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

Response to Attorney General's Department Discussion Paper

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Overview

The ACTU is the peak trade union body and only national confederation representing working people and their unions in Australia. It consists of affiliated unions and State and regional trades and labour councils, collectively representing more than 1.5 million union members engaged across a broad spectrum of industries and occupations in the public and private sector. For more than 90 years, the ACTU has played the leading role in advocating in the Fair Work Commission, and its statutory predecessors, for the improvement of employment conditions of employees. It has consulted with governments in the development of almost every legislative measure concerning employment conditions and trade union regulation over that period.

Australian policy makers have created the conditions for widespread non-compliance with remuneration related obligations in employment instruments. This has occurred through numerous channels including excessively high numbers of people trapped in insecure work, quasi-bonded labour through the migration system, poor supervision of the franchising industry, zero regulation of the labour hire industry, a "hands off" approach to the "gig economy", and incremental restrictions on union organising activity and collective bargaining.

This form of noncompliance has now permeated virtually all sectors of the economy and has become a matter of public importance and a priority industrial and economic issue. Federal industrial relations regulation in this country has transitioned from genuine tripartism to an unbalanced system favouring corporate power, intent on denying organised labour the necessary rights and capacity to expand into new areas while implementing new strategies to frustrate union activity in traditional areas. If we as a country are to begin to address the wage theft crisis, it is necessary to abandon the ideologically tinged conceptions of the role of unions in ensuring that workers' rights are respected and adhered to in the current industrial relations framework. The current review presents an opportunity to do that, but only if it is free from the anti-union biases that have characterised most of the "announceables" and associated talking-points in the industrial relations policy portfolio during the term of the Abbott-Turnbull-Morrison Government.

We have carefully considered the discussion paper "Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance" (hereafter, 'Discussion Paper 1') in consultation with our affiliates. In our view, the appropriate regulatory responses merited by the wage theft crisis are those that tackle the drivers of wage theft. These drivers are:

1. Competitive pressure where it has become common practice to underpay workers in order to obtain a market advantage

2. The potential for high profits that flows from underpaying workers
3. The perception that the risk of being caught is low
4. The belief that the consequences of being caught are minimal

A focus on just one of these drivers will inevitably fall short of community expectations that the scourge of wage theft can and should be stamped out. It is with this in mind that we express our concern at the risk of a piecemeal approach to wage theft with a narrow focus on penalties that ignores the other drivers of the problem.

Civil penalties under the Fair Work Act: Preliminary matters

Before responding to the specific questions posed in Part I of Discussion Paper 1, we make some remarks about the manner in which those questions are introduced and the way in which the scope of the discussion has been framed.

We disagree that it is useful or accurate to generalise, as Discussion Paper 1 does, that there are two distinct groups of employers who do not comply with remuneration related obligations (hereafter, 'RROs') in employment instruments. The groups identified in Discussion Paper 1 are:

- Employers that have made genuinely unintentional mistakes, for instance due to the complexity of the industrial relations system, which have led to miscalculations and underpayments, but are rectified once identified; and
- Employers that knowingly underpay, or otherwise exploit, employees.

To assume, from a policy point of view, that there are and only ever will be two "levels" of contraveners of RROs creates a risk that the regulatory output of that policy process will lack the flexibility to deal appropriately with the range of present or emerging contravening conduct.

We accept that there are employers who unions and the Fair Work Ombudsman (hereafter, 'FWO') have interacted with who could be categorised as having "made genuine mistakes…[which] are rectified once identified". However, we suggest that the willingness to voluntarily rectify such a mistake and the extent of rectification may vary depending on how the mistake is identified and by whom. It is not difficult to imagine that an employer's assessment of how its best interests are served in responding to such a mistake may vary depending on who identifies and raises it with them. A casual employee, or an employee on an employer sponsored visa - both of whom possess minimal capacity to navigate the present enforcement framework and who bear a substantial economic risk from "biting the hand that feeds" - could reasonably be assessed by their employer as warranting a more defensive response than the more contrite response that may be offered to a union or regulatory agency with statutory compliance enforcement powers. This seems to have been recognised in the Coalition's 2016 election policy on Protecting Vulnerable Workers, which referred to increased regulatory powers to "..overcome the culture of fear that often prevents vulnerable workers from coming forward.."

Aspects of the FWO's current operating procedures are informative about the extent to which mistakes (or otherwise) are voluntarily rectified. As its 2017-18 annual report[1] indicates, around 96% of disputes the FWO is informed of are "resolved" without resort to any compliance or enforcement tools, with the resolution reached in an average of 7 days. The process through which these 96% of disputes (nominally, 27,074 disputes) are handled is "assisted dispute resolution", which may take the form of "early intervention", mediation or "small claims assistance". What they each have in common, apart from the absence of any exercise by the FWO of its compliance and enforcement powers, is that they rely on the person raising the dispute to progress it to conclusion.

Early intervention, according to the FWO annual report, involves personnel who "coach and advise customers on how to raise their concerns" – in other words, self-help. It yielded, on average, in 2017-18, $614 in recovered monies per dispute. 20,538 disputes (around 72% of total disputes and around 75% of disputes resolved without resort to compliance or enforcement powers) were dealt with in this way. Mediation accounted for 5125 disputes (around 18% of total disputes and around 19% of disputes resolved) and yielded around $1268 per dispute. Small claims assistance involves the FWO providing assistance to people to help them write a letter or demand, calculate their underpayment and prepare forms to commence a small claim proceeding (which carries with the waiver of any right to seek penalties[2]). Only 800 disputes were resolved in this way (less than 3% of total disputes), yielding around $1530 per dispute. These observations are consistent with the notion that formality and an assessment of risks and benefits inform an employer's response to complaints. Indeed, it is conceivable that many employees, particularly at the early intervention or mediation stage, walk away with nothing or very little of what they are owed.

