Australian Government

Department of Employment and Workplace Relations

Criminalising wage underpayments and reforming civil penalties in the *Fair Work Act 2009*

Consultation paper

April 2023

Contents

Overview

The underpayment and non-payment of wages (together referred to as *underpayment* in this paper) continues to feature across a range of Australian workplaces, from small business to large corporations. Wage underpayment leaves workers out of pocket and forces those businesses that follow the law to compete with businesses that have an unfair advantage.

The Australian Government has made an election commitment to implement the recommendations of the Migrant Workers' Taskforce. The Taskforce identified that despite measures taken by the Fair Work Ombudsman and the Government at the time, underpayments were occurring with a severity and magnitude that suggested maximum penalty levels in the *Fair Work Act 2009* (Fair Work Act) were not sufficient to adequately deter wrongdoing and drive cultural changes amongst employers. In 2021-22, the Fair Work Ombudsman recovered over half a billion dollars' worth of underpayments for nearly 385,000 workers, indicating that non-compliance is widespread and requires stronger deterrence through stronger penalties.

This paper outlines the Government's proposed reforms to strengthen the compliance and enforcement framework in the Fair Work Act and ensure that the framework contains a graduated scale of penalties and enforcement tools which address the full spectrum of non-compliance with workplace obligations.

This paper proposes options for a criminal offence for wage underpayment and proposes methods for increasing the maximum civil penalties for wage exploitation-related provisions of the Fair Work Act.

These changes will implement recommendations 5 and 6 of the Migrant Workers' Taskforce.

This paper also proposes reforms to the sham arrangements provisions in the Fair Work Act. Sham arrangements often result in underpayments of entitlements that attach to employment relationships but not contracting relationships. Amending the defence to sham contracting and increasing penalties for sham arrangements ensures that the provisions protect workers from exploitation and the defence to sham contracting operates fairly for workers and businesses.

How to provide your feedback

The department will use your views to help develop the final measures for introduction in legislation in the second half of this year.

Please provide your written comments by providing a written submission to WRSubmissions@dewr.gov.au. All submissions will be treated as confidential and will not be published. You can choose to remain anonymous.

Closing date: Submissions close at 11:00pm AEST on Friday 12 May 2023.

Please keep informed of progress of these reforms at www.dewr.gov.au, including opportunities to be involved in later stages of consultation.

Policies

Criminalising wage underpayments

Wage underpayment offence

Question 1:

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

Option 1: Knowledge-based wage underpayment offence only

The offence would cover employers who **know** they are not paying an employee the amount to which that employee is entitled.

This offence is proposed to cover the most serious and egregious instances of wage underpayment – for example, deliberate underpayment of wages or entitlements.

Option 2: Recklessness-based wage underpayment offence only

The offence would cover employers who are **aware of a substantial risk** that they are not paying an employee the amount to which that employee is entitled and proceed even though it is **unjustifiable to take that risk**.

This offence is proposed to apply to employers who may not deliberately underpay their workers, but whose appreciation of the risk that an amount is incorrect is such that it is unjustifiable for them to proceed with paying that amount.

Under the Commonwealth Criminal Code, deliberate conduct could also be prosecuted under this offence. The fault element to be proved would remain at recklessness, and the conduct would be punishable by the penalty for reckless conduct.

Option 3: Tiered approach

Two offences would be inserted into the Fair Work Act: a **knowledge-based wage underpayment offence** and a **recklessness-based wage underpayment offence**. There could be different penalties applicable to each offence, reflecting a more graduated approach to criminal culpability.

All offence options would cover instances where an employer is required to pay an amount to a third party on behalf of an employee, for example, where an employer is required to pay superannuation contributions to a superannuation fund on behalf of an employee.

All offence options are proposed to apply to officers of bodies corporate (including directors) if they are covered by the ancillary liability provisions of the Commonwealth Criminal Code (see ***Liability of officers of bodies corporate*** below).

