Ai GROUP SUBMISSION

Department of Employment and Workplace Relations

Submission in response to 'Criminalising wage underpayments and reforming civil penalties Consultation paper

12 May 2023

Introduction

Ai Group makes this submission in response to the Federal Government's Consultation Paper on *Criminalising wage underpayments and reforming civil penalties in the Fair Work Act 2009* (**Consultation Paper**).

Ai Group opposes the proposed introduction of criminal penalties to the underpayment of wages. The proposal would introduce a profound change to Australia's workplace relations laws.

Criminal penalties do not address why most underpayments occur. They instead prioritise the punishment of employers while leaving underpaid workers out of pocket.

Criminal proceedings would disadvantage workers, including the most vulnerable, by significantly delaying civil recovery of underpayments while criminal proceedings are taking place. Where a criminal case is underway, any civil case to recoup unpaid amounts would no doubt be put on hold by the Court until the criminal case is concluded. This means that underpaid workers could be waiting years for redress.

Exposing businesses, directors and managers of businesses to criminal penalties would operate as a major barrier to employers self-disclosing and rectifying underpayments. It will foreseeably discourage constructive engagement with the Fair Work Ombudsman (**FWO**). An unduly punitive framework will also deter investment and discourage employment growth.

Ai Group does not in any way condone non-compliance with workplace laws, however these matters should be dealt with under the Fair Work Act's (**FW Act**) civil contravention framework, while existing labour exploitation offences continue to be dealt with under the *Criminal Code 1995 (Cth)* (**Commonwealth Criminal Code**).

Notwithstanding our overarching views, we seek below to engage with the issues and questions that have been raised by the Government in its Consultation Paper. Our responses should not be taken as support for the Government's policy to introduce criminal penalties in the FW Act relating to wage underpayments.

Criminal penalties do not address why underpayments occur

Australia's workplace relations system comprises of a variety of different sources of minimum employment conditions including some 123 modern industry and occupational awards, the National Employment Standards (**NES**) and other provisions in the FW Act, enterprise agreements, state long service leave laws, and many other laws, regulations and industrial instruments. Workplace laws, regulations and industrial instruments are complex and often the subject of contested interpretations and often contain ambiguity.

Determining a rate of pay should be a straightforward exercise, but for many employers it is not. A rate of pay may be determined by reference to not only multiple sources of legal obligations, but also the application of multiple provisions in an industrial instrument that interact to set monetary

entitlements, (e.g. loadings, allowances, and penalty rates). For example, calculating a rate of pay can involve sourcing in excess of 10 different pay points depending on the hours worked and applicable conditions.

Ai Group devotes significant resources and services to assisting employers to grapple with Australia's workplace relations system so that they can properly calculate a minimum rate of pay under industrial instruments. It is one of our core services to members. In particular, Ai Group receives many thousands of calls from employers seeking advice on the correct payment of wages as they relate to competing modern award coverage, classification structures, the application of loadings to irregular hours of work and the interpretation of enterprise agreements. This is not to mention the calculation of long service leave and other leave or monetary entitlements.

The imposition of criminal penalties does nothing to address the structural complexity of Australia's workplace laws but simply deals with the issue of underpayments by punishing employers who get it wrong.

The complexity of workplace laws also plays out in payroll errors in both directions. In February 2020, the Australian Payroll Association reported that almost 70 per cent of businesses it assessed in an 18-month period had uncovered overpayments estimated to cost employers millions of dollars.[1] In most cases, employees are not asked to give the money back.

Criminal penalties will promote high-cost interpretations of workplace laws at the expense of the proper interpretation of such provisions

In recent years, Australia has seen a number of High Court decisions that have dealt with matters of significant public interest concerning competing interpretations under workplace laws – including in relation to fundamental issues such as the definition of a casual employee, the tests for which workers are independent contractors and the meaning of a *'day'* in the FW Act for the purpose of personal/carers leave.

These cases demonstrate that workplace laws are not static but dynamic and attempts to criminalise underpayments risk significantly stymieing the reasonable ventilation of contested interpretations by employers for fear of such action exposing them to criminal sanctions.

A criminal penalty regime risks causing employers to adopt unwarranted, but understandably cautious, approaches to the interpretation of unclear workplace laws. There is an obvious risk that unions and other applicants will leverage the risk of employer exposure to such penalties in pursuit of claims against employers. This is particularly concerning given the frequency with which unions press for entitlements based upon interpretations that reflect the interests of their members but may in fact be erroneous.

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[1] David Marin-Guzman and Natasha Boddy, 'Overpayment as common as 'wage theft'', *Australian Financial Review*, 22 February 2020.

1. Which of the following options proposed by the department would be the most effective for introducing a criminal offence of wage underpayment?

If despite Ai Group's opposition, the Government is to introduce criminal penalties for the underpayment of wages, it is essential that the new offences are limited to only deliberate underpayments with the fault elements of intent and knowledge.

Option 1 as outlined in the Consultation Paper should be amended to include the fault element of intent, in addition to knowledge.