Little is known of the outcomes in respect of anonymous reporters, who by virtue of their request for anonymity, cannot be channelled through any of those procedures. In 2017-18, there were 15,138 such reports, more than half the number of total disputes dealt with. Whilst it is possible that some small proportion of those persons do directly benefit in the 4% of matters that proceed to the FWO exercising compliance or enforcement powers, the FWO Compliance and Enforcement Policy[3] indicates that requests for confidentiality are among the factors it takes into account in

[1] https://www.fairwork.gov.au/ArticleDocuments/1439/fworoce-annual-report-2017-18-final.pdf.aspx

[2] FW Act, s. 548(1)(a)

[3] https://www.fairwork.gov.au/ArticleDocuments/725/compliance-and-enforcement-policy.pdf

choosing whether to commence a formal investigation that could lead to the exercise of those powers.

We also question the attribution of mistakes in payment to "the complexity of the industrial relations system", in the first category referred to in Discussion Paper 1.

The federal award system is less complex now than it ever has been. Today's 121 "modern awards" are the product of the consolidation and simplification over 1500 State and Federal instruments, and have almost universal application in the private sector. It ought not be forgotten that Award Modernisation in itself came on the back of over two decades of award restructuring, simplification and review within the federal system under which award classifications and wage relativities were aligned, awards were reduced in size and complexity and (from 1986) awards were transitioned from paid rates instruments to a safety net. Some of these processes were initiated by the parties through the Conciliation and Arbitration Commission and Australian Industrial Relations Commission[4] and some were of legislative origin[5]. Thanks to technological developments, today's modern awards are available to anyone who has internet access[6], as are a range of free services including tools to identify which award or awards are relevant to particular work[7], tools which display the pay rates which apply at what times to each type of work performed under that award[8] and tools which notify you when an award has been varied or if a variation is under consideration.[9]

Comparison may be made with the obligations in modern awards, their predecessors and legislation to make superannuation contributions on behalf of employees. The definition of the earnings base of "ordinary time earnings" for the calculation of contributions has been simple, stable and universal since amendments made over a decade ago[10]. Despite this, estimates of the

[4] For example, Restructuring and Efficiency.
[5] For example the Award Simplification Process mandated by the Workplace Relations and Other Legislation Amendment Act 1996.
[6] https://www.fwc.gov.au/awards-and-agreements/awards/modern-awards/modern-awards-list

[7] http://www.fairwork.gov.au/awards-and-agreements/awards/find-my-award

[8] https://www.fairwork.gov.au/pay/minimum-wages/pay-guides

[9] https://www.fwc.gov.au/about-us/reports-publications/subscribe-updates

[10] Superannuation Legislation Amendment (Choice of Superannuation Fund) Act 2005

amount of unpaid superannuation vary between $2.85 billion[11] and $5.6 billion.[12] A lack of complexity is no guarantee against non-compliance.

As to second distinct group identified in Discussion Paper 1, being employers who "knowingly" underpay or exploit, we would again suggest there is spectrum of behaviours that need to be considered and deterred. An employer who does not take reasonable steps to properly inform themselves of their obligations under a modern award might not neatly fit in within the common conception of person who knows what they should do but chooses not to do it. However, by choosing to remain ignorant they likewise could not reasonably have been said to have "made a genuinely unintentional mistake" either. Ignorance, recklessness, wilful blindness and negligence are among the states of mind and knowledge that need to be within in the contemplation of the compliance and enforcement framework. At present, as a result of the *Vulnerable Workers* amendments, the civil penalty framework in the FW Act makes some effort to distinguish between contraveners on the basis of whether or not they "knowingly contravened"[13] particular provisions. Where that case is made and the "systematic conduct" test is also satisfied[14] there is a ten-fold increase in the *maximum* penalty which can be awarded. However, this creates a binary system rather than accommodating a continuum. It is highly artificial to confine the highest level of penalty to the worst cases of knowing contravention, when the worst cases of wilful blindness (for example) would clearly lie somewhere above the maximum penalty for an "ordinary" contravention.

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[11] ATO estimate: https://www.ato.gov.au/Media-centre/Media-releases/ATO-releases-Super-Guarantee-gap-estimate/

[12] Industry Super Australia estimate, cited in Senate Economics References Committee (2017), "Superbad – Wage theft and non-compliance of the Superannuation Guarantee" at [3.7]

[13] FW Act s. 557A. The language of "knowingly contravened" was introduced via a late amendment (replacing" deliberate" in the first reading) and is an attempt to adopt the concept of "knowingly concerned" from the accessorial liability framework. The prediction was that a Court would find that an employer had, for example, "knowingly contravened" obligations regarding hourly wages if the employer had knowledge of the "essential elements" of the contravention such as that an award applied to the relevant work, that it provided an hourly rate of pay of the performance of that work and that the hourly rate was not paid.

[14] FW Act s. 557A(1)(b). It is also notable that under section 557A(1) there must first be a contravention before there can be a serious contravention. These "source" (for want of a better description) contraventions to which section 557A applies all impact on other persons, rather than being mere administrative requirements. Therefore, where s. 557A(1)(b) refers to an "other" person or persons ("the person's conduct constituting the contravention was part of systematic pattern of conduct relating to one or more other persons") it is arguably referring to persons *other than* the person to whom the source contravention relates. In an underpayment scenario, this would preclude an underpayment of single employee ever reaching the threshold of "serious contravention".

Most fundamentally, the discussion is premised on the basis that the practical status quo – that dealing with non-payment or underpayment of remuneration is the function of a government agency – is immutable. The reality is that such an expansive role for a government regulator or labour inspectorate is a relatively recent invention in Commonwealth industrial relations laws:

- From the inception of the *Conciliation and Arbitration Act*, there was no government regulatory agency to enforce awards at all. Rather, enforcement of awards was undertaken by unions. Amendments made in 1928 allowed for the appointment of inspectors to investigate breaches of awards and the Act, however no inspector was appointed until 1934. At that time, only one inspector was appointed and remained the sole inspector nationally until 1940. The first ever prosecution by an inspector took place in 1943, nearly four decades after the *Conciliation and Arbitration Act* took effect. A distinct inspectorate was not established at all until 1952.
- Throughout its various incarnations, the labour inspectorate has had different levels of formal autonomy from its related department and Minister, however Ministers have heavily influenced the prosecution policies adopted. The number of prosecutions undertaken by inspectors was, accordingly, variable. Between 1943 and 1968, just 67 prosecutions were undertaken. Between 1973 and 1976, 239 prosecutions were undertaken. Between 1978 and 1983, 71 prosecutions occurred. Between 1990 and 2006, 41 prosecutions were undertaken. For at least some of the period that the inspectorate bore the title "Office of Workplace Services", it had adopted a policy that employee underpayment claims involving less than $10,000 were to be issued in court by the employees themselves.
- An inspectorate approaching the scale and capacity of the FWO did not exist until the Office of Workplace Services was restructured following the *WorkChoices* amendments as the Office of the Employment Advocate. It was subsequently re named the Workplace Ombudsman, before adopting its current name.[15]