All offence options would also cover:

- cash-back arrangements and
- deductions which benefit the employer directly or indirectly and are unreasonable in the circumstances.

Example:

Amanda's Greengrocer Pty Ltd employs 100 workers across 6 locations. The business pays its staff between $12 and $15 per hour. The owner and CEO are aware that this is below the applicable Award rates for these employees but believe it is the 'market rate'.

A number of the underpaid employees approach the directors, asking to be paid their Award rate. The response from the directors and owners is that paying the award will eat into the company's profits.

In this case, the **knowledge-based offence** could apply to the company's conduct. The owner and senior managers may also be liable for the offence as accessories.

Example:

Speedy Printing Pty Ltd is a commercial printing business that employs 40 workers across 5 stores. Speedy Printing pays all of its employees a flat rate of $20 per hour, including on Saturdays. Speedy Printing Pty Ltd is a member of, and receives fortnightly newsletters from, the Printing Business Consortium. Speedy Printing has received newsletters from the Printing Business Consortium with updates about pay entitlements for employees in the industry, including about changes to penalty rates.

The director of Speedy Printing reads the subject lines of these newsletters but deletes them without checking the entitlements described in the articles. The director of Speedy Printing also does not check the applicable award, deciding that $20 is a fair rate even though she is aware of a substantial risk that it is not the correct rate of pay. This continues for a further 7 months, with underpayments totalling approximately $110,000.

In this case, the **recklessness-based offence** could apply to the company's conduct. The director may also be liable for the offence as an accessory.

State and territory offences

Question 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?

The department is aware that some states and territories have introduced, or are considering introducing, existing wage underpayment offences. Provisions currently exist in Victoria and Queensland.

Victoria

The *Wage Theft Act 2020* (Vic) (Wage Theft Act) contains criminal offences for the dishonest withholding of employee entitlements, and the falsification of or failure to keep employee entitlement records to gain a financial advantage (or prevent the exposure of such an advantage).[1]

[1] *Wage Theft Act 2020* (Vic) ss 6(1), 7(1) and 8(1).

The offences in the Wage Theft Act apply to employers and officers of employers who directly engage in misconduct, or who authorise or permit, expressly or impliedly, another person to engage in misconduct.[2] A defence is available for employers or officers who establish that they had exercised due diligence to comply with the law.[3]

The Wage Theft Act provides that an employer or officer is *dishonest* if they are dishonest according to the standards of ordinary people.[4] The Explanatory Memorandum to the Wage Theft Bill 2020 notes this is an "objective assessment" which is "intended that the assessment of dishonesty go beyond intentionally dishonest conduct and for recklessness to be captured as part of a reasonable person's understanding of dishonesty".[5]

Employee entitlements are amounts payable by an employer to or in respect of an employee, including wages, allowances, leave, superannuation in accordance with relevant laws, contracts or agreements.[6]

All offences are punishable by the same penalty of 1200 penalty units for an individual, 6000 penalty units for a body corporate, or a maximum of 10 years' imprisonment for an individual.[7]

Queensland

The definition of stealing at section 391 of Schedule 1 of the *Criminal Code Act 1899* (Qld) (Queensland Criminal Code) includes 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.[8]

The Queensland offence is intended to apply to intentional behaviour leading to under- or non-payment of entitlements.[9]

The Explanatory Note to the Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020 provides that an amount payable to an employee can include unpaid wages, unreasonable deductions, unpaid superannuation, and underpayment through misclassification of a worker.[10]

Stealing by employers is punishable by a maximum of 10 years' imprisonment.[11]