The Government has made a commitment to implement the recommendations of the Migrant Workers Taskforce (**MWT**). In relation to criminal penalties, the MWT recommended:

> **Recommendation 6**
>
> It is recommended that for the most serious forms of exploitative conduct, such as where that conduct is clear, deliberate and systemic, criminal sanctions be introduced in the most appropriate legislative vehicle.

A criminal underpayment offence containing elements of fault and knowledge would be consistent with the MWT recommendation.

The fault element of intent defined below (5.2 of the *Criminal Code 1995* (Cth) is an appropriate standard for criminal offences of underpayment.

The fault element of intent is also used in other relevant labour exploitation criminal offences contained in the Commonwealth Criminal Code. For instance, section 270.7 refers to deceptive labour recruitment as incorporating intent:

> *'…the recruiter engages in the conduct* ***with the intention*** *of inducing another person (the* ***victim****) to enter into an engagement to provide labour or services…'*

Similarly, the criminal offence of debt bondage at section 270.7C frames the offence of debt bondage as:

> *'…A person commits an offence of debt bondage if:*
>
> *(a) the person engages in conduct that causes another person to enter into debt bondage; and*
>
> *(b) the person* ***intends*** *to cause the other person to enter into debt bondage.'*

Ai Group contends there is no reason to depart from the established criminal standard adopted in other labour exploitation offences, particularly where there is already a robust enforcement and compliance framework for civil contraventions.

It is further necessary to ensure that any new criminal offence refers to underpayment offences that are a result of *systematic conduct*. This is to ensure that any new offence is targeted at deliberate acts of underpayments of the kind described by the MWT. It is also important to ensure that the new criminal offence is no less severe than the FW Act's current serious contravention provisions which presently refer to a systematic pattern of conduct at section 557A(2).

A criminal offence based on recklessness is inappropriate

Ai Group is strongly opposed to the significantly lower threshold of a recklessness-based underpayment offence - both as proposed in Option 2 as a stand-alone offence and in Option 3 as part of a tiered approach to offences.

Criminal offences should not apply to conduct that is reckless when compared to deliberate intentional conduct in underpaying workers. Criminal offences should be reserved for the most deliberate forms of underpayment. Conduct amounting to recklessness is significantly different to deliberate conduct evincing intent and knowledge regarding an underpayment.

A criminal offence based on the much lower threshold of recklessness is highly inappropriate and ill-conceived. It is also inconsistent with the recommendations and the associated findings of the MWT as referred above and with the following analysis:

> Given that there are currently widespread levels of non-compliance with relevant laws, criminal sanctions to tackle serious and systematic underpayments of workers, would usefully form part of the regulatory toolkit. However, careful design will be required to ensure these are an effective addition to regulators existing powers. For example, these powers should be aimed at dealing with exploitation that is clear, deliberate and systemic.[2]

A proposed criminal offence based on recklessness, including the proposed formula of recklessness as described in the Consultation Paper, would capture a much broader range of conduct relating to underpayments that may be more ambiguous, unintentional and ad hoc. Clearly this outcome was not intended by the MWT and should not be pursued by the Government as part of a new criminal sanction regime.

A criminal offence of recklessness is also inappropriate given Australia's complex workplace relations system. The concept of 'recklessness' does not account for the extent and frequency with which Australia's workplace laws can provide for competing interpretations and ambiguities around the simple question of what to pay somebody. From this arises disputed interpretations between employers, unions and, sometimes, the FWO itself. The context of the long running award review proceedings and the extent and frequency with which variations have been made to such awards since their creation to address either deficiencies or a lack of clarity in such instruments demonstrates the potential for such issues to arise. It is trite to observe that enterprise agreements similarly often lack clarity.

[2] Report of the Migrant Workers Taskforce, Australian Government, 2019, p.87

The proposed formulation of Option 2 in the Consultation Paper of a recklessness-based wage underpayment offence states that the offence would *"cover employers who are aware of a substantial risk that they are not paying an employee the amount to which the employee is entitled and proceed even though it is unjustifiable to take that risk."*

Ai Group does not support or condone employers who engage in that conduct. However, the appropriate response should be for these matters to be dealt with under the FW Act's current civil contravention framework.

A civil contravention framework facilitates intervention from the FWO and Courts for the repayment of unpaid entitlements to employees by employers. Courts may also order the payment of a civil penalty for the relevant contravention. In contrast, criminal proceedings focus on punishing employers and offer little if any remedial interventions to underpaid workers.

It is inappropriate for criminal penalties to apply by reference to broad notions of "awareness" and "risk" when Australia's workplace relations system does not provide for accessible and unequivocal information about what to pay an employee. Determining the correct payments for employees is an exercise fraught with risk. Specifically, that risk arises from exercising judgement and expertise in the interpretation of multiple sources of regulation providing for employee entitlements.

Further, the concept of recklessness, including the formulation proposed in the Consultation Paper, would not be capable of clear and consistent application. Australia's workplace laws and the various points at which different jurisdictions, statutes, case law and industrial instruments intersect, often necessitate that employers have regard to a raft of sources to understand their obligations. It is unclear when precisely it will be said that an employer that had failed to successfully navigate such rules to the extent that they can be considered '*reckless*' or '*aware* of a *substantial risk*', or proceeding when it is '*unjustifiable* to do so.'