We don't cavil with the proposition that the Government should have a capable labour inspectorate (nor do we suggest that the Fair Work Ombudsman is not a capable Labour Inspectorate) and we welcome the acknowledgement that "the Government recognises the benefit of a capable and resourced regulator". However, any consideration of reform options to promote compliance – that

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15 '*Political influence and enforcement of minimum labour standards in the Australian federal industrial relations jurisdiction*' – M. Goodwin and G. Maconachie – Paper for 22nd AIRAANZ Conference, La Trobe University Melbourne February 2008.

is, to deter non-compliance – cannot sensibly proceed without looking to options to increase the risk of being caught. That both penalty and detection factors are at play seems to have been recognised in the Coalition's 2016 Election Policy on Protecting Vulnerable Workers, which stated that:

> *"In many cases there is no perceived risk of being caught. If there is such a risk, the cost of any penalty imposed under the Fair Work Act is seen as an acceptable cost of doing business"*

The level of financial penalty that is available for contravening conduct does play a very important part in the degree of deterrence, but only if a clear message is sent that contraveners *will* be detected and exposed to those penalties. In that regard, we consider the separation and deferral of issues in Discussion Paper 1 regarding the "the adequacy of compliance tools" and "mechanisms to recover unpaid wages"[16] as artificial and counterproductive.

Our affiliated unions can play a more significant role in ensuring that the risk of exposure to a penalty is high, if they are given the sufficient tools to do so. However, as the labour inspectorate has increased in resources and scale, unions have been stripped of the necessary rights to monitor and enforce compliance. If it were assumed by policy makers that these changes would meet community expectations of ensuring employer compliance, then it is apparent that the policy makers were wrong in making that assumption. Registered organisations remain among the groups of actors who have standing in the Courts to prosecute contraventions of RROs, however the FW Act places them at a considerable disadvantage compared to the FWO in terms of their rights to properly investigate such contraventions. For example:

- Permit holders in a registered organisation must give advance notice in a prescribed form of their entry to premises, unless an exemption certificate has been issued by the Fair Work Commission.[17] An exemption certificate cannot be issued unless the union can prove to the Fair Work Commission that there is a reasonable basis for believing the advance notice of the entry might result in the destruction, concealment or alternation of relevant evidence – which has been described by the Fair Work Commission as a high bar and unlikely to be met without evidence that the employer concerned has any propensity to engage in such

[16] Issues (iii) and (iv) referred to on page 2 of Discussion Paper 1.
[17] FW Act s. 487, 519

conduct.[18] . FWO inspectors are not required to give any notice before entering premises and exercising compliance powers on those premises.[19]

- Many workers our affiliates encounter only wish to pursue an underpayment matter after they have first secured alternative employment (which in itself is instructive). However, permit holders in a Registered Organisation have no statutory rights to request any relevant documents in respect of employees who no longer work at a particular workplace or to enter premises to investigate compliance with respect to those former employees. FWO inspectors may enter premises and exercise compliance powers on those premises without that restriction[20]
- Permit holders in registered organisations have no right to enter premises to investigate or request documents from employers unless they are first capable of proving that they have a reasonable suspicion that a contravention has occurred, or is occurring.[21] FWO inspectors needs only to have a reasonable belief that the Act applies to work that is being performed (or applied to work that has been performed) on the premises in order to enter premises and request that documents be provided.[22]
- The power of permit holders in registered organisations to request access to documents is limited to documents that are directly relevant to the suspected contravention which they are already capable of proving they have a reasonable suspicion about.[23] FWO inspectors are not confined in the documents they request.[24]
- Where permit holders in registered organisations are permitted to enter premises for investigative purposes, they have no right to interview any person on the premises other than an employee who is eligible to be a member who agrees to be interviewed.[25] FWO inspectors may interview any person on the premises, including the employer.[26]
- Upon entry, a permit holder in a registered organisation is only able to request documents that are kept on the premises they enter or are accessible from a computer that is kept on the premises.[27] The permit holder may provide written notice (either while on the premises or within 5 days thereafter) to the employer requiring that employer to produce or provide access to other documents (i.e. those not kept on or accessible from the premises),

[18] FW Act s. 519; *TWU v. Bogle* [2012] FWA 8247
[19] FW Act s. 703, 706-709.
[20] FW Act, s, 708
[21] FW Act, s. 481(1), 481(3).
[22] FW Act, s. 708, 709
[23] FW Act, s.482(1)(c)
[24] FW Act s. 709(c)-(e)
[25] FW Act, s. 482(1)(b)
[26] FW Act, s. 709(b)
[27] FW Act s.482(1)(c)

provided again that they relate to the suspected contravention. However, owing to the limitations regarding interviews, the permit holder is "flying blind" in relation to what documents they should request access to. An FWO inspector can, by comparison, interview any person on the premises, require that person to tell the inspector *who* has custody of or access to a document and, thereafter, issue a notice to produce to that other person for access to those documents.[28]

- In addition to the restriction that a permit holder must be capable of proving that they have a reasonable suspicion that a contravention has occurred before exercising any investigative powers, and the restriction that the documents that the permit holder seeks must relate to *that* suspected contravention, a permit holder is restricted to accessing documents relating to the union's members or employees who have provided written consent[29] (unless the Fair Work Commission otherwise orders). None of these restrictions apply to FWO inspectors.[30]
- Providing false or misleading documents to an FWO Inspector attracts a civil penalty.[31] There is no penalty for providing false or misleading documents to a permit holder in a registered organisation.
- A permit holder has no capacity to issue a compliance notice[32]. Such notices direct a person whom an FWO inspector "reasonably believes" to have contravened a provision of a modern award (for example), to take specified action to rectify the contravention/and or provide evidence of having done so. Compliance notices are enforceable, subject to a review or a reasonable excuse.[33]