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[2] *Wage Theft Act 2020* (Vic) ss 6(1) and (7), 7(1) and (2), 8(1) and (2).
[3] *Wage Theft Act 2020* (Vic) ss 6(5) and (10), 7(5), 8(5).
[4] *Wage Theft Act 2020* (Vic) s 6(11), 7(7), 8(7).
[5] Explanatory Memorandum to the Wage Theft Bill 2020 (Vic), p 8 (https://content.legislation.vic.gov.au/sites/default/files/bills/591084exi1.pdf)
[6] *Wage Theft Act 2020* (Vic) s 3(1).
[7] *Wage Theft Act 2020* (Vic) ss 6(1), 7(1) and 8(1); Explanatory Memorandum to the Wage Theft Bill 2020 (Vic), p 6.
[8] Schedule 1 of the *Criminal Code Act 1899* (Qld) (Queensland Criminal Code) s 391(6A).
[9] https://www.oir.qld.gov.au/industrial-relations/wage-theft
[10] Explanatory Note to the Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020 (Qld) p 5 (https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2019-087)
[11] Queensland Criminal Code, s 398 item 16; Explanatory Note to the Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020 (Qld) p 6; https://www.oir.qld.gov.au/industrial-relations/wage-theft

Offence-specific defences

Question 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?

Knowledge-based wage underpayment offence

The department proposes no offence-specific defence for a **knowledge-based offence**. In general, a defence is not required for serious offences involving intent or knowledge, because the bar for proving guilt is high and automatically excludes less serious, inadvertent conduct from its scope.

Recklessness-based wage underpayment offence

The department is seeking stakeholder views on whether a due diligence defence should be included.

A **recklessness-based offence** would apply to a broader range of conduct, including underpayments which are not deliberate but are the result of reckless conduct. It may be necessary for a defence to be available to employers who took reasonable steps to mitigate the substantial risk of underpayment.

Types of underpayments covered by the offence

Question 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 wage underpayment offence is proposed to apply to entitlements arising under one of the following:

- An applicable modern award
- An applicable enterprise agreement
- Safety net contractual entitlements
- The Fair Work Act, including the National Employment Standards
- Transitional instruments, where they apply.

Superannuation will be included if it is an entitlement under one of the above instruments, noting the Government has committed to include superannuation in the National Employment Standards.

Underpayment is not limited to wages for time worked. It often extends to other monetary employee entitlements such as leave and superannuation. Covering a broad range of entitlements ensures that the offence adequately captures the types of misconduct seen in workplaces.

Safety net contractual entitlements are terms of a contract that relate to matters either in the National Employment Standards or that can be included in a modern award. Typically, they add entitlements to what would otherwise apply under the applicable National Employment Standard or modern award. The policy intention is that these workers are afforded the same protection as workers covered by other fair work instruments.

Penalties

Penalty amount

Question 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 wage underpayment offence**?

The main objective of introducing criminal penalties in relation to wage underpayments is to punish those who either do not pay or who underpay workers, and to deter others from doing so. These penalties will further extend the existing compliance and enforcement framework.

The intent is for the maximum penalty for the wage underpayment offence to be comparable to maximum penalties for similar offences in other Commonwealth laws, such as the *Corporations Act 2001* or the *Competition and Consumer Act 2010*.

Penalties calculated with reference to the amount of the underpayment

Question 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.

Would it be appropriate to include such a penalty for **knowledge-based** and **recklessness-based** offence options?

High maximum penalties for the offence will significantly increase the cost of non-compliance with workplace obligations, further deterring those employers who consider current penalties low enough to be a risk worth taking. However, certain employers may regard penalties as a 'cost of doing business' if their turnover far exceeds the maximum available in legislation.

Empowering the court to calculate a penalty by reference to the monetary value of entitlements that have been underpaid (or not paid) ensures that adequately deterrent penalties can be applied in cases where the amount of the underpayment is much higher than the maximum penalty available.

This method of calculation is proposed to only be available where the court can make a finding as to the exact value of the underpayment being alleged when considering the penalty orders to be made. Courts will have regard to the circumstances of the offending and will continue to balance the need for deterrence with the need to ensure penalties are not oppressive.