In addition, the application of criminal offences based on recklessness to matters that are currently dealt with under the FW Act's civil contravention framework will discourage employers from both seeking advice from the FWO and self-disclosing underpayments, limiting its effectiveness as both a preventative and remedial regulator. This is not in the interests of the community or workers who benefit from the FWO's educative and regulatory functions.

Any proposed criminal offence involving elements of recklessness, including as proposed by the Consultation Paper would be inappropriate for Australia's workplace relations framework and should not proceed.

2. Are there additional considerations which the department should examine for the wage underpayment offence, for example from other areas of Commonwealth criminal law or existing state and territory wage underpayment offences?

There are many considerations for the Government to consider if introducing a criminal underpayment offence.

Federal criminal underpayment offence must 'cover the field'

It is essential that any new criminal penalty relating to compliance with, and enforcement of, workplace laws, including criminal sanctions for underpayment of wages, operate to the express exclusion of any concurrent application of any state and territory laws relating to the same subject matter. To do otherwise, would create a compliance and enforcement framework with competing, and likely inconsistent enforcement procedures and consequences across the country, notwithstanding that the FW Act already provides a comprehensive enforcement regime for non-compliance with modern awards, enterprise agreements and employment contracts.

Additional and inconsistent state and territory compliance and enforcement frameworks would unnecessarily add to the complexity of our workplace relations system and the costs of compliance for employers.

Competing frameworks raise the prospect of employers being faced with multiple enforcement actions under differing national and state/territory laws, including exposure to multiple penalties for the same offence. This risk must be removed to ensure the integrity of a national compliance framework and the objectives supporting it. Employers and the community should not wear an added regulatory burden where state and federal governments choose to regulate in relation to the same issue in different ways.

Further, it is unfair and inappropriate for the community to carry the burden of any constitutional challenge to the enforceability of competing and inconsistent state/territory laws, when the Federal Government can make this clarification prophylactically under statute or regulation.

Alignment with state and territory laws is inappropriate

Ai Group opposes the alignment of wage underpayment offences with the standard and approaches taken by state '*wage theft*' law, namely in Queensland and Victoria.

These laws were developed in the context of the criminal law jurisdiction within those states, that differ to the Commonwealth's Criminal Code. State and territory jurisdictions should not be followed as a relevant standard, and further, should also be ousted by any new FW Act offence.

Standing to commence criminal proceedings should be with the DPP and not unions

The Consultation Paper does not adequately address the important issue of standing to commence criminal proceedings. Ai Group is strongly opposed to any proposal to provide employee representative organisations with relevant standing to commence criminal proceedings.

The standing to commence criminal proceedings should be solely with the Commonwealth Director of Public Prosecutions.

The FWO's standing should be limited to commencing civil proceedings. Separating the enforcement of criminal and civil offences under the FW Act would also go some way in preserving the FWO's role as an advisory body that may also assist employers who engage with them for help.

We note the *Wage Theft Act 2020 (Vic)* enables the Victorian Wage Inspectorate to commence criminal proceedings for offences under that Act and that it may refer matters to the Victorian Office of Prosecution as it considers appropriate. Ai Group does not consider this approach appropriate for any new FW Act wage underpayment offence. All cases of alleged criminal wage offences should be referred to the DPP, particularly as alleged criminal offences may also involve other offences under migration laws or labour exploitation provisions of the Commonwealth Criminal Code.

Immunity protections are essential

Should new criminal offences be introduced, a criminal framework should positively promote the rectification of errors and engagement with the FWO.

Employers should be afforded greater certainty that they will not be subject to prosecution or the application of civil or criminal penalties if they proactively engage with the FWO over a potential underpayment and constructively take action to rectify it. They should also be afforded certainty that they will not be subject to media announcements in relation to their disclosure.

Similarly, if parties seek to proactively engage with the FWC in the context of proceedings directed at addressing an ambiguity or uncertainty in an industrial instrument there should be certainty that they will not be subject to subsequent prosecution and the application of penalties as a product of disclosing potential non-compliance through such proceedings, provided they are prepared to rectify any underpayment. This will encourage ventilation and rectification of identified problems in such instruments. It is essential that parties be afforded formal immunity from criminal prosecution in a wide array of circumstances including where:

- Advice is sought from the FWO and relied upon by the employer.
- Advice is sought from an organisation or person with workplace law or industrial relations expertise and relied upon by the employer.
- A self-disclosure is made to the FWO by the employer regarding an actual or suspected underpayment and the employer has undertaken to rectify the underpayment in an agreed timeframe.
- An employer was engaged in contested proceedings before the FWC or the Courts regarding an interpretation that may give rise to a finding of an underpayment. This would ensure that employers can freely participate in dispute resolution proceedings under enterprise agreements or other relevant instruments without fear of being exposed to a criminal penalty.

Ai Group has strong concerns that arrangements affording more limited criminal immunity will

discourage employers from constructive dialogue about workplace law interpretations for fear of criminal prosecution.

3. Should offence-specific defences be available for either of the wage underpayment offences in addition to the default defences available in Part 2.3 of the Commonwealth Criminal Code?