Clearly, there is much that can be done to improve the capacity of registered organisations to detect and deter contravention of RROs, irrespective of the level or type of penalty that might ultimately be adopted as the maximum for non-compliance with RROs. It is essential that these gaps in the investigative rights of permit holders in registered organisations be filled, through revisions to the current "right of entry" framework. Such revisions should ideally be recast as not purely a right of entry but also a right of access, to reflect technological change in the way many documents (such as cloud-based payroll documents) are stored and retrieved. Critically, such revisions should also place unions in a position to monitor compliance (and discover non-compliance) with RRO's rather than merely obtain documentary corroboration of breaches in

[28] FW Act s. 709(b)-(d), 712
[29] FW Act s. 482(1), 482(2A), 483AA
[30] FW Act s. 708, 709
[31] FW Act s. 718A.
[32] FW Act, s. 716
[33] FW Act s. 716(5), 717

relation to which they can already mount a prima facie case. Whilst this would mark a substantial departure from the present statutory framework, it would not be without precedent. Indeed, for over two decades the statutory provisions (as opposed to award-based provisions) dealing with right of entry were cast as rights being for the purpose of "ensuring the observance of the award"[34]. Additionally, the union officials permitted to exercise such rights under those provisions were those so authorised in writing by the Secretary of the relevant union. Much as is the case today concerning with the appointment of FWO Inspectors[35], there was no permit or licensing system that existed outside of the investigative body itself under those provisions.

The increased capacity to detect non-compliance we recommend above should be complemented by a more accessible means to hold contraveners to account in order to provide fast, efficient access to justice for underpaid workers. The present system whereby workers or their unions seeking a "simple" process need to elect not to pursue any penalty in order to recover underpayments sends the wrong message, and in any event still leaves the claiming party in the position of having to prove their claim in a Court. We see far more utility in the enhancement of the Fair Work Commission's powers to resolve disputes about RROs and the creation of a co-located Industrial Court to deal with enforcement and penalties.

The benefit of a dispute resolution function is that the Commission could take an interventionist approach in resolving a dispute about whether an RRO had been complied with. The Fair Work Commission could ask the parties questions in an effort to narrow the dispute and request or require additional information to be produced in order to establish the facts necessary to resolve the dispute (such as the hours worked and the extent of any underpayment). The foundations for the Fair Work Commission conducting such a process already exist in its general powers[36]. What is lacking is the capacity to arbitrate where necessary or apply them to a former employee.

There will be some matters that cannot be resolved by the FWC, including where matters in contention strictly require the exercise of judicial powers. Where a matter is not satisfactorily resolved through FWC proceedings, a party to the prior Fair Work Commission matter should be permitted to rely on any result of the Fair Work Commission outcomes in the related dispute to initiate an Industrial Court proceeding. These important streamlining reforms would mean that the prospect of facing a penalty order or other sanction was real and substantial in the mind of the

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[34] Section 42A of the *Conciliation and Arbitration Act* 1904 (as amended by Act No. 138 of 1973), substantially re-enacted as section 286 of the *Industrial Relations Act 1988*
[35] FW Act, s. 700
[36] See FW Act, sections 589-592

employer, which as already raised, is an essential ingredient in effective deterrence. On the other side of the ledger, a certificate from the Fair Work Commission that an RRO dispute had been resolved by agreement would act as a permanent bar to bringing proceedings in the Industrial Court concerning the matter in dispute between the employee and employer concerned.

In the following section, we address the specific questions dealing with potential reforms to the existing civil penalty framework. However, we strongly adhere to the view that further reforms to that framework are unlikely to reach their desired deterrent potential without returning a meaningful compliance and enforcement role to workers through their unions. Persevering with the rubric of the FWO as *the* privileged actor in a legalistic compliance and enforcement structure cannot feasibly provide the same level of monitoring and compliance as unions continuously acting for their members in every industry sector throughout the country.

Civil penalties under the Fair Work Act: Response to discussion questions

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

The issue Discussion Paper 1 seeks to address is how to improve "protections of employees' wages and entitlements". Beyond issues relating to misclassification and sham contracting, Discussion Paper 1 does not deal with broader issues concerning compliance with workplace laws. Accordingly, the improvements we advocate for are improvements relating to the civil penalty regime for RROs.

The introduction, through the *Vulnerable Workers* amendments, of second level of civil penalty for "serious contraventions" was clearly motivated by the need to respond to underpayment and related issues rather than broader issues concerning non-compliance with common award based requirements (for example to consult regarding the introduction of changes in the workplace or give proper notice of roster changes) or other civil penalty provisions in the Fair Work Act (such as prohibitions on contravening a bargaining order or on taking industrial action before the expiry of an enterprise agreement). Indeed, the only contraventions which may be regarded as serious contraventions under those amendments are those which relate either to contraventions of instruments which set out RROs or the obligations to pay on time and in full (and without deductions or refunds) and keep proper records and pay slips.[37] Contravention of these types of obligations by an employer have a clear immediate victim, as well as a corresponding direct gain to the employer and, beyond that, a market distortion. All of these impacts need to be considered in developing an appropriate penalty framework.

In our view, a higher level of penalty should apply to employer's RROs in the various instruments presently captured[38]. This would include underpayment, or non-payment, of wages, overtime and other penalties, superannuation contributions, casual loadings, allowances and the like but would not extend to a failure to post a roster on a notice board, for example. This higher level penalty should also apply to the pay slip and record keeping provisions as well as the provisions concerning

[37] FW Act s. 557A, 539.
[38] Modern Awards, Enterprise Agreements, Workplace Determinations, National Minimum Wage Orders, Equal Remuneration Orders, Guarantees of Annual Earnings.

frequency of payment, deductions from payment and requirements to spend particular amounts.[39] It should also extend to the prohibitions on sham contracting.[40] The various provisions in the Act and its instruments could be described collectively as "Remuneration Related Obligations" (RROs) in order to signify where the higher penalty applied.

