.²⁴ Even businesses that promote themselves on the basis of their social conscience, are closely aligned with unions or operate as experts in the workplace relations field have previously been identified as making very large underpayments to employees as a result of mistakes in the interpretation of the NES, awards and enterprise agreements, as well as a result of payroll errors.
168. For example, in July 2018 law firm Maurice Blackburn, which markets itself under the slogan “we fight fair” and claims to have a Australian leading employment law practice with a “proven track record” when it comes to navigating workplace laws wrote to staff alerting them to an “error” which led to almost \$1 million in underpayments of 400 of the firm’s former and current part time workers, including university students.²⁵ In the letter notifying staff of the underpayment Maurice Blackburn stated “Our firm is deeply committed to doing right by our employees, but mistakes can still happen.”²⁶
169. Similar errors of interpretation leading to substantial underpayments have even come to light from other similar companies, including the Red Cross and even the ABC, who apologised in January 2019 after admitting that it had underpaid 2,500 casual staff to the tune of around \$23 million.²⁷ ACCI questions whether any organisation in Australia could invest more in HR and getting it right than the ABC – yet error were still made.
170. Genuine and accidental errors in the payment of wages and other entitlements are largely due to the inherent complexities of Australia’s workplace relations system. As research conducted by the Australian Payroll Association recently found, almost 90% of payroll managers find the current workplace laws difficult to apply to real-world situations and are unsure of how to interpret the wording of awards and legislation.²⁸
171. ACCI strongly cautions upon any characterisation of (a) deliberate, systematic non-compliance and (b) genuine accidental errors as interchangeable for enforcement and penalties. Any such characterisation is likely to only discourage employers from self-reporting underpayments they have discovered due to error and may discourage constructive remedial actions being taken to rectify pay errors for fear of criminal prosecution and conviction against both the company and individuals. Put

²⁴ IR system hits workers and business, David Marin-Guzman, 26 June 2019.

²⁵ Adele Ferguson (2018) *Maurice Blackburn's \$1 million pay muck up short changes 400 staff*, Sydney Morning Herald

²⁶ <https://www.theage.com.au/business/workplace/maurice-blackburn-s-1-million-pay-muck-up-short-changes-400-staff-20180720-p4zspi.html?platform=hootsuite>

²⁷ <https://www.theaustralian.com.au/business/media/report-reveals-systemic-and-cultural-failure-by-the-abc-over-staff-underpayments/news-story/e50f7072d6402c8f3abe29f1cb4b5411>

²⁸ <https://www.smartcompany.com.au/finance/payroll-managers-confused/>

another way if we start to treat every contravention as deliberate, and as criminal we risk evermore reactive compliance outcomes.

4.2 DP Question II-2 – Dishonesty and patterns of conduct

172. Page 13 of the Discussion Paper poses the following question:

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

4.2.1 Systematic pattern of conduct

173. A single ad hoc breach or case of inadvertent behaviour, which leads to an underpayment of wages and/or entitlements, should never expose a person to incarceration. Even significant and sustained non-compliance can be inadvertent.
174. Incarceration should be reserved for those whose behaviour not only evidences a desire to wilfully and intentionally not comply with our workplace laws but also where conduct is evidence of a clear culture and pattern of behaviour that indicates a culture of complicity where the motivation of parties contributes to high levels of non-compliance.
175. A systematic pattern of conduct should be a key consideration for any new offence which seeks to criminalise conduct that leads to the underpayment of wages and/or entitlements.
176. The concept of a “systematic pattern of conduct” is already in existence in the Fair Work Act, in respect of the new ‘serious contravention of civil remedy provision’ introduced in the Vulnerable Workers Package.
177. Section 557A established a regime for serious contraventions which provides that a contravention is only a serious contravention where the contravening conduct was deliberate and part of a ‘systematic pattern of conduct’ relating to one or more other persons.
178. Section 557A sets out the consideration which the courts may have regard to when determining whether contravening conducts meets this relevant threshold (emphasis added):
- (1) A contravention of a civil remedy provision by a person is a serious contravention if:
 - (a) The person knowingly contravened the provision; and
 - (b) The person’s conduct constituting the contravention was part of a systematic pattern of conduct relating to one or more other persons.
 - (2) In determining whether the person’s conduct constituting the contravention of the provision was part of a systematic pattern of conduct, a court may have regard to:
 - (a) the number of contraventions (the *relevant contraventions*) of this Act committed by the person; and
 - (b) the period over which the relevant contraventions occurred; and

(c) the number of other persons affected by the relevant contraventions; and

(ca) the person's response, or failure to respond, to any complaints made about the relevant contraventions; and

(d) except if the provision contravened is section 535—whether the person also contravened subsection 535(1), (2) or (4) by failing to make or keep, in accordance with that section, an employee record relating to the conduct constituting the relevant contraventions; and

(e) except if the provision contravened is section 536—whether the person also contravened subsection 536(1), (2) or (3) by failing to give, in accordance with that section, a pay slip relating to the conduct constituting the relevant contraventions.

(3) Subsection (2) does not limit the matters that a court may have regard to.

179. The Explanatory Memorandum also notes that “the references to a systematic pattern of conduct is to a recurring pattern of methodical conduct or series of coordinated acts over time. It does not encompass ad hoc or inadvertent conduct.”²⁹

180. The Explanatory Memorandum³⁰ further explains that a contravention will be more likely to be considered part of a systematic pattern of conduct if:

- i. there are concurrent contraventions of the Fair Work Act occurring at the same time (e.g. breaches of multiple award terms and record-keeping failures);
- ii. the contraventions have occurred over a prolonged period of time (e.g. over multiple pay periods) or after complaints were first raised;
- iii. multiple employees are affected (e.g. all or most employees doing the same kind of work at the workplace, or a group of vulnerable employees at the workplace); and
- iv. accurate employee records have not been kept, and pay slips have not been issued, making alleged underpayments difficult to establish.

The factors listed above are intended to be indicative only, and a ‘serious contravention’ may still be established if one or more of these factors are not present. For example a pattern of systematic conduct may affect an individual or group of employees. Other factors may also be relevant, such as a failure to address complaints about alleged underpayments.

181. Section 557A has only been in operation since September 2017, as a result, there is very little case law on its application by the courts. However ACCI contends that if underpayment of wages is to attract a criminal penalty then so far as possible we should aim for consistency, by including the physical element of a ‘systematic pattern of conduct’ in any new criminal offence, with one key difference.

182. Section 557(1) of the Fair Work Act currently deems two or more contraventions of certain civil remedy provisions to be one contravention if they are committed by the same person out of a course

²⁹ Explanatory Memorandum, [24], p.4

³⁰ Ibid

of conduct by that person. This provision applies to a range of contraventions such as contraventions of the National Employment Standards, modern awards, enterprise agreements etc.

183. Problematically however, when section 557A was introduced through the Vulnerable Workers Package it expressly provided that section 557(1) does not apply for the purposes of determining whether a person's conduct is a part of a systematic pattern of conduct.³¹
184. This is extremely problematic as it has opened up the possibility that an error or misunderstanding with reach across a large payroll could be considered 'serious', i.e. because it affects a large number of persons and therefore may be regarded as a systematic pattern of conduct.
185. The exclusion of section 557(1) from any consideration as to whether behaviour constitutes a 'systematic pattern of conduct' also suggests that we may see errors which are not discovered for a period of time, being more likely, by that fact alone, to be found to be a part of a systematic pattern of conduct.
186. Given the gravity of any new criminal offence were it to be pursued, s557(1) were it pursued must apply to any consideration of whether conduct constitutes a 'systematic pattern of conduct' (or an identical provision).
187. This will ensure that the offence rightly only captures behaviour which indicates a culture of complicity, where the motivation of parties contributes to high levels of non-compliance rather than errors or misunderstandings not discovered over a period of time.

4.2.2 Dishonesty

188. Dishonesty is a community-based standard, and one linking morality to the modern law.
189. At law, dishonesty is currently an explicit or implicit element of a wide range of criminal offences and civil causes of action, both under statute and at common law, in Australia and overseas. Currently dishonesty appears in nearly 700 legislative provisions.³²
190. Most recently in workplace relations, the term has been used as a key element in offences related to giving, receiving or soliciting a corrupt benefit.³³
191. Those who have contended publicly that the underpayment of wages and entitlements should be criminalised (including in the Migrant Worker's Taskforce Report) have largely done so on the basis that this conduct is a form of theft.
192. Given this underpinning, it is important that like the criminal property offence of theft, dishonesty be an element of any new criminal offence for underpayment.
193. ACCI notes however that whilst dishonesty is often described as a "fault element", it is in fact according to the Practitioners guide to the Commonwealth Criminal Code³⁴, a compound of the fault element of knowledge coupled with a physical element of departure from ordinary standards. Dishonesty is thus a symptom for a particular state of mind, rather than a fault element itself.

³¹ Fair Work Act, Section 557A(4)

³² Australian Capital Territory 91; South Australia 64; Commonwealth 114; Tasmania 49; New South Wales 96; Victoria 110; Northern Territory 41

³³ Fair Work Act 2009 (Cth) - 536D Giving, receiving or soliciting a corrupting benefit

³⁴ The Commonwealth Criminal Code, A Guide for Practitioners, Commonwealth Attorney General's Department, March 2002.

194. As dishonesty is a characterisation defined by a judge or jury after an event it is important to consider the fact that there is no way a defendant can ever know with complete certainty whether their behaviour is lawful, even if where the characterisation of dishonesty includes the state of mind of the defendant at the time.³⁵ Consequently, ACCI believes that it is of utmost importance that any new criminal offence giving weight to dishonesty be determined using a stable and predictable test.
195. ACCI submits that the definition of the dishonesty limb of any offence should be consistent with the meaning applying to dishonesty offences across numerous Acts of Parliament including in seven Commonwealth statutes including the Criminal Code³⁶. This definition is based upon the definition of dishonesty in the UK Court of Appeal case of Ghosh³⁷. In that case the court explained that the test for dishonesty should be a two-step process:
- In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails.*
- If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest.*³⁸
196. As was acknowledged in the explanatory memorandum to the first Criminal Code Amendment³⁹ which adopted the definition of dishonesty in Ghosh, this test is preferable because:
- a. It is “a straight-forward definition” and
 - b. It is “a familiar concept in Australia” that has “been used in all jurisdictions”.
197. Accordingly, ACCI submits that the definition of ‘dishonesty’ in any new underpayment criminal offence were pursued should be as follows:
- (1) A person’s conduct is dishonest if the person acts dishonestly according to the standards of ordinary people; and knows that he or she is so acting.
 - (2) In a prosecution for an offence, the determination of dishonesty is a matter for the trier of fact.
 - (3) The conduct of a person who acts in a particular way is not dishonest if the person honestly but mistakenly believes that he or she has acted in a legal way.
198. Accordingly, the accused behaviour must be dishonest on an objective view and dishonest on a subjective view. The latter requirement in part constituting a core part of the *mens rea* of the offence.

³⁵ Steel, ‘Describing Dishonest Means’ (n 82)

³⁶ Corporations Act 2001 (Cth), ss 1041F(2) and 1041G(2); Defence Force Discipline Act 1982 (Cth), s 47A; Military Rehabilitation and Compensation Act 2004 (Cth), s 205(2); Australian Passports Act 2005 (Cth), s 27; Australian Participants in British Nuclear Tests (Treatment) Act 2006 (Cth), s 4(2); Future Fund Act 2006 (Cth), s 5.

³⁷ [1982] 3 WLR 110

³⁸ Ibid at 118-9

³⁹ Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000 (Cth)

4.3 DP Question II-3 – Fault elements

199. Page 13 of the Discussion Paper poses the following question:

What kind of fault elements should apply?

4.3.1 Intention

200. If the purpose of the new offence as stated in the Discussion Paper 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 (alongside the requirement for dishonesty, see discussion above) is intention.

201. Underpayment often occurs for a number of reasons including due to disputes over the correct interpretation of an award, enterprise agreement or the NES. In such circumstances, an employer deliberately applies the interpretation that it believes is correct, but at a later stage may find that an alternative interpretation is the correct one. Limiting the offence of underpayment to intention will also ensure that instances such as this, where a person has an honest belief that they are operating in accordance with the law will not be captured by any new offence

202. This position is also in line with the comments of the Chair of the Migrant Worker’s Taskforce, Professor Fells who has publicly stated:

“There should be the real prospect of jail sentences ... in sustained, substantial and intentional cases,”

203. This was supported in the Final Report from the Migrant Worker’s Taskforce which observed:

“The criminalisation of wage underpayment is gaining increasing support, particularly in cases of deliberate, serious and intentional contraventions”

....

“These powers should aimed at dealing with exploitation that is clear, deliberate and systemic.”

204. Section 5 of the Commonwealth Criminal Code defines criminal intention as follows:

(1) A person has intention with respect to conduct if he or she means to engage in that conduct.

(2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.

(3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

205. When intention to cause a particular result is expressly declared to be an element of an offence, the result intended to be caused must be established beyond reasonable doubt.

206. Practically, intentional conduct is an achievable standard which the FWO has successfully prosecuted before.⁴⁰

4.3.2 Dishonesty

207. As outlined at paragraph above, dishonesty should be an element of any criminal offence related to the underpayment of wages and entitlements.
208. As Peter Hastings QC has made clear, dishonesty should be understood as a single fault element that attaches to the physical element of conduct which constitutes that offence.⁴¹
209. The conduct involves fault because it is dishonest according to a prescribed standard. The requirement that the defendant knew this adds an additional fault element.
210. A person's conduct is dishonest if the person acts dishonestly according to the standards of ordinary people; and knows that he or she is so acting.
211. Dishonest conduct can take various forms but in the case of underpayments it is most likely to appear where a person engages in conduct which they knew they had no right to engage in.⁴² As McHugh J in *Peters v The Queen*⁴³ explained:

“a breach of duty, trust or confidence by which an unconscionable advantage is to be taken of another”.