Election to charge multiple offences as a course of conduct

Question 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?

The department proposes to introduce offence-specific course of conduct charging rules into the Fair Work Act. These rules would apply to the wage underpayment and any record-keeping offences introduced (see below for further detail). The rules would provide that a series of incidents involving underpayment, which could be taken as separate offences and charged separately, **may** be treated as a 'course of conduct' and charged as a single offence if all of the below apply:

- each incident would separately satisfy the elements of the relevant offence
- the incidents have taken place on more than one occasion over a certain period of time, and
- the incidents, when taken together, amount to a course of conduct having regard to the time and place when the incidents happened and having regard to the reason for the incidents.

The policy intent is to provide a clear and fair framework for how multiple offences of the same kind will be charged and prosecuted.

Non-compliance may involve many individual instances, each of which could be capable of being charged as a separate offence. Under the course of conduct rule, this same situation may result in a single charge being laid, with a penalty reflecting the serious and systemic nature of the course of conduct.

Liability of bodies corporate

Part 2.5 of the Commonwealth Criminal Code will apply to the proposed wage underpayment and record-keeping offences.

The physical and fault elements of the wage underpayment offence and any record keeping offences may be attributed to a body corporate from its employees, agents or officers acting within the actual or apparent scope of their employment or authority.

The fault elements of the offences will be attributed to a body corporate where it expressly, tacitly or impliedly authorised or permitted the commission of the offences.

Liability of officers of bodies corporate

Question 8:

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

Officers of bodies corporate (including directors) will be liable for a wage underpayment or any record-keeping offences if caught by the ancillary liability provisions in Division 11 of the Commonwealth Criminal Code.

The policy intent is to ensure there is a clear pathway to establishing liability of officers of bodies corporate for the wage underpayment offence, where there is sufficient culpability. The general Commonwealth criminal policy means that standard provisions for ancillary liability in Division 11 of the Commonwealth Criminal Code should apply in the present context, unless there is good reason to provide otherwise.

The department is open to reviewing options to extend the bar to proving ancillary liability of officers of bodies corporate for the wage underpayments offence, for example to provide that officers of bodies corporate may also be held liable for an offence by the body corporate unless they can demonstrate they exercised due diligence to prevent the offence.

Criminalising record-keeping misconduct

Record-keeping offences

Question 9:

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

Underpayment is often accompanied by, or facilitated by, a failure to keep accurate records or give accurate pay slips. Underpayments are often only able to be identified and addressed through compliance action if adequate records are kept.

The Fair Work Act currently has civil remedy provisions which:

- require employers to make, keep and give records and pay slips which are compliant with the requirements in the *Fair Work Regulations 2009*, and
- prohibit the making, keeping or giving of records or payslips which the employer knows to be false or misleading.

Criminalising record-keeping misconduct under the Fair Work Act would ensure that misconduct which directly enables and conceals underpayment is treated as seriously as the underpayment itself. It will also allow charges to be laid for criminal record-keeping misconduct alongside criminal wage underpayment if a case involves both types of non-compliance. The alleged offences could then be heard together.

The department considers that the structure and coverage of any record-keeping offences would need to account for:

- the relationship between the wage underpayment offence and the record-keeping misconduct (for example, **deliberate** underpayment is often facilitated by a **deliberate** failure to keep records or the deliberate falsification of records), and
- the existing civil remedy provisions in sections 535 and 536 of the Fair Work Act, which are frequently and effectively used to address misconduct.

Penalties

The policy intent is that record-keeping misconduct that facilitates criminal underpayment should be treated as seriously as the underpayment itself.

Penalties for underpayment and record-keeping misconduct should be comparable to ensure it is not 'cost effective' for employers to fail to keep records entirely in order to obscure evidence of underpayments.

State and territory offences

As noted with respect to ***Criminalising wage underpayments***, the Victorian Wage Theft Act contains criminal offences for the falsification of, or failure to keep, employee entitlement records to dishonestly gain a financial advantage (or prevent the exposure of such an advantage).