Ai Group strongly opposes any recklessness-based wage underpayment offence.

A defence to a recklessness-based wage underpayment offence, such as '*taking reasonable steps to mitigate the substantial risk of underpayment'* is further reason to justify why the offence should not be based on recklessness. The concept of 'reasonable steps' has the potential to apply to employers such that they would be expected to engage in a broad range of compliance activities to avoid a criminal penalty and imprisonment. This is inappropriate when the same outcome can be achieved through the civil contravention framework.

A criminal defence of reasonable steps could also result in a formulation of costly compliance activities that would be an inappropriate and impracticable burden on many employers. Such steps could conceivably include:

- to seek comprehensive written legal or industrial relations advice, including at their own expense, about what to pay employees;
- understand, interpret and apply all relevant provisions of multiple modern awards and enterprise agreements;
- be familiar with and incur the necessary expense of more sophisticated payroll systems;
- engage in externally-provided training for relevant staff and line managers to understand minimum employment conditions contained in modern awards and the NES;
- to engage in the expense of third party audits.

A defence to a criminal offence requiring employers to engage in a raft of potentially expensive and administratively onerous compliance activities in order to pay somebody correctly, is an overreach of criminal sanctions. Compliance could be better resolved by addressing the complexity of the workplace relations framework.

Ai Group will strongly oppose any recklessness based wage offence.

4. Should the wage underpayment offence apply to any additional or different entitlements to those proposed below? If so, which entitlements should be covered by the offence?

The new wage underpayment offence should be limited to underpayments that are remuneration-related under the NES and modern awards. The NES and modern awards form the safety net of minimum employment conditions under the FW Act.

Ai Group opposes the application of criminal offences to contraventions of enterprise agreements, safety net contractual entitlements and transitional instruments.

Enterprise Agreements

Enterprise agreements are not instruments created by the FWC or Parliament but are bargained arrangements between employers and employees. Enterprise agreements are often not drafted by lawyers and in many instances can be ambiguous or unclear in their terms. It is not uncommon for the drafters of an enterprise agreement to intend a meaning that may not be applied to it by a Court.

It would be inappropriate to impose criminal penalties on employers for contravention of an enterprise agreement.

Contraventions of enterprise agreements can of course be made by persons other than employers. Subjecting enterprise agreements to criminal sanctions raises questions as to why only one party to the agreement is subject to criminal penalties and the other is not, even where the second party may knowingly contravene on its of terms. It is unfair that only employers and not others would be subject to criminal penalties for contravening terms of an enterprise agreement.

We also consider that the criminal sanctions applying to enterprise agreements would discourage employers from engaging in dispute resolution procedures contained in those agreements for fear that disputed matters impacting employee pay may be the subject of future criminal proceedings.

Further, the presence of legacy enterprise agreements that may have been inherited or transferred into a business because of business restructuring and changes needs to be considered. The existence and coverage of these enterprise agreements are not always obvious in some businesses, despite those businesses being compliant in other areas of workplace laws.

Ai Group would further oppose contraventions of multi-enterprise agreements being covered by the proposed criminal offence. Like enterprise agreements, multi-employer agreements would not be agreements drafted by the Fair Work Commission or the Parliament but by an unlimited range of persons who may have little or no drafting experience. The manner in which such agreements are drafted are likely to be highly ambiguous as they apply to different employers with different working arrangements. It must also be remembered that an employer may not have ‘agreed’ to be covered by these agreements in the first place.

It is more appropriate for contraventions of enterprise agreements to be pursued either through the relevant dispute resolution procedures contained in the agreement or through the FW Act’s current civil penalty framework.

Safety Net Contractual Entitlements

The inclusion of safety net contractual entitlements in the list of entitlements subject to the proposed criminal penalty is alarming and strongly opposed.

The Consultation Paper seeks to describe safety net contractual entitlements in terms that refer to the definition of safety net contractual entitlement in section 12 of the FW Act, rather those safety net contractual entitlements that may be the subject of civil contravention orders in section 541.

Section 12 defines safety net contractual entitlement as an entitlement under a contract between an employee and an employer that relates to *any* of the subject matters described in the NES or terms that may be included in modern awards. Under this definition, contractual entitlements relating to above-award payments, or other monetary benefits such incentives, bonuses or loadings, could be included in any proposed wage offence.

This is in fact broader than what can be prosecuted under the civil framework as set out in section 541 of the FW Act. Section 541 limits the application by a FWO inspector for orders in relation to a contravention by an employer of a provision or term of the contract that is:

(a) A provision of the NES;
(b) A term of a modern award;
(c) A term of an enterprise agreement;
(d) A term of a workplace determination;
(e) A term of a national minimum wage order;
(f) A term of an equal remuneration order.

The proposed application of a wage criminal offence to a civil employment contract containing above-award monetary benefits, be they discretionary or fixed should not in any way be subject to a criminal penalty.

This presents an egregious overreach of criminal sanctions into civil agreements between parties. It is highly inappropriate. Employment contracts are negotiated agreements between an employer and employee that frequently deal with matters that provide for additional or more beneficial conditions than the terms and provisions of the NES or modern awards. Such provisions reflect the arrangements at the particular business relevant to the particular employee, rather than the application of standard NES or applicable modern award terms. The broad definition of safety net contractual entitlement as set out in section 12 should not be subject to criminal penalties.