212. A person however, who acts in good faith based on expert advice or because of a genuinely held but mistaken belief as to the interpretation of a law or legal instrument should not be found to have acted dishonestly, even if the belief is subsequently found to be unreasonable or unfounded.⁴⁴ For example there are a high profile instances in which businesses have relied on advice/interpretation of legislation from the FWO as well as information provided in statutory documents such as the Fair Work Information Statement prepared by the FWO, which has subsequently been found by the courts to be incorrect (e.g. AllTrades⁴⁵, Mondelez⁴⁶). Businesses who have in good faith relied upon this information from the Federal regulator whose role includes educating and informing the public of their legal obligations should not later be punished for doing so.
213. This is not to say that someone can be exonerated from liability where they have acted with wilful blindness. Wilful blindness is where a person suspected a fact, realises its probability, but refrains from obtaining the final confirmation because they wanted to be able to deny knowledge. As the UK case of *Twinsectra Ltd v Yardley*⁴⁷ confirmed, such behaviour would still be dishonest as it involves a person deliberately closing one's eyes and ears or deliberately not asking questions, lest the person learn something that they would rather not know. This behaviour is in stark contrast to those who in good faith make inquiries, get advice or rely on information provided by a legitimate source such as a government authority.

⁴⁰ FWO v NHN North Pty Ltd [2017] FCA 1301; FWO v Phau & Foo Pty Ltd [2018] FCA 137; FWO v JS Top Pty Ltd & Anor [2017] FCCA 1689.

⁴¹ https://www.cdpp.gov.au/sites/default/files/PGI-CFC-003_2.pdf

⁴² McHugh J in *Peters v The Queen* (1998) 192 CLR 493 at 529

⁴³ (1998) 192 CLR 493

⁴⁴ R v Lawrence [1997] 1 VR 459; R v Fuge (2001) 123 A Crim R 310

⁴⁵ AFR, David Marin-Guzman, Queensland apprentices were underpaid, owed millions in back pay after court ruling, 27 November 2017.

⁴⁶ Smart Company, Dominic Powell, Controversial Fair Work Commission decision on sick leave could lead to grave consequences for small business, 15 August 2019.

⁴⁷ [2002] 2 All ER 377 at 383

4.4 DP Question II-4 – Accessorial liability and corporate criminal conduct

214. Page 13 of the Discussion Paper poses the following question:

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?

215. As the discussion paper highlights, the Fair Work Act currently contains accessorial liability provisions extending liability to those who are knowingly involved in a contravention. These provisions could operate to extend liability for wage underpayments to an individual if they had the requisite knowledge of the contravention. (See Section 7 and Section 8 of this submission).
216. Accordingly, if a criminal offence is pursued ACCI does not see any justification to depart from the application of the Fair Work Act accessorial liability provisions in respect of a new offence.
217. ACCI does not believe that it is appropriate to also apply the far reach corporate criminal responsibility provisions established in Part 2.5 to any new offence pursued because this introduces liability for corporations and personal liability for officers and directors on the basis of a corporation's 'culture'. Culture is a nebulous concept, that the FWO is not well placed to regulate, it would therefore be entirely inappropriate to apply such a test to any new offence pursued.
218. Excluding Part 2.5 of the Criminal Code from application to any criminal offence for underpayment of wages and/or entitlement is not without precedent. Part 2.5 of the Criminal Code which deals with corporate criminal responsibility currently does not apply to all criminal offences. Part 2.5 has been displaced in a number of instances including in relation to financial services and markets offences.
219. Specifically, section 12.3 of Part 2.5 of the Criminal Code provides that if intention, knowledge or recklessness is a fault element of an offence, then the fault element must be attributed to a body corporate where it "expressly, tacitly or impliedly authorised or permitted the commission of the offence". This may be found where a corporate culture is said to have existed to encourage or tolerate the commission of the offence.
220. Culture is a far reaching, "inherently slippery concept"⁴⁸ that is conceptually imprecise⁴⁹ and it should not be used to impose criminal liability on corporations, directors and officers for any underpayment offences for a number of key reasons.
221. Firstly, corporate culture is not a settled discipline; it is a moving target that cannot be measured in an objective sense. There is no algorithm or formula that you can put a bunch of variables into and it says definitely: this business has a good or bad culture.
222. As culture cannot be readily defined and cannot be measured against an objective standard, it is extremely difficult for the business, the employer and its officers to know if enough has been done to satisfy any statutory prescription of "culture" or to know whether any liability has arisen. The Courts would have equal or greater difficulty.
223. Secondly, culture will likely vary within an organisation, with sub-cultures often emerging, even amongst the smallest of teams. What is good in one region of a business may be poor in another.

⁴⁸ D Awrey, W Blair, D Kershaw, "Between Law and Markets: Is There a Role for Culture and Ethics in Financial regulation?" (2019) 38 Delaware Journal of Corporate Law 191, 194.

⁴⁹ J O'Brien and G Gillian, "Introduction – regulating Culture: Problems and Perspectives" (2013).

224. Thirdly, culture is not a settled concept, cultures change, and at different rates. If a manager inherits a culture that the FWO considers problematic, yet takes reasonable steps to change this culture, and a contravention then still occurs, such a manager should not be liable – but under the current application of Part 2.5 they would be.
225. Fourthly, some businesses or groups are large and diverse. A niche culture may not be representative of an entire business' practices.
226. ACCI strongly therefore contends that culture should not be the foundation for criminal liability in cases of underpayment of wages and/or entitlements.
227. In the alternative, if the parliament does decide to apply part 2.5 of the Criminal Code to such offences then it should only those who have direct involvement in the commission of the offence should have criminal responsibility attributed to them.

4.5 DP Question II-5 – Maximum penalties

228. Page 13 of the Discussion Paper poses the following question:

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

229. Fixing a penalty is discretionary, and it has been widely acknowledged by the courts that it is “not an exact science”.⁵⁰
230. The task of deciding where to place an offence along the scale of maximum penalties requires an examination of the intrinsic nature of the offence along with where the offence ties in with other criminal behaviour.⁵¹
231. A maximum penalty is taken to reflect the seriousness of the prescribed conduct, allowing for a comparison between the worst possible case and that which a court is asked to consider, thus providing a yardstick, which should be taken and balanced with all other relevant factors.⁵²
232. As Callaway JA of the Victorian Court of Appeal observed in *DPP v Aydin & Kirsch*⁵³

There is no gainsaying the importance of the maximum penalty prescribed by Parliament for an offence. It provides authoritative guidance by the legislature as to the relative seriousness of the offence, in the abstract, by comparison with other crimes in the calendar...

It must always be remembered, however, that a maximum penalty is prescribed for the worst class, or one of a number of worst classes, of the offence in question.

.....

The penalty prescribed for the worst class of case is like a lighthouse or a beacon. The ship is not sailed towards it, but rather it is used as a navigational aid.

⁵⁰ Mason v Harrington [2007] FMCA 7 at [18]

⁵¹ Richard Fox and Arie Freiberg, Sentencing: State and Federal Law in Victoria (2nd ed, 1999) 236;

⁵² Murphy v Rooney [2019] FCCA 547 (12 March 2019) at [16]

⁵³ [2005] VSCA 86 [8]–[12]

233. ACCI 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.
234. As part of the exercise of setting the maximum penalty it is appropriate to consider current sentencing practices about where a new offence sits in the scale of relative offence severity, as a maximum penalty should serve as an expression of the gravity with which the community views the offence and should provide guidance about the seriousness of the offence relative to other offences.⁵⁴ Consequently, in order to ensure consistency with penalties for dishonest conduct, any penalty applicable for underpayment of wages and entitlements should not meet or exceed the current penalties for most comparable offence under the Criminal Code: s135.2 - Obtaining a financial advantage (Penalty: Imprisonment for 12 months).
235. ACCI contends that it should remain that even if only imprisonment is the specified criminal penalty for underpayment that the courts should still be empowered to still decide that a fine may instead still be imposed.⁵⁵ This maximum penalty could be calculated in accordance with a formula similar to that set out in section 4B(2) of the Crimes Act, as should the penalty for a body corporate in accordance with section 4B(3) of the Crimes Act.

4.6 DP Question II-6 – Unintended consequences

236. Page 13 of the Discussion Paper poses the following question:

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

237. 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.
238. These unintended consequences will have negative impacts on both employees and employers:
- Negative impact on migrant workers:** Increased likeliness that temporary migrant workers who already report high rates of fear when speaking up about suspected non-compliant behaviour⁵⁶ due to concerns around the loss of their job and visa rights will have their fears compounded where reporting will potentially lead to involvement in criminal investigations and proceedings. This is likely to result in fewer temporary migrant workers speaking up and alerting authorities to non-compliant behaviour.
 - Decrease in self-reporting and proactive compliance:** This year’s annual report from the FWO indicates that the number of businesses self-reporting underpayments is continuing to increase, a sign that “compliance and enforcement activities are creating the desired effect”. However employers fearing jail and a criminal record will be less willing to come forward and seek to correct small to moderate problems before they become major ones if criminal sanctions become available. There is also a risk that criminalisation will lead to employer paralysis and an active avoidance of fixing known problems out of fear. Collectively this will lead to a reduction in the voluntary rectification of underpayment and commitment by firms to proactive monitoring initiatives. This will inevitably lead to conflict with the FWO’s current

⁵⁴ Arie Freiberg, Pathways to Justice: Sentencing Review 2002 (2002) 55;

⁵⁵ See for example section 4B of the Crimes Act 1914 (Cth)

⁵⁶ The Criminalisation of Wage Theft as a Compliance Strategy, Melissa Kennedy and John Howe, page 18.

compliance strategy, which encourages self-disclosure in order to as quickly and efficiently as possible restore those unpaid to their rightful financial position. Whilst this current policy has seen a significant number of high profile companies such as MADE Establishment, Thales, Sunglasses Hut, Wesfarmers and even the ABC self-report underpayments discovered by the businesses to the regulator along with proactive efforts by some of the country's largest employers including McDonalds, Baiada Poultry, JB Hi Fi, La Porchetta, Woolworths and Red Rooster to enter into proactive compliance deeds, it is clear that employers will be significantly less willing to voluntarily come forward to the regulator where errors are identified, if the potential result may be criminal sanctions and incarceration.

- c. **Disincentive to hire:** Placing employers at risk of imprisonment for underpayments would impose a serious disincentive on setting up businesses and employing staff. The entire community benefits when businesses are growing and employing more staff. On the other hand, encouraging employers to shut up shop because of unfair and unbalanced laws that criminalise mistakes that occur as a result of an overly complex model of workplace laws due to the risk of imprisonment, will adversely affect the entire community.
 - d. **Stifling proactive efforts to ensure compliance:** Characterising underpayments as “criminal behaviour” is likely to discourage employers from commissioning expert analysis and advice on their compliance for fear of generating evidence against themselves in any potential criminal prosecution.
 - e. **Incentivises outsourcing:** Placing employers at risk of imprisonment for underpayments only provides an additional incentive for employers to seek to outsource labour in peripheral functions (e.g. through labour hire arrangements) in order to not directly contribute to or benefit from any underpayment of wages and/or entitlement thus ensuring they are less directly connected with any potential criminal sanctions connected with the conduct.
 - f. **Significant delays in compensation:** Currently employers who are made aware of underpayment errors more often than not seek to proactively rectify their errors by compensating employees directly without any court proceedings needing to take place. Employers fearing and/or facing criminal charges will be significantly disincentive from making good any underpayments of wages and/or entitlements for fear of any admission of guilt. Meaning employees will likely face significant prolonged delays which may go on for months if not years.
 - g. **Weaponised by unions & lawyers:** The dramatic rise in class action proceedings, often backed by international litigation funds in return for a high percentage of the returns means that any new criminal sanctions for non-compliance will likely be viewed by unions / applicant lawyers / litigation funders as a lucrative new target for weaponisation. Any new criminal liability offence for underpayment under the Fair Work Act will be particularly commercially attractive due to its no cost jurisdiction.
239. Such risks are best avoided by:
- a. The primary work on compliance continuing to be borne by civil penalties, with any criminal penalties only ever coming into consideration where civil penalties have been proven over a reasonable period of time to have not secured compliance.
 - b. Confining criminal penalties to only the most serious subset of contraventions.

- c. Strictly confining criminalisation to intentional acts or omissions.
- d. Ensuring prosecutions come strictly from the Crown with no role for unions, other employers, ex-employees, and applicant lawyers, litigation funders etc. who may seek to weaponise the threat of criminal sanction for non-compliance to achieve ulterior outcomes.
- e. Ensuring that the introduction of any criminal penalties is reviewed within 24 months to ensure they are having the desired outcome and unintended consequences are significantly limited.

4.7 DP Question II-7 – Wider application?

240. Page 13 of the Discussion Paper poses the following questions:

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

4.7.1 Employee behaviour

241. 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.

242. 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.

243. This contention was confirmed by in the Black Economy Taskforce:⁵⁷

“It is not uncommon for employees to demand cash wages”

244. Later at page 147 the taskforce final report observes:

“employees may be tempted to strike informal, cash-based bargains to avoid tax and loss of welfare benefits.”

245. As the Taskforce observed in its interim report⁵⁸:

Employees will sometimes request to be paid cash wages off the books because that income is not reported to government. This means they can:

- *Avoid paying their share of income tax*
- *Claim welfare benefits to which they are not entitled*
- *Remain under student loan income limits (HECS-HELP)*
- *Avoid child support obligations*
- *If they are a migrant undertake paid work even if they have no work rights, or work longer hours than is permitted under their visa*

⁵⁷ Black Economy Taskforce Final Report, Final Report, page 59

⁵⁸ Black Economy Taskforce Interim report page 17.