Changes to the serious civil contraventions regime

Ensuring the serious civil contraventions regime sits logically alongside new criminal offences

Question 10:

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

A core principle underpinning the proposed reforms is that the Fair Work Act should offer a sensibly graduated scale of penalties and enforcement tools which responsively address the full spectrum of non-compliance with workplace obligations.

The department is considering how (and whether) the existing serious civil contraventions regime under section 557A of the Fair Work Act will align with and complement any new offences. The policy intention is for the proposed offences to capture conduct which is more culpable than the most serious conduct covered by the civil framework.

Knowledge-based wage underpayment offence only

If the wage underpayment offence is knowledge-based, the department proposes to replace the current standard of **'knowing'** and systematic conduct with '**reckless'** and systematic conduct such that it applies to a broader range of misconduct and has less direct overlap with the criminal offence.

A person's contravention of an eligible civil remedy provision would be a serious contravention under section 557A(1) of the Fair Work Act if the person **recklessly** contravened the provision and the person's conduct was part of a systematic pattern of conduct.

Recklessness-based wage underpayment offence only

If the wage underpayment offence is recklessness-based, the serious civil contraventions regime will either need to be amended to a significantly lower threshold, or potentially removed entirely.

Tiered approach

Under a tiered approach, a **recklessness-based offence** will be the minimum threshold for criminal penalties under the Fair Work Act. Any adjustments to the serious civil contraventions regime will need to reflect this threshold.

There will be **no change** to the list of civil remedy provisions which are eligible to be treated as serious civil contraventions.

Increasing maximum civil penalties

Question 11:

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

The ongoing prevalence of underpayment demonstrates that current civil penalties are not effectively deterring non-compliance with workplace obligations.

Option A:

Maximum penalties for the following civil remedy provisions would be increased:

- 44(1) (Contravening a provision of the National Employment Standards)
- 45 (Contravening a term of a modern award)
- 50 (Contravening a term of an enterprise agreement)
- 280 (Contravening a term of a workplace determination)
- 293 (Contravening a national minimum wage order)
- 305 (Contravening an equal remuneration order)
- 323(1) and (3) (Method and frequency of payment)
- 325(1) and (1A) (Unreasonable requirements for an employee to spend or pay amount)
- 328(1), (2) and (3) (Compliance with a guarantee of annual earnings)
- 357(1) (Misrepresenting employment as independent contracting arrangement)
- 358 (Dismissing to engage as independent contractor)
- 359 (Misrepresentation to engage as independent contractor)
- 535(1), (2) and (4) (Employer obligations in relation to employee records)
- 536(1), (2) and (3) (Employer obligations in relation to pay slips)
- 712(3) (Failure to comply with a notice to produce)
- 716(5) (Failure to comply with a compliance notice)*
- 718A(1) (Providing false or misleading information or documents to the FWO)
- 745(1) (Contravening extended parental leave provisions)
- 760 (Contravening extended notice of termination provisions)
- 757BA (Contravening extended paid family and domestic violence leave provisions)

For each of the above provisions (with the exception of subsection 716(5)*), the maximum penalty specified in column 4 of the table at subsection 539(2) of the Fair Work Act would be increased by **5 times.**

- 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))

*The maximum penalty for contravening subsection 716(5) would be increased by **10 times** to ensure it is **equal** to the new maximum penalty for the other identified provisions (300 penalty units for an individual, 1500 for a body corporate).

These provisions have been identified as addressing misconduct which either involves underpayment of entitlements (for example, contraventions of sections 45 or 323 which result in a pecuniary penalty often involve underpayment) or is instrumental to underpayment of entitlements (for example, underpayments are often connected to sham arrangements or a failure to keep records). This approach ensures that misconduct which directly enables, or disguises, an underpayment is able to be treated as seriously as the underpayment itself.