The penalty level we propose is double the level presently set for serious contraventions. This would equate to $1.26 million for a body corporate, on the present value of penalty units. As explained below, we believe that the maximum penalty should be expressed as the higher of either that figure, or three times the amount of underpayment.

Critically, the object being deterrence, the legislation should not erect barriers to achieving high penalties for the types of contraventions which are regarded as serious, in the form of a technical gateway or threshold to accessing those penalties. The objective of a civil penalty is to put a price on contraventions that is sufficiently high to deter, rather than being an acceptable cost of doing business.[41] That objective of deterrence can be frustrated by too much legislative prescription about when which level of penalty is available. A simple message:

> "**If you do not pay your workers properly, you could face a fine of up to $1.26 million**"

is far more capable of deterring that a complex one:

> **"If you do not pay your workers properly, you could face a fine of up to $1.26 million if it can be proven in Court that you had knowledge of the essential elements of the provision that you contravened and the conduct you engaged in was part of systematic pattern of conduct* relating to one or more other persons. If either of those things cannot be proved, the maximum fine will be one twentieth of that amount.**
>
> **Whether or not your conduct was part of systematic pattern of conduct will be judged having regard to all relevant factors including but not limited to the number of contraventions, the period over which they occurred, the number of persons affected, how you responded to any complaints about the conduct and whether you kept mandatory records and supplied compliant pay slips.*

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[39] FW Act s.323(1), 323(3), 325(1)m 325(1A), 328(1), 328(2), 328(3), 535(1), 535(2), 535(4), 536(1), 536(2), 536(3).
[40] FW Act s. 357-359.
[41] *ABCC v. CFMEU* [2017] FCAFC 113 at [98]

Deterrence is better served by the creation, in the mind of the putative contravener, of uncertainty and risk regarding the maximum penalty (or to put it another way, the regulatory cost of doing business). A penalty regime that clearly signals that a capacity to demonstrate ignorance of the law necessarily results in a 95% discount of the maximum penalty will do less to promote compliance than one that does not. For that reason, we recommend that the definitional elements of "serious contravention" and "systematic pattern of conduct" do not apply as gateways for accessing the higher-level penalty we propose.

Removing these gateways and thresholds will not result in inappropriately high penalties for those contraveners whose actions were genuine mistakes which were promptly rectified upon discovery, in the unlikely event that those matters do in fact proceed to contested hearings (and in fact, if those matters do proceed to hearing an agreed penalty that is not clearly unreasonable is more likely than not to be accepted[42]). The existing jurisprudence on the determination of civil penalties[43] ensures that a Court considers all relevant circumstances of the contravening conduct before imposing a penalty, for example:

- The objective nature and seriousness of the contravention, such as:
    - Whether it was deliberate, reckless, negligent or careless;
    - Whether the conduct constituting the contravention was isolated or whether it was systematic conduct over a period of time;
    - Whether senior officers responsible for the contravening conduct;
    - Whether compliance systems were in place;
    - Whether there was a culture of compliance;
    - The impact or consequences of the contravention; and
    - Whether a benefit or profit was derived from the contravening conduct.
- The particular circumstances of the contravener, such as:
    - Its size and financial position;
    - Whether similar conduct has occurred in the past;
    - Whether it has improved compliance systems since the last contravention;
    - Whether it has exhibited contrition or remorse;
    - Whether the profits or benefits received were given up;
    - Whether reparations have been made;

[42] See Commonwealth v. Fair Work Building Industry Inspectorate [2015] HCA 46
[43] See for example FWO v. NSH North [2017] FCA 1301, Mason v. Harrington [2007] FMCA 7, Australian Ophthalmic Supplies v. McAlary-Smith [2008] FCAFC 8.

    - Whether the contravener co-operated with the prosecutor; and
    - Whether the contravener has already suffered any extra-curial punishment or detriment.
- The extent of any overlap between contraventions (so as to avoid any double punishment); and
- Applying the totality principle, that is, to consider whether the sum of penalties considered appropriate in the circumstances for the separate contraventions involved is in fact just and proportionate given the overall conduct.

Given the above, we would expect that redefining the maximum penalty in the way we have proposed would result in little if any impact on the lowest level of inadvertent and promptly remediated contraventions. However, it would provide a flexible a graduated response to the continuum of more serious conduct which is lacking in the present provisions.

What are some ways to calculate maximum penalties? For example, by reference to business size or the size of underpayment or some measure of culpability or fault?

For reasons already given, we have concerns about the deterrent effect, or compliance promoting effect, of a civil penalty regime that enables some form of risk calculus or gaming based on set thresholds or criteria. The courts have developed principles to deal with matters on a continuum of seriousness and these should not be usurped.

However, we are mindful that the range of direct and indirect victims and the extent of their loss is highly variable where RROs are not complied with. We see some synergy with recent amendments to the *Australian Consumer Law,* referred to in Discussion Paper 1, in the sense that:

- Contraveners can vary in size and means; and
- Their contraventions may impact either a small or a large group of direct victims, can deliver measurable benefits to a contravener and can distort the operation of markets.

We would support the adoption of maximum penalty alternatives for contraventions of the RROs we have identified above. In no case should the maximum penalty available be less than the benefit that has been derived from the underpayment. The extent of the actual underpayment is a reasonable proxy for that benefit, notwithstanding that it excludes measurement of increased turnover and profits that might be derived from the reduced price of goods and services funded by the underpayments. Adapting the formulation used in the *Australian Consumer Law*, we support the maximum penalty for contravention of RROs being the higher of 1200 penalty units (6,000 penalty units for a body corporate), or 3 times the amount of the underpayment.

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, the period of underpayments, or some other measure?

This question is directed to the merits of the grouping provision in section 557 of the FW Act in an underpayment context. We have concerns about the operation of section 557 in the context of non-compliance with RRO's. In practice it results in, for example, the worst case of non-payment of Sunday penalty rates to one employee as deserving of the same response as the worst case of non-payment of Sunday penalty rates to 600 employees. This is clearly inappropriate where the aggregate direct and indirect impacts on others vary greatly with the number of contraventions, as does the benefit derived by the wrongdoer from engaging in that contravention.