246. Evidence provided by GrowCom to the Queensland Governments Inquiry into Wage Exploitation also highlighted that employees may sometimes demand / request cash-in-hand arrangements to avoid their obligations:

“We had one of our very good members in complete frustration ring me and say, ‘Rachel, I have had 60 workers walk off the job because I will not pay them in cash.’ Whilst on one hand it is easy to blame the employers—and they obviously have a significant responsibility—it makes it very difficult when you have workers who do not want to be paid through the legal system either.”⁵⁹

247. Within a number of key industries, ACCI’s chamber and industry association members report high levels of circumstances in which ‘workers’ demand being engaged through arrangements which evade the legal system and refuse offers of engagement on any other basis. This leaves employers with the invidious choice between entering into arrangements which may see them not meeting their legal obligations and not being able to run their businesses with sufficient staff.
248. This is particularly the case in strong labour markets where demand for certain types of workers and professionals means that employees can often have a significantly better bargaining position than employers and that they can maximise their earnings by seeking engagements which avoid their tax obligations.
249. The Australia Institute in fact has estimates that 5% of Australian employees work cash-in-hand in their current job, with aggregate earnings of approximately \$12.8 billion.⁶⁰
250. ACCI therefore contends that it is not only employers who should be the focus of criminal penalties that may be added to the Fair Work Act. We recommend that anyone should be exposed to penalties where they seek to incite another party into an arrangement which evades the legal system / breaches the Fair Work Act or award.
251. Where this behaviour by an individual is intentional and dishonest, we see no reason why it shouldn’t be subject to the level and type of penalties being proposed for employers who engage in underpayment conduct. In particular we recommend including a new offence for employees and prospective employees who incite an employer or prospective to commit an offence (see the offence of incitement under section 11.4 of the Criminal Code).

4.8 Interaction with any state or territory laws

252. Page 13 of the Discussion Paper includes the following:

A number of states have indicated their intention to consider introducing criminal sanctions for wage underpayment matters. In addition, existing state-based criminal offences may also regulate similar conduct. Consideration would need to be given to the interaction between Commonwealth and state laws.

253. Currently no Australian jurisdiction has a criminalisation model in place in relation to breaches of employment standards.

⁵⁹ Queensland, Education Employment and Small Business Committee, Public Hearing – Inquiry into Wage Theft in Queensland, Transcript of Proceedings, 17 September 2019.

⁶⁰ D Richardson & R Denniss, Cash-in-hand means less for the states — the impact of tax evasion of public finances, The Australia Institute Technical Brief No. 17, October 2012, p. 2

254. However at a state level, the Victorian Labor Party pledged at the last state election in November 2018 to criminalise ‘wage theft’ for employers who deliberately contravene specified employment standards, by introducing up to 10 years maximum criminal sentences for employers, fines up to \$190,284 for individual and fines up to \$951,420 for corporations.
255. A number of other states including Queensland, Western Australian and South Australia have held parliamentary inquiries into “wage theft” and have similarly canvassed the introduction of state based criminal laws.
256. When the Fair Work Act was passed in March of 2009 it provided for a national workplace relations system for Constitutional corporations, following the referral of certain industrial relations power to the Commonwealth by a number of states.
257. A core objective in establishing a national workplace relations system was to remove complexity and duplication and to ensure that Australian workers and employers were subject to consistent workplace laws irrespective of geographic location or type of business.
258. Generally-speaking, compliance and enforcement functions in respect of standards set by the Fair Work Act are generally vested in the federal workplace regulator and the imposition of civil remedies, including pecuniary penalties, is a task largely assigned to federal courts.
259. Section 26(1) of the *Fair Work Act 2009* states that the “Act is intended to apply to the exclusion of all State or Territory industrial laws so far as they would otherwise apply in relation to a national system employee or national system employer.
260. The definition of industrial laws includes those ‘providing for the establishment or enforcement of terms and conditions of employment’ therefore any laws relating to the criminalisation of underpayment of workers should at a state or territory level should be held invalid.
261. As academics Melissa Kennedy and Professor John Howe⁶¹ have strongly argued the Victorian proposal is likely to “face constitutional challenges based on inconsistency between state law and Commonwealth law”– as it is highly likely that the introduction of a ‘wage theft’ offence under a state law will be directly inconsistent with section 26 of the Fair Work Act, leading to constitutional invalidity on the basis of s 109 of the Constitution.
262. In any case, ACCI submits that a fragmented state-based approaches to addressing non-compliance would inevitably create a two-tiered system, adding a further lawyer of complexity and causing practical difficulties with enforcement.
263. The existing workplace relations regulatory regime will not be improved by duplication across various jurisdiction each directed at addressing underpayment in slightly different ways. In fact, any return to a system where workers and employers face different standards depending on where they operate and work represents a significant step backwards.
264. Whilst ACCI does not support criminal penalties, ACCI strongly suggests that if criminal penalties are to be introduced they be implemented by the Commonwealth (to the exclusion of the states) in a manner which expressly ‘covers the field’ in order to avoid any unnecessary duplication of efforts and subsequent confusion from a two tiered system.

⁶¹ Melissa Kennedy, John Howe, *The Criminalisation of Wage Theft as a Compliance Strategy*, 2019

4.9 Should Australia also reintroduce criminal contempt / penal powers?

265. The prospect of adding criminal offences for some breaches of the Fair Work Act also raises significant and highly controversial events from Australia's industrial relations history.
266. Without trying to recount the general strikes of the late 1960s, Clarrie O'Shea (Victorian State Secretary of the Australian Tramway & Motor Omnibus Employees' Association) was jailed in 1969 by Sir John Kerr for contempt of the Industrial Court, using the penal sections of the then Conciliation and Arbitration Act.
267. This led to a massive union campaign against criminal offences (the penal provisions) being applied to breaches of the exercise of the Fair Work Act, and to criminal contempt (which remains possible in regard to actions on underpayments, albeit that prosecutions have not always been successful⁶²).
268. It would be more than passing ironic to see contemporary trade unions and academia support the reintroduction of criminal sanctions into Australian industrial relations when their forbears fought so hard to remove any risk of criminal findings and jail from the system.
269. The premise of a recommendation for criminalisation is that what has been viewed by the left as an anathema when applied to trade unions (criminalising industrial relations non-compliance) now seems acceptable when applied to employers? This is a strikingly inconsistent piece of thinking.
270. With due respect to the Migrant Workers' Taskforce, we are not clear whether it had any awareness of the controversy that has attached to the application of criminal laws in Australian industrial relations.
271. The old aphorism rapidly comes to mind 'what's sauce for the goose should be sauce for the gander'. If Australia is going to get into criminal penalties for breaching the Fair Work Act – how could they not be applied to the CFMMEU? How could Australia's most notorious recidivists (by some measure) remain able to pay fines when employers record convictions and risk jail?
272. ACCI is not actually arguing at this point that criminal penalties or incarceration should attach to the breaches of the Fair Work Act and other industrial relations legislation by trade unions such as the CFMMEU.
273. There are superior options, and the ACCI network strongly supports passage of Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019, to more effectively ensure all registered organisations, unions and employers, comply with the law, which does not seek to introduce criminalisation.
274. However the point should be borne in mind that creating new criminal offences for breaches of the Fair Work Act begs the a wider and ongoing question of where else they may be applicable to circumstances of repeated and calculated law breaking, where it is equally arguable that pecuniary penalties are not deterring unlawful conduct.
275. In reality as set out in Section 4, criminal penalties will not be effective and not improve compliance.

⁶² <https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/may-2018/20180513-jorgensen-contempt-penalty-media-release>

5 CIVIL PENALTIES

5.1 DP Question I-1 – Further increased fines?

276. Page 6 of the Discussion Paper poses the following question:

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

277. The statutory regime currently in place under the Fair Work Act exposes employers to significant penalties where they breach civil penalty provisions, including those related to a failure to comply with the National Employment Standards and minimum rates of pay. Failure to pay employee wages and entitlements correctly can potentially result in an individual receiving a penalty of \$12,600 and a company \$63,000 per contravention.
278. As outlined in Chapter 2, the *Fair Work (Protecting Vulnerable Workers) Act 2017* amended the Fair Work Act to introduce a higher scale of penalties (up to 10 times the former amount) for a new category of ‘serious contravention’ of prescribed workplace laws’ In such cases, the penalties now rise to \$126,000 for an individual and \$630,000 for a corporation. The amendments also give the FWO stronger powers to collect evidence in investigations.
279. As discussed in some length at Chapter 2, it would be entirely inappropriate to make any further changes to the civil penalties regime in the Fair Work Act until the effects of the Vulnerable Workers Package 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.
280. Amending the current approach to the calculation of maximum penalties could also potentially have the unintended consequence of over-deterring micro and small business so much that they may avoid engaging in particular activities, such as the hiring of staff out of sheer fear of breaching the Fair Work Act. The fact that micro and small business often do not seek preventative legal advice means that the overall deterrence effect of penalties is likely to be magnified.
281. As such, ACCI opposes any further increases to the existing civil penalty regime in the absence of evidence that such an increase will enhance compliance outcomes and indeed any increase would be entirely misguided and made without sound basis.
282. In fact increasing penalties further is more likely to have the opposite effect to generating compliance by pushing those who operate outside the system even further underground. Furthermore, businesses faced with significant penalties may not be able to meet the cost of high penalties and may be forced into insolvency with broader effects upon the workplace, including unemployment. The best outcome from actions for a breach taken under the identified provisions should be remediation of the breach and prevention of future breaches.

5.2 DP Question I-2 – Alternative ways to calculate maximum penalties?

283. Page 6 of the Discussion Paper poses the following 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.

284. The current approach to maximum penalties involves the determination of a single maximum penalty. The current maximum penalty for a contravention of a civil remedy provision under the Fair Work Act is for a corporation is \$630,000 and for an individual \$126,000.

285. As ACCI outlines in Chapter 3 these penalties are substantial and are ten times the maximum penalties that applied prior to the introduction of the Vulnerable Workers Package.

286. As the discussion paper highlights, the structure for determining maximum penalties for contravention under other types of laws including under the *Competition and Consumer Act 2010* (Cth) and the *Taxation Administration Act 1953* (Cth) involve a different approach to a single maximum penalty which involves the calculation of maximum penalties based upon other factors such as a multiple of the gain from the prohibited conduct or a proportion of the corporations turnover or revenue.

287. The Dawson Review into the Trade Practice Act⁶³ was one of the first reviews to recommend such a change in approach to the setting of maximum penalties in Australia. The justification for the recommended change in the review appears to stem from an acceptance that an effective sanction should take into account the expected gains from behaviour:

'The most important principle for levying fines is the expected loss for violating the law should exceed the gain.'

288. ACCI believes that the introduction of alternative ways to calculate maximum penalties is ill advised for a number of key reasons.

289. Firstly as a general principle maximum penalties should be reserved for the most egregious conduct (e.g. where there is clear intent, dishonesty etc). Basing maximum penalties in underpayment cases on something like the 'multiples of the gain' (e.g. quantum of the underpayment) will not have this effect as there is often no correlation between the nature of conduct which leads to an underpayment and the quantum of the underpayments. In part this is because errors in interpretation or minor calculation or classification errors multiplied over large periods of time or across a substantial numbers of employees can lead to a significant quantum of underpayment, without any intention or impropriety on the part of the employer. Conversely, whilst other forms of underpayment such as forced cash back arrangements may not quantify into a large underpayment, the conduct itself is of such an egregious nature that it often deserved a far greater maximum penalty in order to function as both an effective general and specific deterrent.

290. Secondly, it would only introduce further uncertainty and complexity into an already overwhelming difficult and complex area of the law. In order to function as an effective deterrent for employers, any maximum penalties that may apply should be able to be exactly determined and assessed under the law. Alternative methods of calculation will inevitably lead to difficulties in determining the exact

⁶³ Committee of Inquiry into the Competition Provisions of the Trade Practices Act 1974, Review of the competition provisions of the Trade Practices Act, (Dawson Review) Commonwealth of Australia, Canberra, 2003

amount of benefit gained from the conduct or the exact annual revenue or turnover of a particular business.

291. Thirdly, it is important that minimum penalties are proportionate to an offence rather than the size of an organisation, as any such change would likely lead to a disproportionately negative effect on small businesses that are less able to absorb significant penalties than larger businesses.
292. Fourthly, penalties in underpayment cases are typically coupled with an order for compensation equivalent to the quantum of any unpaid wages and/or entitlements. This is in stark contrast to penalties that are currently applied under other areas of the law, where the value of the penalty awarded can often be less than the benefit derived by the offending party, as there is no comparable addition order for compensation and/or damages.
293. Even where an alternative method of calculating a maximum penalty is preferred, ACCI strongly contends that it is vital that it be up to the courts to determine any appropriate financial penalty in a flexible and proportionate way by applying the following well-established sentencing principles:
 - a. The nature and extent of the conduct which led to the breaches;
 - 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 breaches;
 - d. Whether there had been similar previous conduct by the respondent;
 - e. Whether the breaches were properly distinct or arose out of the one course of conduct;
 - f. The size of the business enterprise involved;
 - g. Whether or not the breaches were deliberate;
 - h. Whether senior management was involved in the breaches;
 - i. Whether the party committing the breach had exhibited contrition;
 - j. Whether the party committing the breach had taken corrective action;
 - k. Whether the party committing the breach had cooperated with the enforcement authorities;
 - l. The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements; and
 - m. The need for specific and general deterrence.⁶⁴

⁶⁴ Kelly v Fitzpatrick [2007] FCA 108

5.3 DP Question I-3 – Grouping Penalties?

294. Page 6 of the Discussion Paper poses the following question:

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?