Option A is intended to balance enhancing the deterrent impact of maximum penalties with preserving clarity for applicants, respondents and the court when calculating the maximum applicable penalty in each case. This option would have the effect of increasing maximum penalties available for contraventions of the listed civil remedy provisions that do not involve underpayment, in the event that they are litigated.

Option B:
A new provision would be inserted into the Fair Work Act which will increase the maximum penalty available for a contravention of any civil remedy provision that **involves underpayment**. The intention is that the exact quantum of the underpayment would not need to be proved, only that an underpayment occurred.

If a contravention **involves underpayment**, the maximum penalty available would be **5 times** the maximum penalty amount specified in column 4 of the table at subsection 539(2) of the Fair Work Act.

Option B ensures a consistent and comprehensive approach to penalising and deterring underpayments by making higher penalties available if there has been an underpayment, regardless of the specific contravention being alleged in that particular case.

This option would add an extra step for applicants and courts when determining the applicable maximum penalty in a given case, including requiring parties to adduce evidence during litigation to assist the court in determining whether the higher penalty applies.

Option B also would not increase penalties in cases where an underpayment may have occurred, but the misconduct in question resulted in those underpayments being concealed and unable to be proved, for example record-keeping misconduct or failures to comply with notices to produce.

Example:

Scott is the owner of the Island Bar and Restaurant and employs his staff under the Hospitality Industry (General) Award 2020.

Scott decides to change the roster for his four part-time employees such that they are alternating day and night shifts. Scott does not consult with his employees about the change before making it. The employees work the new shifts and Scott pays them correctly for their hours worked.

Scott may have contravened section 45 of the Fair Work Act by failing to comply with the consultation clauses in the Award. Under **Option A**, the maximum penalty would be increased to 300 penalty units (in the event that this is litigated). Under **Option B**, this contravention did not involve an underpayment, and as such the maximum penalty would be 60 penalty units for each contravention.

If Scott paid his four part-time employees a flat rate of $20 an hour, he may have contravened section 45 of the Fair Work Act by failing to pay his employees the correct hourly rate in breach of the Award. This contravention *did* involve an underpayment, and as such the maximum penalty would be increased to 300 penalty units for each contravention under **both options**.

Penalties calculated with reference to amount of the underpayment

Question 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.

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

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

As with the new criminal offences, empowering the court to use the amount of the underpayment to calculate a penalty will ensure that penalties can operate as an appropriate deterrent against non-compliance.

In certain circumstances, a penalty calculated with reference to the amount of the underpayment by the employer as a result of the contravention may also better reflect the systemic nature of the misconduct. A benefit may have been obtained by the employer as a result of the misconduct being sustained over a period of time or relating to a high number of affected employees.

Sham arrangements

Reforming the defence to sham contracting

Question 13:

The department proposes to amend the defence to a claim of sham contracting in subsection 357(2) of the Fair Work Act to provide that an employer will not 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.

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

Several independent reports (Black Economy Taskforce 2017 Final Report, Productivity Commission Workplace Relations Framework: Inquiry Report Volume 2 No 76 and the Post-Implementation Review of the Fair Work Legislation) have recommended amendments to the defence; finding that the current defence relies on an ambiguous test of 'recklessness' and is not effective at deterring sham contracting.

Amending the defence would ensure that a court can assess an employer's behaviour in an instance of alleged sham contracting according to what the employer reasonably believed, rather than assessing whether an employer acted recklessly, which involves a more subjective test.

The department acknowledges that different employers have access to different resources and experience when determining whether a person is an employee or a contractor, and what is reasonable for one employer to believe may not be reasonable for another. This would be a matter for the court to determine on the evidence available when assessing whether an employer's belief was reasonable.

The amendments to the defence will not change existing laws about what does or does not qualify as a sham contract under the Fair Work Act. The reforms also will not change the existing rules about when a worker should be classified as an employee or a contractor.