Any proposed criminal offence should only apply to the remuneration-related contraventions under modern awards and the NES.

The stated policy intent that these workers be afforded the same protection as workers covered by other fair work instruments is a flawed and blatant miss-use of criminal penalties. The use of criminal penalties to ‘level up’ protections across employees irrespective of risk factors that were examined by the MWT is ill-conceived.

It would result in employment contracts for many employees, including professionals and executives, being subject to criminal penalties for the non-payment by employers of monetary benefits, including any bonus payments, incentive payments or other monetary benefits contained in the contract.

This is a far-cry from the MWT Report whose recommendation was to address labour exploitation for vulnerable migrant workers.

Contractual entitlements should not be covered by a proposed wage offence.

Transitional Instruments

Ai Group also opposes the inclusion of transitional instruments. The laws around whether or not transitional instruments apply are complex and ae matters about which employers frequently need to seek legal advice. Many transitional provisions also contain out-dated provisions that are very difficult to interpret. It is inappropriate for transitional instruments to be covered by a criminal offence.

5. What would be appropriate penalties (including a fine and/or a period of imprisonment) for a knowledge-based wage underpayment offence and a recklessness-based underpayment offence?

The Australian Government should formulate an appropriate penalty framework having regard to its own existing Commonwealth laws that already include criminal penalties for labour exploitation and crimes of slavery.

Ai Group strongly opposes the criminal penalty of imprisonment for wage underpayment offences.

Imprisonment is a disproportionate and excessive penalty for a wage underpayment offence when imprisonment is already recognised by Commonwealth law as appropriate for other more serious crimes involving the non-payment of wages - like slavery and forced labour. A distinction between crimes of slavery and underpayment of wages should be maintained in the criminal framework and reflected in differential penalties.

It is appropriate and proportionate for criminal penalties for the underpayment of wages in the FW Act to be significantly less severe than penalties for crimes of slavery (including forced labour) under the Commonwealth Criminal Code.

The Commonwealth Criminal Code's penalties and framing of offences relating to labour exploitation are therefore highly relevant (as set out below) and show that the framing of an offence based on knowingly underpaying wages (or such other lower threshold such as recklessness), absent more serious factors, such as depriving another person's liberty, attracts a longer imprisonment term.

The table below shows that serious forms of labour exploitation ranging from forced labour, debt bondages and the deceptive recruitment of labour carry maximum terms of imprisonment <u>less than</u> the 10-year term as contained in the *Wage Theft Act 2020 (Vic)* and *Criminal Code 1899 (Qld)*

Act	Offence	Max Penalty	Offence definition
Criminal Code Act 1995 (Cth)	Causing someone to enter or remain in forced labour (s270.6A)	Imprisonment of 9 years Imprisonment of 12 years (aggravated)	***270.6A – Definition of forced labour*** ***forced labour*** is the condition of a person (the ***victim***) who provides labour or services if, because of the use of coercion, threat or deception, a reasonable person in the position of the victim would not consider himself or herself to be free: (a) to cease providing the labour or services; or (b) to leave the place or area where the victim provides the labour or services. (2) Subsection (1) applies whether the coercion, threat or deception is used against the victim or another person. (3) The victim may be in a condition of forced labour whether or not: (a) escape from the condition is practically possible for the victim; or (b) the victim has attempted to escape from the condition.
Criminal Code Act 1995 (Cth)	Conducting a business involving forced labour – aggravated offence	Imprisonment of 9 years Imprisonment of 12 years (aggravated)	
Criminal Code Act 1995 (Cth)	Deceptive recruiting for labour or services (s.270.7)	Imprisonment of 7 years Imprisonment of 9 years (aggravated)	270.7 Deceptive recruitment of labour or services A person (the ***recruiter***) commits an offence if: (a) the recruiter engages in conduct; and (b) the recruiter engages in the conduct with the intention of inducing another person (the ***victim***) to enter

Act	Offence	Max Penalty	Offence definition
			into an engagement to provide labour or services; and (c) the conduct causes the victim to be deceived about: (i) the extent to which the victim will be free to leave the place or area where the victim provides the labour or services; or (ii) the extent to which the victim will be free to cease providing the labour or services; or (iii) the extent to which the victim will be free to leave his or her place of residence; or (iv) if there is or will be a debt owed or claimed to be owed by the victim in connection with the engagement—the quantum, or the existence, of the debt owed or claimed to be owed; or (v) the fact that the engagement will involve exploitation, or the confiscation of the victim's travel or identity documents; or (vi) if the engagement is to involve the provision of sexual services—that fact, or the nature of sexual services to be provided (for example, whether those services will require the victim to have unprotected sex).
Criminal Code Act 1995 (Cth)	Debt bondage (s.270.7C)	Imprisonment of 4 years Imprisonment of 7 years (aggravated)	270.7C A person commits an offence of debt bondage if: (a) the person engages in conduct that causes another person to enter into debt bondage; and (b) the person intends to cause the other person to enter into debt bondage.