1. Section 557(1) of the Fair Work Act currently deems two or more contraventions of certain civil remedy provisions to be one contravention if they are committed by the same person out of a course of conduct by that person.
2. 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). The list is comprised of contraventions which involve payments to employees. The list specifically does not include s 357 or 358 of the Fair Work Act or any other provisions in Part 3-1 of the Fair Work Act.
3. The overriding principle in sentencing is to ensure that the sentence is proportionate to the gravity of the contravening conduct.
4. The importance of section 557(1) of the Fair Work Act should therefore first be understood by reference to the well-established four step approach to determining appropriate penalties as explained by McKerracher J in *Fair Work Ombudsman v Kentwood Industries Pty Ltd*⁶⁵ (emphasis added) :
 1. *Each contravention of each separate obligation is a separate contravention so it is necessary to identify the maximum penalty for each separate contravention.*
 2. *It is necessary then to consider an appropriate penalty to impose with respect to each contravention (whether a single contravention alone or as part of a course of conduct), having regard to all of the circumstances of the case.*
 3. *To the extent that two or more contraventions have common elements, this may be taken into account when considering the appropriate penalty for each contravention. The respondents should not be penalised more than once for the same conduct and the penalties imposed should be an appropriate response to the respondents' actions.*
 4. *Having fixed an appropriate penalty for each separate contravention, group of contraventions or course of conduct, a final review of the aggregate penalty is necessary to determine whether it is an appropriate response to the conduct which led to the contraventions*
5. The concept of grouping together multiple civil penalty provisions has its foundations in the application of the principle of totality and proportionality with the aim being that respondents are not penalised more than once for the same or substantially the same conduct.

⁶⁵ [2011] FCA 579

6. This concept as Moore J explained in *Construction, Forestry, Mining and Energy Union v Cahill*⁶⁶ is a consideration as to whether there is an interrelationship between the legal and factual elements of contraventions:

“Rather, it is a question answered by evaluating the differences and similarities in the Acts to determine whether, ultimately, they are or are not a manifestation of singular criminality.”

7. ACCI does not accept that some other measure such as the number of affected employees or period of the underpayments could result in a similarly just outcome to the current ‘course of conduct’ measure. In fact a measure of the number of employees or the period of time of the underpayment is likely to result in significantly unjust outcomes.

⁶⁶ (2010) 194 IR 461 at 465

6 ACCESSORIAL LIABILITY

6.1 Introduction

295. Under the heading 'Extending Liability' the Discussion Paper addresses accessorial liability stating that:

The Fair Work Act presently extends accessorial liability for contraventions of workplace laws in circumstances where a person or company is involved in that contravention but is not the principal person or company responsible for the contravention. This might occur in where they have aided, abetted, counselled or procured the contravention; induced the contravention; were knowingly concerned in the contravention or conspired with others to effect the contravention. An 'involved' person can be liable for penalties for their involvement in the contravention and, in some circumstances, for any unpaid employment entitlements.⁶⁷

296. The Migrant Worker's Taskforce Recommendation 11 was:

Recommendation 11

It is recommended that the Government consider additional avenues to hold individuals and businesses to account for their involvement in breaches of workplace laws, with specific reference to:

a) extending accessorial liability provisions of the Fair Work Act 2009 to also cover situations where businesses contract out services to persons, building on existing provisions relating to franchisors and holding companies

297. The Taskforce report provides insufficient basis or analysis to determine why this recommendation was made. With respect to the Taskforce, this is presented as a non-sequitur, without sufficient analysis or evidence. This makes it difficult to examine the case for such a change, and to assist the Government in considering this recommendation.
298. ACCI does not support the implementation of Taskforce Recommendation 11. Respectfully, the Migrant Workers' Taskforce appears to have comprehensively failed to properly take into account the existing accessorial liability provisions and their application, the increased response to franchise arrangements in 2017, and the inescapable fact that the full benefits and impact of the 2017 changes has not yet been realised. Recommendation 11 was made notwithstanding the Taskforce clearly recognising that it could not know the extent to which what has already been done will deliver on its intentions and improve compliance:

Measuring the impact of legislative changes

The amendments contained in the Protecting Vulnerable Workers Act apply prospectively (i.e. to breaches that occur after the commencement of the amendments on 15 September 2017 (and 27 October 2017 in relation to the provisions relating to franchisors and holding companies). It may take some time to see the full impact of the amendments.⁶⁸

⁶⁷ Attorney General's Department (2019) Discussion Paper – Improving Protections of Employees' Wages and Entitlements: Strengthening Penalties for Non-Compliance, pp.7-9

⁶⁸ Migrant Workers Taskforce (2019) Final Report, p.64

299. Once again, the Migrant Workers' Taskforce has proceeded as though the Coalition did not move to take any action in response to the 7-Eleven underpayments, and as though the Vulnerable Workers Package was never implemented.
300. The Taskforce proceeded to recommend additional or extended accessorial liabilities as though accessorial liabilities in Australia remained as they were in the year 2000, not what is actually going on in 2019. Furthermore, the Taskforce did not take sufficient account of what the FWO can and is already doing to work with franchises and supply chains.
301. This should see Government:
- a. Be sceptical and cautious in addressing what has been recommended.
 - b. Decline to progress this Taskforce recommendation.
302. Furthermore, Recommendation 11 is to consider additional accessorial liabilities, it is not a direct recommendation to increase or extend accessorial liabilities. As such, determining that Government should not take further action in this area at this time, and that a case has not been sufficiently made for any further changes would be entirely consistent with the Government's pre-election commitment in relation to the Taskforce report and recommendations.⁶⁹
303. ACCI recognises that that there have been some problems associated with some relationships in which one business has a degree of control over another. Changes have already been made in response to such concerns across the past decade by both Coalition and Labor governments.
304. However, caution needs to be exercised in departing from the fundamental premise of our legal and commercial systems that each legal entity needs to meet its direct contractual obligations to those it directly contracts with (in this case in contracts of employment), and that entities cannot be legally responsible for contractual relations to which they are not party and that they do not control.
305. The law should not demand that liabilities flow upwards to those who are most observable and with the deepest pockets in all cases where the large entities are not party to specific contractual relationships. The actions taken to date (s.550, 558A-C of the Fair Work Act) are not inconsistent with this important parameter but could become so if over-extended beyond their legitimate application.

⁶⁹ <https://ministers.employment.gov.au/odwyer/standing-vulnerable-workers-0>

6.2 What's already been done – Section 550

306. The first step must be to properly recognise what has already been done. Properly considered this should lead to a conclusion that there does not need to be any further extension of existing legal liability at this time in relation to indirect liabilities (as canvassed in Part I of the Discussion Paper).
307. Australia already has extensive accessory liability provisions in relation to breaches of the Fair Work Act 2009, particularly relating to underpayments. They are comparatively recent additions to the system, and encompass:
- a. Section 550 of the Fair Work Act, inserted at the time of its passage in 2009.
 - b. Section 558B, which “hold franchisors and holding companies liable for breaches of workplace laws in their networks unless they can show they took reasonable steps to prevent the contraventions”, inserted in 2017 as part of the Vulnerable Workers Package.⁷⁰
308. When Section 550 was added to the legislation in 2009, the intention was to extend the range of punishments to additional persons involved in breaches of the Act. The FWO explains the application of s.550⁷¹ as follows:

Accessory liability occurs when a person or company is involved in the contravention of a workplace law. When this happens, they're treated the same way as the employer responsible for the contravention. They can be ordered by a court to pay employees' unpaid wages and entitlements, as well as penalties for their involvement in the contravention.

309. A decision arising from the FWO's use of the existing law⁷² recently provided useful analysis and explanation of s.550:

Section 550 enacts liability upon the common law doctrine of secondary participation, and is derived from the criminal law. Paragraph 550(2)(a) imports the criminal law concepts of aiding, abetting, counselling or procuring; expressions that collectively bear the description of 'accessory'. Paragraphs 550(2)(b)-(d) expand upon the only means by which involvement in a contravention of a civil liability provision may be established.

Accessory liability is grounded upon a principle that a secondary wrongdoer who had a sufficient practical connection to the wrongdoing should share responsibility for the wrong of the primary wrongdoer.

*Accessory liability may be imposed upon a secondary wrongdoer who has actively participated in the commission of a crime or civil wrong as by assisting or encouraging the primary wrongdoer in that conduct. Where accessory liability is found in a statute, it is declaratory of the common law and is procedural in nature: *Giorgianni v The Queen* [1985] HCA 29; (1985) 156 CLR 473, 490, 492. Such provisions are understood as making the secondary participant liable once the principal offence has been committed: *Yorke v Lucas* [1985] HCA 65; (1985) 158 CLR 661, 673.*

⁷⁰ Attorney General's Department (2019) [Discussion Paper – Improving Protections of Employees' Wages and Entitlements: Strengthening Penalties for Non-Compliance](#), p.8

⁷¹ <https://www.fairwork.gov.au/about-us/our-role/enforcing-the-legislation/litigation/accessorial-franchisor-and-holding-company-liability>

⁷² Fair Work Ombudsman v Nobrace Centre Pty Ltd & Ors [2018] FCCA 378

*The purpose of accessory liability is to make it possible to impose liability upon a secondary wrongdoer who, with knowledge of the facts, engaged in the conduct which constituted the primary wrong: *Mallan v Lee* [1949] HCA 48; (1949) 80 CLR 198, 211. As a corporation can only act through the agency of natural persons, the law of accessory liability aims to protect the corporation against the consequences of wrongful conduct by a person whose conduct caused the corporation to incur the primary liability: cf *R v Australian Industrial Court; Ex parte CLM Holdings Pty Ltd* (1977) 136 CLR 235, 246....*

*Accessory liability is not the same in scope as primary liability: cf *Maroney v The Queen* [2003] HCA 63; (2003) 216 CLR 31, [11]. Irrespective of whether the principle offence is one of strict liability, a secondary participant's accessory liability is not engaged absent proof of intention.*

*It is necessary that the alleged accessory participated in, or assented to, the contraventions with actual knowledge of the essential elements constituting the contravention. The requirement of actual knowledge derives from the focus of the criminal law upon fault and informs the nature of accessory liability. A participant who knows they may be participating in a crime has the opportunity to decide not to proceed: cf *Davies, Accessory Liability*, [2015] (Hart Publishing), 77. However, it is not necessary that the accessory should have appreciated the conduct was unlawful: *Johnson v Youden* [1950] 1 KB 544, 546 (HL); *Giorgianni v The Queen* [1985] HCA 29; 156 CLR 473, 506-7; *Yorke v Lucas* [1985] HCA 65; 158 CLR 661, 676; *Australian Competition and Consumer Commission v Giraffe World Australia Pty Ltd (No 2)* [1999] FCA 1161; (1999) 95 FCR 302, [186]; *Rural Press Ltd v Australian Competition and Consumer Commission (Rural Press)* [2002] FCAFC 213; (2002) 118 FCR 236, [155], [159]; *Qantas Airways v Transport Workers Union* [2011] FCA 470, [323].*

*If it is not established that the primary wrongdoer is liable for the wrong alleged, accessory liability against the secondary wrongdoer cannot be established: *Mallan v Lee* [1949] HCA 48; (1949) 80 CLR 198, 205, 210; *Giorgianni v The Queen* [1985] HCA 29; 156 CLR 473, 478-9, 495, 505; *Rural Press* [2002] FCAFC 213; 118 FCR 236, [154]; *Australian Competition & Consumer Commission v IMB Group Pty Ltd* [2003] FCAFC 17, [130]; *Port Kembla Coal Terminal Ltd v Construction, Forestry, Mining and Energy Union* [2016] FCAFC 99; [2016] 248 FCR 18, [268].*

*The liability of the primary wrongdoer must be established, albeit by proof or admission: eg, *Gore v Australian Securities and Investment Commission* [2017] FCAFC 13 [7], [163]; *Construction, Forestry, Mining and Energy Union v Australian Building and Construction Commission* [2017] FCA 168, [45], [51]; *Fair Work Ombudsman v Liquid Fuel Pty Ltd* [2015] FCCA 2694, [7]; *Fair Work Ombudsman v Priority Matters Pty Ltd* [2017] FCA 833, [122] (Flick J). In the latter case, Flick J at [124] suggested that in the face of such admissions, it may be difficult to resist a conclusion that the secondary participant had been 'knowingly concerned in' a primary contravener's contraventions arising from non-payment of entitlements.*

As the text of sub-s 550(2) confirms, accessory liability is established if, and only if, the person has engaged in conduct of the kind described in sub-para's 550(2)(a)-(d).

310. The FWO can and is using these existing provisions of the *Fair Work Act 2009* in relation to accessory liability. Examples of recent cases in which s.550 of the *Fair Work Act 2009* was used, include:

- a. Fair Work Ombudsman v Nobrace Centre Pty Ltd & Ors [2018] FCCA 378
 - b. Fair Work Ombudsman v Priority Matters Pty Ltd [2017] FCA 833
 - c. Fair Work Ombudsman v Siner Enterprises Pty Ltd & Anor [2017] FCCA 2583
 - d. Fair Work Ombudsman v Yenida Pty Ltd & Anor [2017] FCCA 2299
 - e. Fair Work Ombudsman v Raying Holding Pty Ltd & Anor (No.2) [2017] FCCA 2148
 - f. Fair Work Ombudsman v Viplus Pty Ltd & Anor and Fair Work Ombudsman v Vipper Pty Ltd & Anor [2017] FCCA 1669
 - g. Fair Work Ombudsman v Liquid Fuel Pty Ltd [2015] FCCA 2694.
311. It appears that actions are regularly (and successfully) being pursued against individuals using s.550, in addition to the underpaying employer. Findings are being recorded and penalties are being awarded using the existing law. Actions are regularly being taken by the FWO to involve individuals such as directors in contraventions.
312. ACCI knows of no basis to conclude that the existing accessorial provisions of the Fair Work Act are not operating as intended and having an impact.