In the RRO context, section 557 applies a hard rule which effectively supplants the Court's more flexible and nuanced approach to sentencing, such as consideration of the degree of overlap between contraventions and application of the totality in principle. Section 557 has been described by the Federal Court[44], in an underpayment context as producing "a significant degree of built in leniency", leaving "limited scope for the totality principle to do any meaningful work" and "making the benefit obtained by the conduct disproportionate to the potential detriment in the event of being caught".

We recognise that the present circumstance where "serious contraventions" attracting a higher penalty under section 557A must arise from a "systematic pattern of conduct" is an effort to mitigate the dampening effect of section 557. However, the threshold requirements in section 557A are otherwise problematic for reasons already given and, further, the mitigation is blunt in so far as at it simply raises the level of the penalty available for contraventions already grouped under section 557. A far more flexible and responsible solution, in our view, is exclude section 557 from operating in relation to contraventions of RROs.

[44] At *FWO v. NSH North* [2017] FCA 1301 [195]-[196]

Fair Work Amendment (Protecting Vulnerable Workers) Act 2017

The *Vulnerable Workers* amendments were an effort to improve compliance by reference to examples of some of the worst cases of exploitation as revealed in the *National Disgrace* report[45] and multiple reports of the FWO concerning its inquiries and investigations[46]. Intelligence about the progress and likely findings of the long running inquiry into the *Harvest Trail*[47] presumably also informed the development of the reforms.

There are elements of the *Vulnerable Workers* reforms which are commendable, including the presumption of liability where records and pay slips are not kept[48], the increased penalties for record keeping and pay slip breaches, the prohibition on "cash back" and related schemes[49] and the prohibitions on false or misleading records and payslips.[50] The limited extension of liability to franchisors and holding companies[51] has merit in principle, although we recommend some improvements to it in the next section concerning extending liability In the main, our comments about the "serious contravention" elements of the of the *Vulnerable Workers* reforms have been made in the preceding sections. Our comments in relation to specific questions raised in Discussion Paper 1 about the *Vulnerable Workers* reforms are as follows.

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?

The industries that were the focus of policy makers when developing the Protecting Vulnerable Workers Act face competitive markets in which non-compliance gives an unfair advantage. The attraction of that advantage outweighs their perceived risk of being of discovered under the present model. While the consequences of a "serious" contravention are significant, the likelihood of facing the penalty are at the present time low.

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[45] Senate Education and Employment References Committee (2016), "A National Disgrace: The Exploitation of Temporary Work Visa Holders.

[46] Identifying and addressing the drivers of non-compliance in the 7-Eleven network (2016), Inquiry into the labour procurement arrangements of the Baiada Group in New South Wales (2015), Inquiry into the wages and conditions of people working under the 417 Working Holiday Visa Program (2016)

[47] The inquiry was on foot between 2013-2018. The final report is accessible online: A report on workplace arrangements along the Harvest Trail

[48] FW Act s. 557C

[49] FW Act s. 325-327

[50] FW Act s. 535-536

[51] FW Act s. 558A

It is informative in this regard that surprising numbers of employers have engaged in repeat contraventions. For example, last year FWO conducted a review of their publicly reported compliance audit activities between 2011/12 and 2017/18. Those audits took place across a range of industries and locations, involving 8449 employers. On average, 28% of employers audited during that period were not paying their employees correctly. Rates of non-compliance varied between 7% (for motor vehicle retailing, nationwide) and 47% (observed for both retail bakeries in Victoria and fast food outlets nationwide). Included in the audit activities were 3 audits of employers (1025 employers in total) who had been found by the FWO to have been non-compliant in an earlier audit and dealt with accordingly. In that repeat audit, 25% of business were found again to be non-compliant with payment obligations (a range of 17% to 33%).

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

As explained in the preceding sections, the deterrent potential of the 'serious contravention' category is compromised by its setting of an inflexible threshold for accessing significant financial penalties (and the signalling effects of this), its interaction with section 557, the privileged investigative power given exclusively to the FWO and the lack of an accessible enforcement framework.

Extending liability

Accessorial liability is only one way of extending liability for a contravention. There are other mechanisms, such as presumed liability[52] or chain of contract liability[53], which could be explored. The form or forms of accessorial liability imposed should be suited to the nature of the harm and benefit likely to result from the contravention they relate to.

Another consideration is the penalty that may be imposed where such liability is proven. Whilst section 545 of the FW Act provides that a court may make "any order it considers appropriate" where a civil penalty provision has been contravened, a court's inclination to make particular orders might be effected where other laws appear to constitute a "code" on the imposition of particular sanctions or where the explicit availability of that sanction in another law makes the absence of an explicit reference in the FW Act conspicuous. We are concerned that orders such as director disqualification[54], the cancellation of registration as a migration agent[55] or an adverse publicity order[56] may be unavailable given the present drafting of section 545 of the FW Act. As noted in the Migrant Workers Taskforce report, specific powers should be provided to the courts to make such orders in matters concerning non-compliance with an RRO.

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

Whilst it is conceivable that the accessorial liability provisions in section 550 would apply in some supply chain contexts, the requirement to prove knowledge is a less effective deterrent than a positive duty by head contractors to satisfy themselves that the employees of their sub-contractors have been paid.

Longstanding provisions of this nature exist in section 127 of the *Industrial Relations Act 1996* (NSW). Specifically, those provisions:

- Make the principal contractor liable for the unpaid wages of the subcontractor's employees, except where the subcontractor has certified to the principal that the

[52] See for example, Australian Consumer Law at sections 7, 147
[53] See FW Act s. 789BA-789CE
[54] Corporations Act 2001, Part 2D.6
[55] *Migration Act* 1958, s.302-303.
[56] Competition and Consumer Act 2010, s. 86D

employees have been paid for the work performed under the contract for the relevant period;

- Require the retention of certifications for 6 years;
- Create a right in the principal contractor to withhold payment to the subcontractor in the absence of such certification;
- Make the principal contractor liable for the unpaid wages of the subcontractor if the principal contractor had reason to believe the certification it was provided with was false; and
- Create an offence of knowingly giving false certification.