Act	Offence	Max Penalty	Offence definition
Wage Theft Act 2020 (Vic)	Dishonest withholding of an entitlement (Section 6)	6000 penalty units for a body corporate Imprisonment of 10 years	Section 6 An employer must not dishonestly— (a) withhold the whole or part of an employee entitlement owed by the employer to an employee; or (b) authorise or permit, expressly or impliedly, another person to withhold the whole or part of an employee entitlement owed by the employer to an employee and that other person does so.
Criminal Code Act 1899 (Qld)	Stealing (section 391)	Imprisonment of 10 years	Section 391 (1)A person who fraudulently takes anything capable of being stolen, or fraudulently converts to the person's own use or to the use of any other person anything capable of being stolen, is said to steal that thing. … (6A) For stealing that is a failure to pay an employee, or another person on behalf of the employee, an amount payable to the employee or other person in relation to the performance of work by the employee— (a) the amount is a thing that is capable of being stolen; and (b) subsection (6) does not apply; and (c) the amount is converted to the person's own use when— (i) the amount becomes, under an Act, industrial instrument or agreement, payable to the employee or to the other person on behalf of the employee; and (ii) the amount is not paid.

The penalties attached to a new criminal offence should be significantly lower and distinct to that of labour exploitation offences. Criminal penalties, contrary to the Queensland and Victorian jurisdiction, should not include terms of imprisonment. Imprisonment should be reserved for the most severe forms of labour exploitation.

Were the Government to align its criminal penalties with the Queensland and Victorian laws it would result in persons convicted of the underpayment of wages facing more severe penalties

(including longer custodial sentences) than persons convicted of the serious crimes of slavery and labour exploitation.

Ai Group opposes a recklessness-based wage underpayment offence. Any penalty should be in line with the maximum civil penalty given that recklessness-based underpayments can be dealt with under the FW Act's civil contravention framework.

6. The department proposes that courts would be empowered to order the higher of the maximum penalty units available or up to three times the amount of the underpayment arising in the particular matter if that amount can be calculated.

Ai Group does not support a penalty formulation calculated by reference to multiples of the underpayment amount. The penalty should be framed by reference to a maximum penalty only, which should be applied at the Court's discretion.

Ai Group does not agree with the premise of this policy that employers take a calculated approach to weighing up the underpayment of wages with the maximum penalties available. It is unlikely to have a significant deterrent effect.

Penalties for criminal matters should consider a broader range of factors, including whether or not the employer still employs workers and whether the employer is able to re-pay workers based on the penalty imposed. This would be relevant if there are civil proceedings that are stayed against the employer under section 553 of the FW Act.

Ai Group's opposition to this approach to penalties would apply to both knowledge-based offences and any recklessness-based offence.

7. Should the department consider an alternative method than the one set out below for "grouping" or "rolling up" charges for wage underpayment (and any record-keeping) offences?

If despite Ai Group's opposition, a new criminal offence is to be introduced into the FW Act, then the adoption of a 'grouping' provision for separate underpayment offences would serve some utility in the administration of criminal charges and proceedings.

It is essential that each incident:

- would separately satisfy the elements of the relevant offence;
- be taken over consecutive pay cycles;
- occur because of the same reason.

8. Is it appropriate to extend the bar to proving ancillary liability of officers of bodies corporate the wage underpayments offence beyond the default provisions in the Commonwealth Criminal Code?

Ai Group does not support the full application of Division 11 of the Commonwealth Criminal Code to proposed wage underpayment offences. Specifically, section 11.2 section 3(b) and its reference to reckless should not apply to wage offences.

Further, Ai Group strongly opposes that officers of bodies corporate may also be held liable for an offence by the body corporate unless they can demonstrate that they exercised due diligence to prevent the offence.

The concept of due diligence to prevent wage underpayment offences in a criminal standard is inappropriate for the complex structure of Australia's workplace relations system. Ai Group refers to its earlier points made in this response.

It would be highly inappropriate and impractical for offices, including directors and members of principal governing bodies to:

- Understand and apply the different sources of workplace regulation as a measure to prevent the offence;
- Be familiar with the terms of relevant provisions of workplace laws and industrial instruments so as to prevent the offence;

Further, the investment in comprehensive payroll systems and extended teams of legal counsel and HR personnel does not necessarily result in compliance with workplace laws. Determining the correct rate of pay for an individual across competing modern award coverage and other applicable industrial instruments is an inherently difficult task arising from the framework itself which demands a high level of interpretation, judgement and expertise.

Ai Group opposes the expansion of any ancillary liability in the Commonwealth Criminal Code, rather Division 11 should be narrowed to the application of proposed underpayment offences by removing section 3(b).

9. Should criminal offences for record-keeping misconduct be introduced to complement a criminal offence for wage underpayment?

Ai Group does not support a separate stand-alone criminal offence for record-keeping misconduct. Record-keeping obligations are already set out comprehensively in the FW Act's current civil contravention framework. Specifically, section 557C requires an employer to disprove a presumption of an underpayment if the relevant records are not made or kept.

It is unnecessary to duplicate a record-keeping obligation as it exists in the civil contravention framework, by creating a new criminal offence.