6.3 What's already been done – Section 558A-C

313. The Vulnerable Workers Package (see Section 2.1) of 2017 extended accessorial liabilities to franchise arrangements, specifically as a response to the high profile 7-Eleven underpayments. A new Division 4A “*Responsibility of responsible franchisor entities and holding companies for certain contraventions*”, was inserted into Part 4-1 of the Fair Work Act.
314. The FWO’s Annual Report for 2017-2018 indicates that:
- On 14 September 2017, the Fair Work Amendment (Protecting Vulnerable Workers) Act received royal assent. The Act provided the FWO with increased powers to more effectively investigate and address instances of worker exploitation.*
- It introduced higher maximum penalties for serious contraventions and made franchisors and holding companies more accountable for non-compliance in their networks.*
- We responded swiftly to ensure that key stakeholders, business and the Australian public were aware of the changes and their impact. We launched a comprehensive guide to help franchisors promote workplace compliance within their networks in light of the Act. The new powers have also assisted the reframing of our litigation strategy, the principles of which guide the cases we initiate.*
315. The FWO explains the application of these provisions⁷³ as follows:

⁷³ <https://www.fairwork.gov.au/about-us/our-role/enforcing-the-legislation/litigation/accessorial-franchisor-and-holding-company-liability>

Franchisors and holding companies can be held responsible when they have a significant amount of influence or control over their franchisee or subsidiary...

A franchisor or holding company doesn't have to know about the exact contravention that occurred (eg. an employee not getting paid the correct penalty rates). They can still be held responsible if they:

- *were reasonably expected to know that the contravention would occur*
- *knew the franchisee or subsidiary was likely to breach a workplace law similar to the actual contravention.*

What can you do to reduce your risk?

Franchisors and holding companies won't be held responsible if they can show they took reasonable steps to prevent a contravention (or one of a similar kind).

Make sure your franchisees or subsidiaries understand the relevant workplace laws and know their obligations. Visit our Franchisors page for tips on how to enable, support and monitor compliance in a franchise.

You can also provide your franchisees and subsidiaries with information and tools to encourage compliance with the Fair Work Act, such as:

- *a copy of our Fair Work Handbook found on our Franchises page*
- *resources for Small business*
- *tips for hiring new staff*
- *our Online learning centre external-icon.png to take our Record-keeping & Pay Slips course*
- *our Workplace Basics quiz to test their knowledge*
- *our step-by-step guide on How to fix an underpayment.*

316. The FWO provides extensive information and advice to both franchisors⁷⁴ (linked directly to their accessorial liabilities) and franchisees to support compliance with workplace relations laws, particularly on pay.⁷⁵ All of this has been delivered under the law as it stands.

6.4 How accessorial liability should be approached

317. ACCI has examined the text of the Taskforce Report leading to the making of Recommendation 11.⁷⁶ Respectfully, the bare bones, ad hoc description of the status quo contained in the report does not in any way justify this recommendation of the Taskforce. Insufficient reasoning is provided by the Taskforce to justify the course it recommends to government. This, along with a proper consideration

⁷⁴ <https://www.fairwork.gov.au/find-help-for/franchises/franchisors>

⁷⁵ <https://www.fairwork.gov.au/find-help-for/franchises>

⁷⁶ Migrant Workers' Taskforce (2019) *Final Report*, pp.92-93

of what the FWO is clearly already able to do under the existing law, should lead government to not pursue any further changes in this area.

318. **ACCI knows of no evidence that could support a conclusion that s.550 plus the newer ss.558A-55C, are not operating as intended, nor of evidence that could justify a conclusion that more need to be done.**
319. **There are no demonstrated failures of the existing provisions and insufficient decisions to date against the FWO upon which such a conclusion could be based.**
320. The Report of the Migrant Workers' Taskforce fails to analyse any usage or application of new franchise provisions.⁷⁷
321. In fact, the Taskforce specifically acknowledges that "It may take some time to see the full impact of the amendments". The Taskforce effectively acknowledges that it cannot conclude the existing provisions do not work, but it does so anyway.
322. This must dictate that it is not open to the Taskforce to, nor should Government, conclude that any change needs to be made in this area.
323. Recommendation 11 is also a recommendation to consider additional accessorial liabilities, not a direct recommendation to increase or extend accessorial liabilities. This review is an opportunity for such consideration and should lead to a conclusion that at this point of time:
 - a. The FWO can and is using the existing accessorial liability provisions of the Fair Work Act.
 - b. Significant personal penalties are being secured by the FWO in addition to penalties against organisations.
 - c. The application of the existing laws, including through the FWO's engagement with key networks of franchises, would need to be reviewed before there could be any valid conclusion that further changes to law are required.
 - d. No change the existing liability provisions in the Fair Work Act is merited that this time.

6.5 DP Question Part I-7: Level of knowledge required for contraventions

324. We address this question (p.8 of the Discussion Paper) first, to allow us to group those on supply chains and contracting in the next section. Question 7 of the paper asks:

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?

325. ACCI opposes any change to existing s.550 of the Fair Work Act. The FWO is regularly using the existing provisions, with high degrees of success to attach additional liabilities to individuals in particular (often directors) for aiding, abetting, counselling or procuring breaches of the Fair Work

⁷⁷ Migrant Workers' Taskforce (2019) Final Report, pp.61-64

Act, in particular in relation to underpayments. Numerous of its prosecutions are against both organisations and individuals.

326. We encourage the Government to review the decision of Kelly J in *Fair Work Ombudsman v Nobrace Centre Pty Ltd & Ors* [2018] FCCA 378. This provides an extensive analysis of the basis for accessory liability, its antecedents in criminal and other areas of the law and the background and principles which apply. This includes examining the common law doctrine of ‘secondary participation’ and the necessity for knowledge and intent in such situations arising from the development of the common law from which the accessory liability provisions of the Fair Work Act were derived.
327. This makes clear that the purpose of accessory liability is to make it possible to impose liability upon a secondary wrongdoer who, with knowledge of the facts, engages in the conduct which constitutes the primary wrong: *Mallan v Lee* [1949] HCA 48; (1949) 80 CLR 198, 211.⁷⁸
328. In *Mallan*, Gibbs CJ stated that the term ‘knowingly’ operated to significantly confine the operation of a provision which turned on knowing involvement.⁷⁹
329. The following from *Nobrace* goes directly to Question posed in Part I of the Discussion Paper:

[287] Accessorial liability is not the same in scope as primary liability: cf Maroney v The Queen [2003] HCA 63; (2003) 216 CLR 31, [11]. Irrespective of whether the principle offence is one of strict liability, a secondary participant’s accessory liability is not engaged absent proof of intention. It is necessary that the alleged accessory participated in, or assented to, the contraventions with actual knowledge of the essential elements constituting the contravention. The requirement of actual knowledge derives from the focus of the criminal law upon fault and informs the nature of accessory liability. A participant who knows they may be participating in a crime has the opportunity to decide not to proceed: cf Davies, Accessory Liability, [2015] (Hart Publishing), 77. However, it is not necessary that the accessory should have appreciated the conduct was unlawful: Johnson v Youden [1950] 1 KB 544, 546 (HL); Giorgianni v The Queen [1985] HCA 29; 156 CLR 473, 506-7; Yorke v Lucas [1985] HCA 65; 158 CLR 661, 676; Australian Competition and Consumer Commission v Giraffe World Australia Pty Ltd (No 2) [1999] FCA 1161; (1999) 95 FCR 302, [186]; Rural Press Ltd v Australian Competition and Consumer Commission (Rural Press) [2002] FCAFC 213; (2002) 118 FCR 236, [155], [159]; Qantas Airways v Transport Workers Union [2011] FCA 470, [323].

330. This is consistent with the antecedents of accessory liability in the criminal law, which requires intent. The wording of s.550 has been directly derived from the criminal law.

⁷⁸ Fair Work Ombudsman v Nobrace Centre Pty Ltd & Ors [2018] FCCA 378, [284], Emphasis added.

⁷⁹ Fair Work Ombudsman v Nobrace Centre Pty Ltd & Ors [2018] FCCA 378, [286]

6.5.1 Recklessness

331. The Discussion Paper asks whether “recklessness [should] constitute a fair element to an offence of this type?”.
332. This was effectively addressed in the criminal context in *Giorginani*⁸⁰, which is described in *Nobrace* as “a seminal decision on the scope of accessorial liability by aiding, abetting, counselling or procuring”⁸¹.
333. *Giorginani* held that a lower criminal court jury “*had been misdirected by being told that to constitute the appellant the procurer of the offence of culpable driving, proof of reckless behaviour sufficed to establish the necessary intent*”. The decision contains an extensive examination of the grounding of accessorial liability in intent and knowledge, and deliberately not in mere recklessness.
334. Going down the recklessness path would seem to rob accessorial liability under the Fair Work Act of the essential elements of knowledge that are fundamental to such liabilities being administrable and operating fairly, equitably and effectively.
335. Considering the development of the law and the *Nobrace* and *Giorginani* decisions, and how this needs to work in practice, actual knowledge should continue to be required.
336. In summary:
- a. ACCI sees no basis to depart from the requirement for there to be actual knowledge and intent for accessorial liability.
 - b. There is no evidence to justify any departure in the Fair Work Act from the wider application of accessorial liability in other laws from which the clear legal concepts included in the Fair Work Act were derived.
 - c. A recklessness based approach would unduly remove accessorial liability under the Fair Work Act from its legal antecedents and the operation of other laws of the Commonwealth (such as those relating to trade practices), which would create undue uncertainty and delay for no clear gain. We would also be concerned that actions brought by the FWO would stand reduced chances of success.
 - d. The words “aided, abetted, counselled or procured the contravention” in s.550(2)(a) have been directly and intentionally calibrated with the criminal law, and should continue to be so.
 - e. There is no evidence of regulatory failure or adverse decisions which could justify such a move (a recklessness based offence), in fact the evidence goes the opposite way.
 - f. The FWO regularly brings and wins matters using the existing accessorial liabilities in s.550 of the Fair Work Act. ACCI is aware of no failure of the current provisions to accord accessorial liability where it can or should be allocated.
 - g. It is not in any way clear what the effect would be of rendering such liability based on recklessness, rather than the long standing precedents that attach to having knowingly “aided, abetted, counselled or procured the contravention”. In addition to there being no

⁸⁰ *Giorginani* [1985] HCA 29; , 156 CLR 473,

⁸¹ *Fair Work Ombudsman v Nobrace Centre Pty Ltd & Ors* [2018] FCCA 378, [293]

evidence to justify change, it is not sufficiently clear whether a recklessness based approach would deliver safe and reliable determinations. It would genuinely be speculative to embark on such a course.

337. This cannot be viewed in isolation. Were the Government to amend the Fair Work Act to add criminal penalties (canvassed in Part II of the Discussion Paper / Section 4 of this submission) it would seem additionally important that any accessorial liabilities that may apply (i.e. s.550) continue to be as congruent with the comparable criminal law as possible. Concerns would be multiplied were (contrary to ACCI's recommendation) any new criminal offence be created that a person could be an accessory to. How one could less than knowingly be involved in the commission of a criminal offence seems difficult to fathom.
338. We also note some disparity (even irony) in canvassing removing or watering down a long-standing recklessness based approach in one section of the Discussion Paper (in relation to sham contracting⁸²), and then canvassing moving to apply such a test in another (in relation to accessorial liability⁸³).

⁸² Attorney General's Department (2019) [Discussion Paper – Improving Protections of Employees' Wages and Entitlements: Strengthening Penalties for Non-Compliance](#), p.10

⁸³ Attorney General's Department (2019) [Discussion Paper – Improving Protections of Employees' Wages and Entitlements: Strengthening Penalties for Non-Compliance](#), p.8

7 SUPPLY CHAINS

7.1 How to approach supply chains

339. It remains a fundamental tenet of doing business in Australia that the contractual obligations of any person or organisation should be those to which they are directly party, and have chosen to enter into.
340. From the first time a late 18th Century farmer agreed a price with someone with a horse or bullock cart to take grain across the burgeoning Sydney colony, it has been a fundamental tenet of Australian commerce that ancillary functions of business and personal life can be contracted out to others with the resources, equipment and expertise to perform those ancillary functions (no matter how critical they may be to doing business, such as cartage of grown produce or finished products).
341. One of the great driving forces of modern capitalism and of our contemporary society has been increasing specialisation and almost no business outside the very smallest and most direct does not contract with other businesses for some of their functions. Hundreds of thousands have jobs and careers undertaking functions which have been contracted out by others.
342. ACCI's primary position is that attempting to apply the thinking wrapped up in the logistical and commercial concept of a 'supply chain' to employment obligations is fundamentally misplaced. We say this nationally and we say this globally.
343. The compliance buck should not be passed (or passable) to any entity or individual who is not the actual direct employer of an employee – the legal entity that pays the wages or salary should be responsible for the legal obligations relating to that wage or salary.
344. Compliance obligations should not be able to be elevated upwards until any regulator finds a business with sufficient public reputation to endanger or the deepest pockets. That is not sound policy and regulation.
345. Compliance obligations should arise only for direct employers in relation to their employees, where:
 - a. A direct employment relationship exists between an entity (employer) and a claimant (current or former employee), within the ordinary meaning of those terms (which is what the Fair Work Act says).
 - b. An entity pays salary or wages directly to an employee or claimant. Where a business does not pay someone, deduct tax, pay their superannuation etc it should not have any employment based obligations in regard to them.
 - c. The entity controls and directs the work of the employee or claimant. This seems particularly important as someone has to control and direct when work is performed and which duties are undertaken, which in turn determine the level of employment obligations / compliance.
346. If there are concerns about cleaners, security guards or any occupation or function, the FWO should prioritise working with the direct employers actually paying and directing the people doing the work to ensure that pay is full accordance with the law.