Provisions of this type are easily applicable to a range of circumstances, most notably labour hire and contracts where certain of the employees of the subcontractor can be readily identified as performing the work required under the contract. Whilst we recommend the Commonwealth to adopt such provisions in those contexts, more broadly we would encourage a paradigm shift in accessorial liability for underpayment, more centred on control.

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

The accessorial liability provisions in section 550 draw on provisions in criminal law and in consumer protection legislation. Such provisions are appropriate for penalising individual actors. Other considerations apply when attempting to regulate economic activity broadly, particularly where underpayment is contributed to by asymmetry in business to business bargaining power.

The *vulnerable workers* amendments introduced broader notions of accessorial liability based on assumptions of legal and economic control existing in franchises and corporate groups[57]. We would encourage the expansion of corporate liability for underpayment based on legal or economic control in broader acquisition and supply contexts, subject to "a reasonable steps" defence of the type set out in sections 558B(3)-(4) of the FW Act. For clarity, we would not restrict this extension of liability to circumstances where business functions had been outsourced or re-tendered, but rather to all contexts where the putative accessory had the practical capacity to act as a price maker.

[57] See Explanatory Memorandum to the *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* at [39]-[40], FW Act s. 558B(3)-(4).

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?

We refer to our answer above.

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?

There is a regulatory burden associated with any intervention. The burden under the provisions we propose would fall on the most well-resourced businesses, at the high end of local supply chains. That burden would come in the form of due diligence which would ultimately benefit the workers at the opposite end of the chain of production. The benefits of extending accessorial liability would clearly outweigh any possible regulatory burden.

Sham contracting

Sham contracting has been particularly prevalent in the cleaning and construction industries for decades. The advent of technological platforms in the transport industry and in so called "online marketplaces" creates significant risk for sham contracting[58], as does the growth of the National Disability Insurance Scheme[59]. In our submission to the *Black Economy Taskforce*, we demonstrated that, of persons classified as independent contractors in the Australian Bureau of Statistics *Characteristics of Employment* survey, around 64% of persons did not have authority of their own work and around 40% were not able to sub-contract their own work. The absence of these characteristics is highly inconsistent with the individuals genuinely conducting a business of their own account.[60]

Whilst sham contracting has its own unique causes and effects, it needs to be characterised as a subset, or particular manifestation, of the broader long-run shift to more precarious, non- standard forms of work and especially the growing intensity and vertical and horizontal scope of subcontracting that has occurred within the broader economy. The forces driving sham contracting are often not simply from firms looking to evade workplace employment provisions or dodge tax and superannuation laws. The competitive pressures driving sham contracting are occurring across the economy, and often originate right from the top of production value chains. However, economic and social regulation should not occur in ways that have the effect of undercutting employment rights and safety, nor should the cost pressures be allowed to justify tax avoidance and evasion.

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?

The current prohibition on sham contracting is cast as prohibition on misrepresentation. It has clear parallels with the prohibitions on *misleading conduct relating to employment* contained in the *Australian Consumer Law.* Those provisions provide civil[61] and criminal[62] liability, with a maximum penalty of $10,000,000 or, in some cases, a greater amount referable to turnover or

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[58]
[59] See Black Economy Taskforce Final Report at p 238.
[60] See Hollis v. Vabu (2001) 207 CLR 21, On Call Interpreters and Translators Agency v. Commissioner of Taxation (No. 3) [2011] FCA 366.
[61] Section 31
[62] Section 153

the benefit gained from non-compliance. The financial penalties are the same regardless of whether the liability is civil or criminal. The conduct constituting a civil or criminal contravention is identical, because the criminal offence is one of strict liability. There is no sound reason for the particular type of misrepresentation in relation to employment governed by the FW Act sham contracting provisions to deviate so far, in design or penalty, from those broader provisions. In our view, the misrepresentation of an employment contract as a contract for services should carry a significant civil penalty, with no fault-based criterion. The penalty should be that which we recommend for non-compliance with other RROs as discussed above.

Consistent with our earlier comments, the severity of sham contracting should be assessed as part of the sentencing process, and the high-level penalty should be available in all cases.

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

The removal of the recklessness defence was recommended by the *Sham Contracting Inquiry Report* by the Australian Building and Construction Commission (2011), the *Towards more productive and equitable workplaces* post-implementation review of the FW Act (2012), the Productivity Commission Inquiry into the *Workplace Relations Framework* (2015) and, most recently, in the final report of the *Black Economy Taskforce* (2017). The formulation favoured in each of those reports was one which placed the evidential onus on the employer to prove reasonableness, that is, at the time the representation was made, the employer *believed* the contract was a contract for services *and* could not reasonably have expected to know otherwise.

In our submission the recklessness defence should be removed.

Criminal sanctions

We take issue with the characterisation in Discussion Paper 1 of criminal sanctions being "reserved for the most serious misconduct". Whilst it may be the case that individual regulator's enforcement policies discourage the bringing of criminal proceedings except where the conduct concerned is at the highest end of culpability when judged against the particular public interests which the regulator in question is obliged to protect, that is not the same as drafting laws *so as to ensure* that only the most serious offenders ever face a criminal sanction.