Ai Group does not agree with the policy intent of treating the failure to keep records as seriously as the underpayment of wages. While there may be a relationship between the two forms of conduct, an underpayment is more objectively serious and imposes more harm on a worker than the failure to make or keep a record.

If the Government is to proceed with a record-keeping offence, it should:

- Not be a stand-alone offence, but relate to an underpayment offence under which a charge has been made;
- Be limited to the deliberate destruction of records with elements of intent and knowledge;
- Not overlap in any way with the current civil contravention provision.

Ai Group does not support the extension of the approach taken in the Victorian *Wage Theft Act 2020* in respect of criminal penalties for record-keeping misconduct offences. The FW Act already provides for robust civil contravention penalties for failing to make and keep appropriate records.

10. How should the serious civil contravention regime be adjusted to align with the wage underpayment and any record-keeping offences?

If the Government proposes to introduce a criminal offence, it should be limited to the fault elements of knowledge and intent, rather than recklessness.

A criminal offence based on knowledge and intent would not necessitate a change to the FW Act's serious contravention provision to distinguish it from the criminal offence.

The FW Act's serious civil contravention regime at ss.557A, B and C frame conduct around a person's knowledge and a systematic pattern of conduct.

These provisions should remain in the civil enforcement framework that prioritises the recovering of unpaid wages for workers.

As stated earlier, Ai Group opposes a criminal offence based on recklessness.

If the Government decides to frame wage underpayments around recklessness, then this should be pursued though the civil contravention framework.

If, despite Ai Group's position the Government elects to adjust the serious contravention provisions to include the concept of recklessness, it is essential the current serious contravention provisions retain the concept of *systematic pattern of conduct* as set out in sections 557A(1)(b) and 557A(2). The systematic pattern of conduct threshold is an important distinction between a serious contravention and a contravention of a workplace law.

11. Which of the following options would most effectively implement recommendation 5 of the Migrant Workers Taskforce?

The Consultation Paper states that the new maximum penalty would be increased by 5 times such that:

- For an individual the new maximum penalty will be 300 penalty units ($82,500) (serious contravention: 3000 penalty units ($825,000));
- For a body corporate the new maximum penalty will be 1500 penalty units ($412,500) (serious contravention: 15,000 penalty units ($4,125,000).

In addition, it is proposed that the new maximum penalty for contravening section 716(5) would be increased by 10 times to ensure parity with other identified provisions. Section 716(5) deals with compliance notices issued by the FWO.

Ai Group opposes the proposed increase in civil penalties.

If the motivation for introducing a new criminal offence for the underpayment of wages is stronger deterrence (as cited by the Consultation Paper) then it is unnecessary to also increase civil penalties for relating to underpayments. Any deterrence resulting from new criminal offences should at least have opportunity to take effect before consideration is given to increasing civil penalties.

Civil contravention penalties have already been significantly increased for employers. No further increases are necessary. From 1 January 2023 and following the 2022 October Budget the Australian Government significantly increased the value of a penalty unit from $225 to $275, thereby significantly increasing the dollar amount of the FW Act's civil contravention penalties from $66,000 to $82,500 for a body corporate and from $666,000 to $825,000 for a serious contravention. The recent increase in the value of the penalty unit (by just under a significant 25%) should be a reason not to increase the number of penalty units in the FW Act for civil contraventions.

In addition, the recent amendments to the FW Act, through the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth), increased maximum penalties for underpayments by 10 times, and for breaches of the pay record requirements, by 20 times.

A further increase in penalties is not justified in order to create a meaningful deterrent.

We also observe that many corporations have self-disclosed underpayments to the FWO over the past three years after identifying payroll errors, and back-paying the relevant amounts to employees. As acknowledged in the FWO's 2018-19 annual report (published in September 2019), this development suggests that '*compliance and enforcement activities are creating the desired effect*'.[3] Since these comments in September 2019, this trend has continued and accelerated, as can

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be seen from the FWO's 2019/20 annual report:

> *'Since July 2019, we have seen a significant increase in the number of large corporate entities self-reporting non-compliance with their workplace obligations.'*[4]

If despite Ai Group's objection, civil penalties are increased, then it is essential that increased penalties are limited to underpayment contraventions as identified in Option B of the Consultation Paper.

Option A would create an unreasonable level of cost risk for businesses engaging in procedural obligations. It is unreasonable and unfair for procedural obligations to be afforded the same seriousness in terms of penalty maximums as an underpayment contravention.

Ai Group opposes the proposed increase in civil penalties.

12. The department proposes that for all civil contraventions, courts would be empowered to order (at the election of the applicant) either the maximum penalty available or three times the amount of the underpayment arising in the particular matter if that amount can be calculated.

(a) Would it be appropriate to include such a penalty for all civil contraventions?

Ai Group opposes both an increase in civil remedy penalties and a formulation of three times (or such other amount) the amount of the underpayment.

Ai Group does not support a formulation of a penalty calculated by reference to multiples of the underpayment amount. The penalty should be framed by a maximum penalty only and applied at the Court's discretion.

Ai Group does not agree with the premise of this policy that employers take a calculated approach to weighing up the underpayment of wages with the maximum penalties available. It is unlikely to have a significant deterrent effect.