347. Yes, it is harder to get around to hundreds of contract cleaning companies contracted to clean bank branches than it is to target one of the big four banks, but the banks do not employ the cleaners and they have what should remain an inalienable right to contract out their ancillary functions to other entities (contract cleaning companies) willing to undertake them on commercial terms.
348. Banks are in the business of banking not cleaning and time and wages responsibilities for cleaners should remain with those who directly employ them.
349. In law and in commerce it should not matter whether a second tier company contracting with a principal supplies merchant banking, feng shui consulting, or office cleaning, its obligations to its employees should remain its own.
350. Compliance with workplace laws is the specific responsibility of the directly employing entity. 'Employer' is defined in various provisions in the Fair Work Act, and the responsibilities of employment attach to businesses and individuals in their legal capacities as employers.
- a. There are other obligations and treatment in some specific areas of workplace relations legislation such as independent contracting, but they are separate to those relating to employment, and they ultimately rely on the legal construct of direct employment for their operation (e.g. where independent contracting does not exist).
 - b. Safety law operates differently based on the notion of the person in control of the workplace, which is unique to safety law and distinguishable from workplace relations law.
351. Businesses must be able to do business with other businesses with confidence that in doing so they will not become liable for that businesses employment contracts and obligations.
352. To do otherwise risks paralysing every contract or every attempt to contract for a good or service as the purchaser attempts to satisfy themselves of the wider contractual obligations of those they are contracting with. This also risks an impact on Australia's viability as a place to do business.
353. In this regard we note that the Australian Government sets minimum wages based on modern awards of general and pervasive coverage (for all cleaners or all security people for example⁸⁴) and that the FWO will take enforcement action for all cleaners, security workers, trolley collectors etc. The principal in a commercial contract does not generally need to become involved, has no cause to become involved and it not properly involved in what an organisation the principle contracts with to provide services.
354. A practical issue also arises. How is any business which is not in a specific field to know the employment obligations of that field. For example, how could a company (or indeed an individual) instructing Maurice Blackburn on a legal matter completely unrelated to employment law be expected to know that the law firm had underpaid 400 staff more than a million dollars?⁸⁵
355. In this example the client would have received a representation or warrant from Maurice Blackburn that it was a law firm, that it is eligible to provide legal services in that state or territory, and that it can provide the services sought. The commissioning or instructing business is not going consider for a moment that it may assume employment responsibilities for the work of lawyers it does not direct (and probably never meets) in providing legal services to it.

⁸⁴ Or at least all employed by federal system employers and a particular award.

⁸⁵ <https://www.smh.com.au/business/workplace/maurice-blackburn-s-1-million-pay-muck-up-short-changes-400-staff-20180720-p4zspi.html>

7.1.1 What the FWO already does on supply chains is adequate / has not proven inadequate

356. In advancing the above, ACCI does however acknowledge that this Rubicon has already been somewhat crossed and that very specific actions have already been taken to apply supply chain type liabilities following some high profile underpayments.
357. Our system has already departed in a very limited way from an appropriate allocation of employment responsibilities in light of commercial, business to business contracts.
- a. The Vulnerable Workers Package of 2017 (see Section 2) extended accessorial liabilities to franchise arrangements, very specifically in response to the 7-Eleven underpayments. A new Division 4A “*Responsibility of responsible franchisor entities and holding companies for certain contraventions*”, was inserted into Part 4-1 of the Fair Work Act.
 - b. Franchising is a unique specie of commercial arrangement to which Parliament has chosen to apply a specific measure and treatment in the wake of specific developments.
 - c. The FWO is (as set out below) also using the supply chain concept to support compliance in a specific set of circumstances, within the bounds of the existing law.
358. The FWO can and does already become involved in some supply chains in response to particular problems or risks, which should further convince government against any need for more or altered laws in this area.
- a. “Supply chain risks” are already identified as one of the stated priorities for the FWO in 2019-20, using its existing legal powers.⁸⁶
 - b. “Inquiries into supply chain networks” are identified as one of the FWO’s key activities in its annual report.⁸⁷ This indicates that, under the existing law “*We continue to tackle the systemic issues of non-compliance and exploitation in labour supply chains*”. ACCI understands the FWO has, under its existing powers and resources, been able to commission extensive inquiries into areas such as cleaning and trolley collection.
 - c. The FWO has targeted supply chains in relation to security services contracted by local government, trolley collectors contracted by supermarkets, supermarket cleaning, and cleaning more generally.⁸⁸
 - d. Large companies such as Coles Supermarkets are entering into Enforceable Undertakings with the FWO using the existing law (in this case in regard to trolley collectors not directly employed by Coles).⁸⁹
 - e. The FWO provides extensive written resources online to businesses that ‘contract out’ labour and services.⁹⁰ This includes guides, and support for self-auditing of supply chains.

⁸⁶ <https://www.fairwork.gov.au/about-us/our-purpose/our-priorities>

⁸⁷ <https://www.fairwork.gov.au/annual-reports/annual-report-2017-18/02-fwo-performance-report/proactive-activities/inquiries-into-supply-chain-networks>

⁸⁸ <https://www.fairwork.gov.au/annual-reports/annual-report-2017-18/02-fwo-performance-report/proactive-activities/inquiries-into-supply-chain-networks>

⁸⁹ <https://www.fairwork.gov.au/reports/coles-eu-report--3rd-annual-report/conclusion>

⁹⁰ <https://www.fairwork.gov.au/find-help-for/contracting-labour-and-supply-chains>

359. The FWO is proceeding on the basis that

Major companies have an ethical responsibility to take the lead in promoting a culture of compliance with workplace laws in their contracting networks.

While it is the direct employer's responsibility to ensure workers are receiving their proper entitlements, the top of the supply chain has an obligation to ensure that unlawful conduct is not occurring within their business. Where operators deliberately ignore exploitation in their supply chains, we use every lever available to ensure they are held accountable. ...

The FWO also supports and encourages businesses in monitoring and managing their supply chains. Industry-driven initiatives play a key role in fostering sustainable, long-term cultural change. ...

... Our supply chain resources provide practical steps that help businesses take responsibility for their labour supply chains and networks. These guides were created in consultation with business, unions and employer organisations where contracting work is most common. In 2017-18, these resources were collectively viewed over 15 000 times.⁹¹

360. ACCI may not support this approach, but we do certainly know there is no basis to attempt to go further. There is no failure of what is already an overextended status quo in relation to applying supply chain based thinking and assumptions to workplace relations.
361. ACCI does not see any further justification to amend the law to extend further employment liabilities to other supply chains, and we see significant, severe and inescapable practical problems in any attempt to do so.

7.2 DP Question Part I-6: Existing approach to supply chains is adequate

362. Question I-6 of the Discussion Paper is a catch all or introductory question on supply chains that then flows on to specific questions on the necessity of control for liability (Question I-8) and extension to contracting out of services (Question I-9). Question I-6 asks:

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

363. Taking into account the range of supply chain activities reported by the FWO, its established work with major corporations, and its work for cleaners, security guards and trolley collectors... ACCI sees no reason not to conclude that **existing law and practice in Australia is adequate in regard to supply chains**, recalling that the overwhelming allocation of regulatory responsibilities in employment should continue to be based on direct contractual obligations.
364. ACCI knows of no basis to reach conclusions other than:
- a. Australia has already somewhat departed from a proper and merited allocation of employment responsibilities to direct employing entities.

⁹¹ <https://www.fairwork.gov.au/annual-reports/annual-report-2017-18/02-fwo-performance-report/proactive-activities/inquiries-into-supply-chain-networks>

- b. The FWO is demonstrably already working with supply chains where particular vulnerabilities to underpayments are thought to / claimed to exist.
- c. This is being done under the existing law, with no proven inadequacy of that law.
- d. No case has been made out for change or any extension of supply chain liabilities.

7.3 DP Question Part I-8: Control and supply chain liability

365. The Discussion Paper then asks:

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

366. ACCI's principal (and principle) position remains that direct control and intention to enter into a direct employment relationship should be pre-requisites for attaching employment obligations and liabilities to any commercial organisation.
367. ACCI acknowledges that the Rubicon has been somewhat crossed, and that the FWO is already adopting supply chain thinking and assumptions against some contract principals in relation to some work which can be characterised as lower paying and potentially more vulnerable. We make two points on this:
- a. Any supply chain based approaches to enforcement must be limited and targeted, and not become the norm in enforcement. A supply chain approach should remain the exception and only be applied to a limited subset of enforcement where it is merited and will work.
 - b. Even within a supply chain approach, there should at all times be a strong preference towards the direct employer rather than the commissioning contract principal being responsible for the employment obligations of the direct employer (i.e. the contract cleaning company).
368. ACCI would see supply chain approaches only ever coming into consideration in relation to employment compliance where:
- a. There is some demonstrated, substantial and compelling reason to depart from the otherwise universal assumption that each business' employment obligations are its own.
 - b. Standard enforcement approaches have been demonstrated to have been tried and failed. Supply chain responsibilities cannot become the norm, more widely perverting fundamental contractual responsibilities, simply because some may think they are cheaper and easier.
 - c. The principal sets the price for the intermediate companies contracting to it.
 - d. The price payable for the commercial services (by the principle of major company) is set at so low a level that it is patently, obviously, and without any requirement for specialist or forensic analysis, clear that the intermediary or contracting company could not be observing its wages and conditions obligations in providing services at that price point.

- e. The principal rather than the contracting business that employs those doing the work (such as a cleaning or security company) directly controls where, when and how the work is performed and its staff direct the work and in practice assume the operational role of the actual employer.
 - f. Only a single layer of contractual responsibility is transferable upwards. Major companies should not be required to track and assess further subcontracting.
 - g. The intermediary or contracting company provides services solely to a contract principal that has an annual turnover in excess of some particular threshold that confines application of supply chain responsibilities. A contracting company that provides services to multiple larger companies across multiple sites should at all times remain solely responsible for its employment obligations.
 - h. The ancillary functions contracted to another employer appear on a particular list of functions or occupations deemed at risk (and identified as such by Government). Ideally the Fair Work Act would be amended and a regulation making power created to prescribe a list of potentially vulnerable work that could trigger a supply chain approach:
 - i. Perhaps cleaning, security and trolley collection may be listed based on evidence to date.
 - ii. In all other situations, it would be the intermediate contracting company that should retain full liability for its employment obligations at all times.
 - i. The intermediary company (e.g. the cleaning company fulfilling a cleaning contract with a major corporate) employs less than a prescribed number of persons, such that it is a micro business.
 - i. A working definition might be less than 5 FTE positions.
 - ii. In all other situations it would be the contract cleaning company that should retain full liability for its employment obligations at all times.
369. We also recall the Fair Entitlements Guarantee offered by government. It should be recognised that ultimately, all employees no matter the size of their employer or who that employer contracts with, have protection for their employment entitlements guaranteed by government.
370. ACCI supports no change to the status quo, which has already seen the FWO go further down the supply chain path than is appropriate or sensitive to the reputation of Australia as a place to do business.
371. If any further changes of either law or practice are considered, they should not expand or extend such liabilities. Care will also need to be taken to ensure that any tests of control not extend to areas of commercial contracting and work where there are not vulnerabilities or low pay. Merely looking at the degree of control and oversight of second tier contractors could risk roping in resource construction or transport infrastructure projects where low pay is not a risk. The proposed approach of listing 'vulnerable supply chains' (sic) in a regulation that allowed the FWO to pursue supply chain approaches where appropriate may preclude any such ambiguity.

372. Finally where the proposed scheme of Labour Hire or On-Hire Registration is set to address particular areas of concern, there should not be additional application of supply chain based enforcement.

7.4 DP Question Part I-9: Extension to contracting out / other business models

373. The Discussion Paper concludes on supply chains and accessorial liabilities:

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?

374. ACCI strongly opposes any extension of either accessorial liability or supply chain based approaches to enforcement to any further range of commercial relationships and contracting out.
- Employers cannot jump at shadows, and it is not sufficiently clear which functions or business models this may be referring to, which makes the question difficult to engage with.
 - Employment obligations are employment obligations whether the employer is a commercial entity, not for profit, cooperative, trust, individual etc – and we are not clear why the identity of the employer or their place in a supply chain would ever change that.
 - The principle should stand, each employer is responsible for the employment relationships to which it is directly party, and not beyond that.
 - Supply chain based enforcement should remain a topical treatment applied in a minority of circumstances where specifically merited and likely to be efficacious. Supply chain thinking should not be applied universally.
 - Existing provisions of the Act already address outsourcing and contracting out scenarios, such as the transfer of business provisions.
375. Governments, Federal, state, and local, should also have a careful think about this, as entities that regularly contract out functions and commission construction and other major projects delivered by private companies that employ non-public servants. We recall that Part 6-3A is already included in the Fair Work Act to address outsourcing from government.

7.5 Practical issues for small business

376. Attempts to apply responsibilities upwards to larger businesses can have the perverse effect of creating significant burdens for smaller businesses. Consider again the example of the contract cleaner cleaning a bank on high street as well as other commercial premises.
377. If additional supply chain responsibilities are to flow upwards to the bank (or council, supermarket, government agency etc), the bank is going to try to manage and minimise its responsibilities and liabilities for the accuracy of payrolls that it does not run.
378. Just as ACCI expressed in relation to the application of the *Modern Slavery Act 2018*, we foresee larger companies making smaller ones jump through substantial additional regulatory hoops imposed by the principle contractor not the government.

379. If the bank is going to be ultimately responsible for what its contract cleaners pay, it is going to demand its contract cleaners warrant that they are paying correctly, fill out substantial paperwork and reporting, and may (for example) require the cleaner to pay for additional independent auditing.
380. The resultant cost and administrative burden:
- a. May increase barriers to entry for smaller and start-up businesses.
 - b. May create purchaser pressures from the principal for the agglomeration of small, family owned entities.
 - c. Is unlikely to be 'funded' by the principal, the bank in our example. Perversely this could drive the contracting company's margins lower and actually increase the risks of non-compliance.