Two cases in point, which already apply to businesses, bear this out:

- The *Corporations Act 2001* regulates a wide range of conduct, including governance, raising and dealing with share capital, insolvency, acquisitions and the offering of financial products and services. Section 1311 of the *Corporations Act* establishes a general rule that a person who does a thing that is forbidden by the Act; or does not do a thing required to be done by the Act; or otherwise contravenes a provision of the Act, is guilty of an offence. As a consequence, there are a number of provisions of the *Corporations Act* which may result in either civil penalty or criminal proceedings if they are contravened[63].
- The *Australian Consumer Law*[64] regulates markets for consumer products and services in areas such as misrepresentation, defects, pricing and some aspects of consumer credit and also provides some regulation of employment[65]. To a large extent, civil penalties created in some parts of the *Australian Consumer Law* are replicated with no or very little modification as strict liability criminal offences.[66] Moreover, as a result of recent amendments by the current Government, those civil penalties and strict liability offences carry the same upper penalty level of $10,000,000 or more depending on turnover or the value of the benefit obtained from breaking the law. [67]

In addition, historical provisions in the New South Wales industrial relations system allowed claims for non-payment of wages due under an award or industrial agreement to be pursued either as

[63] Sections 985J(1), 985J(2), 985J(4), 1023P(1), 1023P(2), 1023P(4), 1041A, 1041B(1), 1041C(1), 1041D, 1043A(1), 1043A(2), 1317AC(1), 1317AC(2), 1317AC(3), 1317AAE(1).
[64] Competition and Consumer Act 2010, Schedule 2
[65] See sections 31, 153
[66] For example, sections 29-49, which deal with unfair practices ranging from misrepresentation to unsolicited goods, are criminalised in identical or almost identical terms in sections 151-204.
[67] Treasury Laws Amendment (2018 Measures No. 3) Act 2018

civil claims[68] or claims for the recovery of a criminal penalty[69]. Specific standing to bring the criminal proceedings was accorded to "the secretary of an industrial union concerned in the industry covered by such award or industrial agreement".[70]

If the object of the current review is the deterrence of wrongdoing and encouragement of compliance, it cannot follow that an unreasonably high bar is set to attracting the stigma of criminality. Criminal sanctions can meet dual goals of encouraging the careless to engage in due diligence and punishing wrongdoing. Consistent with our earlier observations, unions should not be excluded from the range of actors who are equipped to investigate and prosecute these offences.

In what circumstances should underpayment of wages attract criminal penalties?

Criminal penalties should be available for non-compliance with an RRO in an Award or Enterprise Agreement, on a strict liability basis. This would follow the model of dual liability recently endorsed by the current Government through its amendments to the *Australian Consumer Law*. A strict liability offence would retain the defence of mistake of fact[71], which would excuse liability where, for example, Sunday penalty rates were not paid because the employer mistakenly but reasonably believed the relevant hours were in fact worked on a Saturday (for example due to a computer error or because the employee entered the incorrect date into the sign-in book). Whilst a "due diligence" defence is available to bodies corporate in respect of factual errors if this model is adopted[72], further consideration could be given to a broader due diligence defence which required the employer to prove that they had taken all reasonable steps to ensure that the RRO was complied with or exercised due diligence to prevent the contravention of the RRO. Such an approach would ensure that the period between discovery and rectification of a continuing breach was extremely short.

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[68] Industrial Arbitration Act 1940 (NSW), s. 92.
[69] Industrial Arbitration Act 1940 (NSW), s. 93. See also TWU v. Australian Document Exchange [2000] NSWIRComm 74 at [51].
[70] Industrial Arbitration Act 1940 (NSW), s. 93(4).
[71] See clauses 9.2 and 12.2 of the Schedule to the *Criminal Code Act* 1995
[72] See clauses 12.2 of the Schedule to the *Criminal Code Act* 1995

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

The level of culpability is capable of being addressed in sentencing. We expect that an employer charged with 70 counts of one offence (i.e. in one count per employee) would be dealt with more harshly than an employer charged with a single count.

What kind of fault elements should apply?

As above, we favour an offence of strict liability. However, subject to what we say below regarding interaction with State laws, there may be regulatory efficiency in establishing a secondary offence with a far higher penalty – such as the $10,000,000 which currently applies for misleading and deceptive conduct in relation to employment[73] - for conduct that is intentional, reckless or dishonest. The availability of such an offence would encourage earlier pleas to the lesser, strict liability offence, where the higher offence was appropriately charged on the facts.

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

We would not recommend the application of Parts 2.4 or 2.5 of the criminal code to an offence of strict liability such as that we have proposed. Rather, accessorial and corporate liability could be determined on the basis of sections 550 and 793 of the FW Act. If a secondary, fault-based offence were to be created, it would be appropriate for the accessorial liability provisions in part 2.4 of the Criminal Code to apply. However, given the variety of business settings in which the secondary offence may be applicable, we see merit in section 793(2) of the FW Act being merged in with Clause 12.3 of the Criminal Code as a means of establishing corporate criminal responsibility. This would enable liability on the basis of the state of mind of a single individual acting within the scope of their actual or apparent authority, without the necessity to prove that person was a "high managerial agent" of the body corporate.

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

Consistent with the above we propose that the maximum penalty for a strict liability offence should be $1 million for a corporation and $200,000 for an individual whereas for a secondary, fault based offence the penalty should be $10 million for a corporation and $2 million and/or 5 years imprisonment for an individual.

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

As Discussion Paper 1 notes, some States have indicated their intention to amend their criminal laws to deal with wage theft. The potential for inconsistent laws would already be a consideration in the steps that those States are taking. An advantage of confining Commonwealth offences to those of strict liability is that they are less likely to further complicate the task of those States in devising the laws that they wish to introduce.

Insofar as the Commonwealth does wish to pursue a secondary, fault-based offence, it should consult directly with the States so as to ensure the laws are capable of simultaneous operation, including with respect to penalty. Alternately, the Commonwealth could choose to confine the operation of its fault-based offence to employers who hold the status of visa sponsors under the *Migration Act* 1958.

Whichever route the Commonwealth elects to take, there will be a need to contend with procedural impacts where civil and criminal penalties are available in respect of the same (or substantially the same) conduct. In terms of evidence gathering, we note that the *Competition and Consumer Act*, which has dual civil and criminal strict liability provisions, provides to individuals a use immunity in respect of criminal but not civil proceedings (and no derivative use immunity at all) where documents are obtained under a compulsion.[74] This precedent is worthy of consideration in re-framing the investigative rights of permit holders as we have proposed. In addition, it will important to ensure that existing employee rights to request their own records are not diminished by any privilege against self-incrimination or use or derivative use immunities.

[74] Competition and Consumer Act, s. 155(7).

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

In the context of the present discussion paper we have confined our comments to imposing criminal sanctions in relation to RRO contraventions.

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