The framing of civil penalties based on a 'benefit obtained' approach as seen in competition law is inappropriate for underpayment contraventions, many of which are inadvertent, unintentional, or not committed knowingly.

Underpayment contraventions are different in character to contraventions in competition, consumer and corporations laws. For instance, a large number of separate contraventions may arise where employers mistakenly apply the incorrect modern award, or genuinely consider certain employed occupations to be award-free.

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Under competition law, where a company has obtained a commercial benefit from unfair and unlawful competition, it is logical to impose a penalty that is based on the extent of the benefit obtained because the company will not be typically required to compensate those impacted. However, this is not a logical approach with wage underpayments because the employer will have to back-pay the employees and therefore will not typically receive any benefit from the underpayments.

If the Government is to proceed with a 'benefit obtained' approach to penalties, despite Ai Group's strong opposition, this framework should be confined to cases where employers have knowingly contravened workplace laws, as found in the current serious contravention provisions of the FW Act.

Also, it is important that the benefit reflects the actual benefit obtained by an employer. No benefit is obtained by an employer if the employer repays any unpaid wages to affected employees. Such an approach would be much fairer and would encourage employers to backpay any amounts owing at an early stage, which is of course in employees' interests.

(b) Should this penalty option be limited to certain types of civil remedy provisions?

Should the Government proceed with a 'benefits obtained' approach to civil contraventions, it is essential it be limited to remuneration-related underpayments that result from a serious contravention under as currently defined in the FW Act.

13. Should the department consider adopting a different test or additional features for the defense to sham contracting?

The Consultation Paper proposes to amend the defence to a claim of sham contracting in subsection 357(2) of the FW Act to provide that an employer will no be liable for a sham arrangement, if when the employer misrepresented the relationship as a contract for services rather than a contract for employment, the employer ***reasonably believed*** that the contract was for services and not for employment.

Currently section 357(2) enables an employer to defend an allegation of sham contracting if the employer proves, that when the representation was made, the employer:

(a) Did not know; and
(b) Was not reckless as to whether;

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

Ai Group does not support the proposed amendment to the defense; it appears to potentially significantly raise the threshold that must be met for the availability of the defense.

It is unclear whether the phrase *reasonably believed* would replace section 357(2) in its entirety and how it would be proved that the person reasonably believed the contract to be a contract for services.

It is entirely unclear what standard of belief would be required adoption of the word "reasonably". We are concerned that this might require, for example, that parties are put to the expense of obtaining legal advice to confirm such matters. The Government should provide much further details around any proposed change in this area and should consult industry in relation to such matters before rushing ahead with any change as contemplated in the Consultation Paper.

Any changes in this area should also take into account any other legislative amendments that are being implemented. For example, if the Government implements a new jurisdiction that brings some cohorts of contractors within the scope of mandatory minimum standards set by the FWC, a defense to a claim of sham contracting should incuse compliance by the party with such minimum standards.

ABOUT THE AUSTRALIAN INDUSTRY GROUP

The Australian Industry Group (Ai Group®) is a peak national employer organisation representing traditional, innovative and emerging industry sectors. We have been acting on behalf of businesses across Australia for 150 years.

Ai Group and partner organisations represent the interests of more than 60,000 businesses employing more than 1 million staff. Our membership includes businesses of all sizes, from large international companies operating in Australia and iconic Australian brands to family-run SMEs. Our members operate across a wide cross-section of the Australian economy and are linked to the broader economy through national and international supply chains.

Our purpose is to create a better Australia by empowering industry success. We offer our membership strong advocacy and an effective voice at all levels of government underpinned by our respected position of policy leadership and political non-partisanship.

With more than 250 staff and networks of relationships that extend beyond borders (domestic and international) we have the resources and the expertise to meet the changing needs of our membership. We provide the practical information, advice and assistance you need to run your business. Our deep experience of industrial relations and workplace law positions Ai Group as Australia's leading industrial advocate.

We *listen* and we *support* our members in facing their challenges by remaining at the cutting edge of policy debate and legislative change. We *provide solution-driven* advice to address business opportunities and risks.

OFFICE ADDRESSES

NEW SOUTH WALES

Sydney
51 Walker Street
North Sydney NSW 2060

Western Sydney
Level 2, 100 George Street
Parramatta NSW 2150

Albury Wodonga
560 David Street
Albury NSW 2640

Hunter
Suite 1, "Nautilos" 265
Wharf Road
Newcastle NSW 2300

VICTORIA

Melbourne
Level 5 / 441 St Kilda Road
Melbourne VIC 3004

Bendigo
87 Wil Street
Bendigo VIC 3550

QUEENSLAND

Brisbane
202 Boundary Street Spring Hill
QLD 4000

ACT

Canberra
Ground Floor,
42 Macquarie Street
Barton ACT 2600

SOUTH AUSTRALIA

Adelaide
Level 1 / 45 Greenhill Road
Wayville SA 5034

WESTERN AUSTRALIA

South Perth
Suite 6, Level 3 South Shore Centre 85
South Perth Esplanade
South Perth WA 6151

www.aigroup.com.au