7.6 Application to professional and representative advice

381. Employers remain concerned about the application of accessorial liabilities, existing or extended, to the advice registered and unregistered organisations of employers provide to their members.
382. If there were to be any revisiting of s.550 or 558B of the Fair Work Act (which ACCI argues should not occur) then there should be an improved application of the "counselling" of contraventions. This might encompass consideration of:
- a. Only triggering accessorial liability in counselling contraventions if the counselling individual or organisation stood to gain financially from that contravention.
 - b. Some form of exemption where the counsel was provided in good faith.
 - c. Some form of exemption where a registered organisation or unregistered association provides advice to a member support that member's compliance with the law.
 - d. Clarification that registered organisations, their officers and employees can only be liable for counselling breaches in the most exceptional circumstances.

8 SHAM CONTRACTING

8.1 Background

383. Pages 9 and 10 of the Discussion Paper address sham contracting.⁹² This follows the following recommendation of the Migrant Workers Taskforce:

The Taskforce recognised the ongoing issues around sham contracting and noted the work being undertaken through other reviews, such as the Black Economy Taskforce, to address this matter. For this reason, the Taskforce did not fully consider the subject of sham contracting. The ATO and the Department of Home Affairs are implementing strong integrity measures for visa holders obtaining ABNs to address cases of misuse of ABNs and sham contracting. This includes providing more information to prospective ABN holders and employers, better identifying visa holders when they are applying for an ABN, and taking action with employers who incorrectly treat their employees as contractors by making them wrongly apply for an ABN. The FWO's website also provides a detailed explanation of the differences between employees and contractors, and advice about the factors to consider when determining the correct category for a worker.⁹³

384. ACCI is opposed to sham contracting, deliberately misrepresenting an employment relationship as a contractual relationship.
385. Sham contracting disadvantages both legitimate employers and genuine independent contractors who are forced to compete against businesses whose wages, tax and other costs are reduced via unlawful means. More broadly, sham contracting negatively affects the community as a whole, as it facilitates tax avoidance and impacts on retirement savings; the cost of which is ultimately borne by taxpayers.
386. However, it is important to remember that independent contracting is a legitimate and legal method of engagement. Addressing sham contracting should not undermine or erode this lawful, acceptable, and essential practice more broadly.
387. 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" there are already strong anti-sham contracting provisions in the Fair Work Act to address this behaviour.
388. 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.
389. The concept of sham contracting is found in the "sham arrangement" provisions of the Fair Work Act (ss.357- 359), which apply in situations in which an employer attempts to deliberately disguise an employment relationship as an independent contracting relationship.

⁹² Attorney General's Department (2019) Discussion Paper – Improving Protections of Employees' Wages and Entitlements: Strengthening Penalties for Non-Compliance, pp.10-11

⁹³ Migrant Workers' Taskforce (2019) Final Report, pp.74

390. These existing provisions prohibit an employer from:
- a. Representing to an individual that the contract of employment under which the individual is (or would be) employed by the employer is in fact a contract for services under which the individual performs (or would perform) work as an independent contractor (Fair Work Act s.357(1)).
 - b. Dismissing, or threatening to dismiss, an employee who performs particular work for the employer in order to engage them as an independent contractor to perform the same or substantially the same, work (Fair Work Act s.358).
 - c. Making a statement to an employee or former employee that it knows is false in order to persuade or influence the individual to enter into a contract for services under which the individual will perform the same, or substantially the same, work as an independent contractor (Fair Work Act s.359).
391. Failure to comply with the sham arrangement provisions attracts potential penalties of up to \$63,000 per breach for corporate entities and up to \$12,600 per breach for individuals involved.

8.2 DP Question I-8 - Additional contravention for more serious cases

392. The Discussion Paper⁹⁴ indicates that:

To respond to sham contracting, the Black Economy Taskforce recommended 'tougher and more visible enforcement', including 'new and strengthened penalties'. The Government's May 2018 response to the taskforce agreed with this recommendation in principle. The Government subsequently provided additional funding in the 2019–20 Budget for the FWO to establish a dedicated sham contracting unit to help educate individuals about their rights and crackdown on the practice. The Government also announced a commitment to introduce tougher penalties for sham contracting contraventions.

393. The Discussion Paper then poses the following, two part, question:

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?

8.2.1 Prevalence of Sham Contracting

394. ACCI supports strong laws and penalties applying against businesses and individuals that deliberately evade their legal obligations. However, ACCI believes that it is important to acknowledge that there are still currently widely divergent views about whether sham contracting is in fact a widespread problem, whether it is increasing, whether current law and practice adequately addresses it, and whether there is any justification for higher penalties and legislative change.
395. As the Discussion Paper itself notes, "the incidence of sham contracting is difficult to estimate".

⁹⁴ Attorney General's Department (2019) Discussion Paper – Improving Protections of Employees' Wages and Entitlements: Strengthening Penalties for Non-Compliance, p.10

396. Similar issues were reflected in the Improving Black Economy Consultation Paper upon which also acknowledged that “it is difficult to estimate the size of the issue around sham contracting” and that any increase in the prevalence of sham contracting “may” be occurring (which is speculative not definitive, and not a sound foundation for change). In addition, the Taskforce’s Final Report also accepted that “we do not have specific estimates on the size of the sham contracting problem” and that it is “an area which requires further examination”.
397. Further examination therefore implies two key things:
- a. A caution approach to considering any changes, increased laws or penalties.
 - b. The need for further information prior to any change of approach being considered.
398. The problems associated with sham contracting have been considered extensively by various Governments, parliaments, and regulators including the FWO and the building regulator, the Australian Building and Construction Commission (ABCC). Despite this, ACCI is unaware of any concrete evidence of a groundswell of ‘sham’ arrangements designed to exploit or avoid workplace obligations, or any reliable data or evidence to suggest that there is a growing number of instances of sham contracting that could justify further increasing penalties. Such conclusions are not available based on the information we understand is to hand in this area
399. For example, the Post Implementation Review of the Fair Work Act, which commented on the prevalence of independent contracting across every industry and sector, was unable, because of a lack of data, to reach a conclusion about the prevalence of sham contracting.
400. In November 2011, the ABCC Report into Sham Contracting into the building industry found that ‘sham contracting’ was not rife in the industry nor even ‘widespread’ (contrary to claims being made by the (then) CFMEU). It rejected proposals for radical action such as further changes to legislation.
401. Similarly the FWO in its 2011 report “Sham contracting and the misclassification of workers in the cleaning services, hair and beauty and call centre industries” found that “in the majority of instances where enterprises engaged independent contractors they were assessed as being genuine contracting relationships.”
402. A more recent specific compliance audit undertaken by the FWO in July 2015 likewise found “no prima-facie evidence of sham-contracting arrangements”.
403. This conclusion is further backed up by the litigation outcomes of the FWO. During the last reporting period (2018/2019) only two instances of sham contracting were successfully litigated, a decrease of over 70% on the previous report 2017/2018 period
404. The only basis upon which the Black Economy Taskforce Final Report released in October 2017 concluded there “may be” a growing “sham contracting problem” was ABS data from 2016 which had noted a growing level of contractors reporting that they have no control over their own work. This statement inferred that this represented a rise in sham contracting.
405. However, there are two key issues with the reliance on this data by the Black Economy Taskforce Final Report.
- a. Firstly, subsequent data released by the ABS in August 2018 (after the release of the Black Economy Taskforce Final Report in October 2017) directly conflicts with the conclusion

made in the Black Economy Taskforce Final Report. The date released in August 2018 by the ABS shows that in fact the number of contractors reporting that they do not have authority over their own work is not growing, it is in fact declining (37.1% in 2018⁹⁵, down from 37.9% in 2013⁹⁶).

- b. Secondly, self-reported ABS data related to independent contractors should not be relied upon as an accurate reflection of “instance of sham contracting”. Authority over how work is carried out is but merely one element that may or may not go towards understanding the legitimacy of an independent contracting relationship. It is in no way determinative of a legitimate or illegitimate arrangement. Self-ascribed reporting is also not materially the same as the legal tests that delineate employment from independent contracting.
406. For example, an independent contractor engaged to carry out work may subjectively have no control over the product or task they are required to produce. They may be required to follow specific plans, use certain materials, follow a specific method and meet a certain deadline to complete the work they have been engaged to do. Hence, this contractor may feel that they do not have any authority over the way in which they carry out this role. However just because they things are determined by the person engaging the independent contractor does not stop the independent contractor from determining their hourly rate, method of invoicing, choice of branding, whether or not they are engaged on other tasks at the same time and ultimately whether they will choose to work with that same person again in the future.
407. The challenge for policymakers is to transcend simplistic assumptions and noisy (and often self-interested) opposition to independent contracting, to err on the side of being cautious to change law and regulation, and to make decisions based on evidence and proof. This is particularly the case where there is an existing regulatory system, which has proven itself capable of adapting to changing circumstances (as the common law tests and anti-sham contracting provisions have done).
408. On any reasonable assessment of the available data, it cannot be said that instances of sham contracting and systemic, unduly problematic or rising. Put another way, it cannot be concluded that the existing law is inadequate or needs to change.
409. In the absence of credible data or evidence to the contrary, Governments should resist pressures to over-regulate and further legislate particularly in instances where negative hype and publicity around an issue (often deliberately concocted) do not translate / have not translated into real and reliable facts and figures that could justify a policy or regulatory change.
410. In the absence of any further examination and legitimate data to the contrary, ACCI sees no basis to conclude that change to our existing laws and penalties in this area of law is warranted.

8.2.2 Creating a separate offence for more serious and systematic cases of sham contracting that attract higher penalties

411. As highlighted above in the discussion regarding the prevalence of sham contracting, there is currently no credible basis for concluding that contracting or other arrangements are being used to avoid the application of workplace and other laws, in addition where there may be risk of misclassification, the existing laws are an effective deterrent and are appropriately enforced.

⁹⁵ 6333.0 - Characteristics of Employment, Australia, August 2018

⁹⁶ 6359.0 - Forms of Employment, Australia, November 2013

412. In addition, unlike some areas of our workplace law, where there have been a number of high profile examples of deliberate, serious and systematic breaches of the Fair Work Act, such as those reflected in the Inquiry into 7-Eleven Report, the same cannot be said of the breach of the sham contracting provisions in the Fair Work Act.
413. 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.⁹⁷ This can add up very quickly where multiple errors are made.
414. Despite the fact that there has been no identifiable evidence of issues with serious and systemic breaches of the existing sham contracting provisions if an employer is found to have misclassified a worker who is subsequently found to be an employee, the new civil penalty provisions for ‘serious contravention’ of certain existing provision of the Fair Work Act⁹⁸ introduced in the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* will already apply to companies and individuals who engage in serious and system cases of sham contracting.
- a. This is because any employers who engages in sham contracting will almost definitely have also engaged in violations of the NES and/or a Modern Award. Serious violations of the NES and/or a Modern Award can already result in penalties of up to \$630,000 per serious violation.
 - b. A serious violation is considered to have taken place when an employer knowingly breached the provision, and their conduct was part of a systematic pattern of conduct relating to one or more persons.⁹⁹
415. This means that the Coalition Government has already taken action, as recently as 2017 which addresses any concerns in this area. The law has already been strengthened, and very recently.
416. An employer is also likely to accumulate numerous other penalties (outside of the Fair Work Act) that as a consequence of contravening the sham contracting provisions. The deterrent effect of these existing penalties is also a relevant consideration to any consideration of creating a new separate offence for more serious and systematic cases of sham contracting.
417. For example, the Australian Taxation Office is likely to pursue the employer for a range of penalties under superannuation and taxation legislation. Under state workers’ compensation and long service leave laws, businesses are also likely to be the subject of serious penalties including significant fines. A payroll tax liability may also arise.
418. In addition, the decision of *Linkhill Pty Ltd v Director, Office of the Fair Work Ombudsman Industry Inspectorate*¹⁰⁰ has thrown doubt on whether payments that had been made to a worker can be “set off” against other wages and entitlements owing in cases where an employer has failed to create an independent contractor relationship. If an employer cannot “off-set” this will also have a doubling

⁹⁷ Fair Work Act 2009, s 539(2).

⁹⁸ See proposed section 539(2)

⁹⁹ Fair Work Act 2009, s 557A

¹⁰⁰ [2015] FCAFC 99 at [39] to [67], (2015) 240 FCR 578 at 585 to 595 per North and Bromberg JJ.

effect on any repayment obligations for employers, even before any penalties are potentially awarded against them.

419. Businesses may also face penalties under the common law for breach of contract, tort, equity and misleading and deceptive conduct in trade or commerce.
420. As a result, ACCI does not believe that it is necessary or warranted to create another separate offence for sham contracting offences that are serious and systemic. The penalties are already serious and the existing law is capable of dealing with systematic conduct.
421. When it comes to penalties for sham contracting, decisions being handed down by the courts also signal an increasing willingness to impose significantly high penalties, which reflect the seriousness of the offence.
422. For example in the Federal Circuit Court in *Fair Work Ombudsman v Happy Cabby Pty Ltd*¹⁰¹, fined a NSW transport business which had misrepresented employment contracts as independent contracting arrangements \$238,920 and \$47,784 against its sole director, despite the underpaid wages and entitlements of the seven shuttle bus drivers involved in the contravention only to a total of \$26,082. In his judgement, Judge Diver said:

“I accept that high penalties are appropriate in this case for the sham contracting contraventions as the respondents were put on notice, on multiple occasions, of the differences between an employment and independent contracting relationship.”
423. In another more recent case before the Federal Circuit Court, a Pizza Hut franchisee on the Gold Coast was penalised a total of \$216,700 (\$36,700 ordered against the director and \$180,000 against the company) for engaging a delivery driver under a sham contract, despite the underpaid wages and entitlements owed to the worker amounting to just over \$6,000.¹⁰²
424. In addition to the high penalty, Judge Jarrett also ordered the director and his company to commission retrospective and future audits of their pay practices and to display a workplace notice containing information about minimum lawful pay rates and the FWO’s contact details.
425. Further, when the High Court in 2015 unanimously held that employers could not avoid sham contracting provisions by utilising ‘triangular’ arrangements (i.e. where independent contractors are engaged through labour hire companies) the deterrent nature of s357 received a significant boost as prosecutions for sham contracting now pose an ever-greater risk to employers through third party engagements.¹⁰³
426. The FWO is extremely active in bringing sham contracting proceedings and seeking penalties against companies and their directors, having made the pursuit of such claims one of the organisation’s published priorities.
427. The FWO’s Compliance and Enforcement Policy provides that the agency will seek penalties that “are proportionate to the nature of the behaviour (and) will achieve general and specific deterrence...”¹⁰⁴

¹⁰¹ [2013] FCCA 397.

¹⁰² *Fair Work Ombudsman v Skyter Trade Pty Ltd & Anor* [2018] FCCA 1483.

¹⁰³ *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] HCA 45.

¹⁰⁴ *Fair Work Ombudsman Compliance and Enforcement Policy*, July 2019.

428. The current Fair Work Ombudsman, Sandra Parker PSM has also continued to reiterate that the FWO will take a “zero tolerance approach” to sham contracting and that companies involved in such behaviour “risk significant penalties from the court”.¹⁰⁵
429. The FWO’s active approach to pursuing contraventions of sham contracting arrangements coupled with the courts’ preparedness to impose significantly high penalties, in combination with accessorial liability for advisors, demonstrate existing penalties act as an appropriate deterrent to any attempts to deliberately manipulate the law. Consequently, there is no cause to warrant any amendment or higher penalties under the current system.
430. Where an employer is found to have misclassified employee/s the consequences of this error alone are substantial and detrimental, particularly to small business.
431. In such instances the business is in all likelihood going to have obligations as an employer of persons purportedly engaged as contractors. This generally involves substantial back-pay restitution and an ongoing obligation to employ. For many businesses the impact of this repayment alone on their cash flow can be potentially fatal. In financial terms even without penalties a misclassification hurts any business and is a substantial disincentive to enter into sham arrangements.
432. As a result, any moves to increase penalties will likely actually have the opposite effect to a deterrence by pushing those who deliberately try to operate outside the law even further underground or in some case into insolvency, which will have unfortunate flow on effects including job losses for all workers. There may even be some risk of driving some towards payment in cash and not ‘risking’ any engagement with the law, which would have the wider negative consequences associated with undeclared work.
433. A far preferable approach to addressing incidences of sham contracting would be to put resources into securing appropriate restitution for the individual workers affected, including securing monies outstanding and appropriate coverage by laws being deliberately avoided rather than introducing any new offences or raising already substantially high penalties any further. This can be done with the law as it is, without either amendment or changes to already increased penalties.

8.3 DP Question I-9 - Recklessness defence

434. The Discussion Paper¹⁰⁶ indicates that:

In order to increase the deterrent effect of the sham arrangements provisions, the Black Economy Taskforce and other reviews recommended amendments to the recklessness defence in section 357 of the Fair Work Act. This provision enables employers to avoid liability under that provision if they can prove that they did not know an individual was an employee and were not reckless about this.

It has been suggested that employers should instead be required to prove that they did not know, and could not reasonably be expected to know, the individual was an employee.

¹⁰⁵ FWO, Over \$165,000 penalties for tour bus operator, 14 December 2018.

¹⁰⁶ Attorney General’s Department (2019) Discussion Paper – Improving Protections of Employees’ Wages and Entitlements: Strengthening Penalties for Non-Compliance, p.10

435. The Discussion Paper then asks the following question:

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

8.3.1 ‘Sham arrangements and misclassification of workers

436. As set out above, there are three ‘sham arrangement’ contraventions set out in the Fair Work Act under the General Protection provisions.

437. These sham contracting provisions prohibit employers from:

- a. Misrepresenting an employment relationship or a proposed employment arrangement as an independent contracting arrangement
- b. Dismissing or threatening to dismiss an employee for the purpose of engaging them as an independent contractor.
- c. Making a knowingly false statement in order to persuade or influence an employee to become an independent contractor.

438. As well as requiring knowledge or recklessness, the term ‘sham’ has also been described by the Courts. Lockhart J in *Sharmment Pty Ltd v Official Trustee in Bankruptcy*²⁰ described it as:

“Something that is intended to be mistaken for something else or that is not really what it purports to be. It is a spurious imitation, a counterfeit, a disguise or a false front. It is not genuine or true, but something made in imitation of something else or made to appear to be something, which it is not. It is something which is false or deceptive.”

439. At the heart of this ‘sham’ contracting definition is the deliberate attempt by a person to conceal the true nature of a relationship. As the ABCC’s 2011 report on sham contracting made clear:

At common law, a ‘sham arrangement’ occurs where the parties to an employment relationship intentionally misrepresent or disguise that relationship as being a contracting relationship. There are elements of premeditation and subterfuge; such arrangements are intended to hide the actual relationship between the parties and make it appear as though there is a totally different kind of relationship. Parties know and intend to create an employment relationship (contract of service), but try to masquerade it as a contracting arrangement (contract for service) for the benefit of one or both of the parties. In this sense, a ‘sham arrangement’ involved intended deception.

440. There are of course many similar situations, which are in many ways analogous to a ‘sham’ but for which there is no intent to deceive on the behalf of the person involved.

441. This kind of conduct is not to be confused with sham contracting; it is instead the misclassification of workers, as there is an absence of any deliberate falsity or deception.

442. The incorrect engagement of the worker through misclassification arises unintentionally or through inadvertence, when for example a genuine independent contracting relationship over time becomes more integrated and closer to one of employee and employer.

443. Misclassification can potentially lead to various contraventions of the Fair Work Act and other laws for a failure to properly distinguish between an employee and an independent contractor. Misclassification however does not entail behaviour which is driven by an intention to deliberately disguise or deceive in order to float the law, there is no dishonesty on the part of the employer and so it should not be punished as such.
444. Current sham-contracting laws are not directed towards punishing misclassification. The two should continue to not be conflated, as they are clearly distinct issues. ACCI submits that any changes to sham contracting provisions should not impact on inadvertent misclassification.

8.3.2 The 'recklessness' defence

445. Whilst ACCI acknowledges that sham contracting can harm those denied the rights and entitlements of ongoing employment, we would strongly oppose any suggestion that the established recklessness test should be lowered and replaced with a less robust test (for the reasons set out above, as well as below). The existing threshold is effective and entirely appropriate.
446. Under section 357(2) of the Fair Work Act, an employer will have a defence against the prohibition on 'sham arrangements' if the employer can prove that at the time the representation was made, they 'did not know' and 'were not reckless' to the fact that the contract was a contract of employment rather than a contract for services.
447. The Black Economy Taskforce Enforcement and Offence Consolation Paper recommended that the Fair Work Act be amended to shift the reasonableness test in order to "*address the weaker incentives under the current 'recklessness' test and remove the high burden of proof required to establish 'recklessness'.*" The Paper also purports to justify the recommendation to amend the existing test by observing that "*currently there is no clear definition of the term 'reckless', and the onus of proving the employer knew or was reckless rests with the person alleging the breach.*"
448. The Black Economy Taskforce's Final Report (Recommendation 10.3) has suggested lowering the legal threshold for prosecuting employers involved in (alleged) sham contracting arrangements, from a 'recklessness' test to a 'reasonableness' test, which it is claimed will "*remove the high burden of proof required to establish 'recklessness'.*"
449. ACCI believes that a number of major flaws underpin the rationales advanced by those seeking to amend the current recklessness test.
450. Firstly, ACCI respectfully submits that in coming to its recommendation and consulting on such a change, the Black Economy Taskforce has incorrectly presented the current legal dispute, in that the legal onus appears to have been inadvertently reversed in how it has been presented.
451. Whilst it ordinarily falls upon the person making a complaint to prove a breach, under the sham contracting recklessness defence in the Fair Work Act, the person making the representation (the employer) is required to prove their defence on the balance of probabilities in order to avoid liability for a penalty. There is already a reverse onus in the Act.
452. This operates in effect to relieve an employer from liability if they can prove that they made an honest mistake about the contractual nature of an employment relationship at the time the representation was made.

453. There is no burden or onus on the person alleging a sham contracting breach (e.g. the regulator acting as prosecutor) to prove that the employer knew or was reckless. For this reason we respectfully suggest the concerns of the Black Economy Taskforce that the current test is a deterrent to bringing prosecutions is misplaced, as any difficulties with meeting the existing ‘recklessness’ threshold and the high burden of proof are borne by the employer (defendant) in pursuit of an ability to strike out a sham contracting contravention through a successful use the “recklessness” defence, not the prosecutor (regulator).
454. Put another way, the current reckless threshold allows for the successful prosecution of employers who deliberately withhold employment contracts or employers who realise that they have possibly engaged the worker in what is effectively an employment contract but are indifferent to this possibility and/or don’t take steps to rectify it.
455. With respect to the issue of a lack of a ‘recklessness’ definition as a factor towards reframing the current test. ACCI makes two observations:
- a. Firstly, although not settled, the recklessness test has already been the subject of judicial commentary¹⁰⁷ and is likely to gain increasing clarity and specificity as the judiciary seek to further settle its meaning in application to specific circumstances. We should trust the Courts to determine the appropriate meaning.
 - b. Secondly, if a lack of clarity is the issue with the recklessness test then the sensible path to rectification should be to amend s12 of the Fair Work Act to include a definition of recklessness, rather than replacing an entire test with a new, untried test.

8.3.3 Specific issues with any move to a reasonableness test

456. The forerunner to the recklessness defence in the Fair Work Act was section 900(2) of the *Workplace Relations Legislation Amendment (Independent Contractors) Act 2006*. The wording of s 900(2) had originally included a ‘reasonableness’ test in that an employer would be innocent of a contravention if they “could not reasonably have been expected to know” the contract was really an employment contract.¹⁰⁸ This objective test however was amended by the Government and replaced with the current ‘recklessness’ test prior to the passing of the 2006 legislation.
457. In moving the amendment to revert away from the reasonableness test, Senator Eric Abetz explained to the Senate, the then Government’s rationale for changing the test:
- “What we are doing there is ensuring – which I think most people would accept – if it was an honest mistake, that in those circumstances the employer would need in effect to prove that it was so. That is the purpose of those amendments.”*¹⁰⁹
458. As Senator Abetz made clear, a reasonableness test runs the risk of impacting employers who enter into contractual arrangement honestly and in good faith, but where misclassification is an unintended and unfortunate result.
459. The reasonableness test is unjustified because it is at odds with the basis on which sham contracting provisions were inserted; preventing employers from seeking to avoid legal responsibilities by disguising a relationship as a contractual as opposed to employment. To impose a further penalty in

¹⁰⁷ CFMEU v Nubrick Pty Ltd (2009) 190 IR 175

¹⁰⁸ Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006, as introduced on 22 June 2006.

¹⁰⁹ Senate Hansard, Friday, 1 December 2006, p 33.

circumstances void of any positive intent to deceive would turn sham contracting provisions into something more akin to strict liability offences.

460. Such a change would potentially lower the bar so low it would capture misclassification cases, which would no longer have the protection of 'recklessness' to distinguish them sufficiently from "sham contracting". The roping of sham behaviours and misclassification accidents into the same reasonableness category would be a disproportionate outcome and far from just and equitable.
461. Changing to a reasonableness test would also likely disproportionately impact smaller businesses that are more likely to fall foul of misclassification without sophisticated legal and HR teams to monitor their contractual engagements with workers and employees.
462. There is also no evidence that changing the threshold will necessarily deter those employers who do seek to profit from engaging in sham contracting. Conversely such a change would place a further burden on those employers who are not acting in bad faith and overwhelmingly seek to comply with the law.
463. Whilst ignorance should not generally be a defence, there is a huge difference between employers recklessly denying workers employment rights and employers who 'reasonably' should have known.
464. If the threshold is lowered, the burden on employers to show that they should not have reasonably known that a contract was a contract for employment rather than a contract for services is much more onerous than the current test and will negatively impact many employers who are none the wiser.
465. Finally, moving to a reasonableness threshold would also raise the issue of how to determine the objective 'reasonableness' in sham contracting.
 - a. In the absence of precedent, how would an employer show that they could not reasonably be expected to have known that the contract was a contract for employment rather than a contract for services?
 - b. Conversely, how would the prosecutor show that they could have reasonably been expected to have known?
466. If one had to debate which burden of proof is more difficult, it could easily be argued that the burden of proof is more difficult for the employer than the prosecutor, even in cases of clear misclassification.
467. Changing this type of provision without set guidelines and reliance on precedent is therefore problematic and would have many adverse consequences for employers.
468. As a result, ACCI submits that no changes should be made to the current 'recklessness' threshold for prosecuting employers involved in sham contracting.

9 ABOUT THE AUSTRALIAN CHAMBER

The Australian Chamber of Commerce and Industry is the largest and most representative business advocacy network in Australia. We speak on behalf of Australian business at home and abroad.

Our membership comprises all state and territory chambers of commerce and dozens of national industry associations. Individual businesses are also able to be members of our Business Leaders Council.

We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, employing over 4 million Australian workers.

The Australian Chamber strives to make Australia the best place in the world to do business – so that Australians have the jobs, living standards and opportunities to which they aspire.

We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies. We represent Australian business in international forums.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

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