HOUSING INDUSTRY ASSOCIATION

Submission to the
Australian Government Attorney-General's Department

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

25 October 2019

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contents

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ABOUT THE HOUSING INDUSTRY ASSOCIATION

The Housing Industry Association (HIA) is Australia's only national industry association representing the interests of the residential building industry, including new home builders, renovators, trade contractors, land developers, related building professionals, and suppliers and manufacturers of building products.

As the voice of the residential building industry, HIA represents a membership of 60,000 across Australia. HIA members are involved in land development, detached home building, home renovations, low & medium-density housing, high-rise apartment buildings and building product manufacturing.

HIA members comprise a diverse mix of companies including residential volume builders, small to medium builders and renovators, residential developers, trade contractors, building product manufacturers and suppliers and allied building professionals that support the industry.

HIA members construct over 85 per cent of the nation's new building stock.

The residential building industry is one of Australia's most dynamic, innovative and efficient service industries and is a key driver of the Australian economy. The residential building industry has a wide reach into manufacturing, supply, and retail sectors.

Contributing over $100 billion per annum and accounting for 5.8 per cent of Gross Domestic Product, the residential building industry employs over one million people, representing tens of thousands of small businesses and over 200,000 sub-contractors reliant on the industry for their livelihood.

HIA exists to service the businesses it represents, lobby for the best possible business environment for the building industry and to encourage a responsible and quality driven, affordable residential building development industry. HIA's mission is to:

> *"promote policies and provide services which enhance our members' business practices, products and profitability, consistent with the highest standards of professional and commercial conduct."*

HIA develops and advocates policy on behalf of members to further advance new home building and renovating, enabling members to provide affordable and appropriate housing to the growing Australian population. New policy is generated through a grassroots process that starts with local and regional committees before progressing to the National Policy Congress by which time it has passed through almost 1,000 sets of hands.

Policy development is supported by an ongoing process of collecting and analysing data, forecasting, and providing industry data and insights for members, the general public and on a contract basis.

The Association operates offices in 22 centres around the nation providing a wide range of advocacy, business support services and products for members, including legal, technical, planning, workplace health and safety and business compliance advice, along with training services, contracts and stationary, industry awards for excellence, and member only discounts on goods and services.

1. INTRODUCTION

On 19 September 2019, the Australian Government Attorney-General's Department released a Discussion Paper '*Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance'* (**Discussion Paper**), seeking input about the operation of the *Fair Work Act 2009* (Cth) (**FW Act**) penalty framework.

HIA takes this opportunity to provide submissions in response to the Discussion Paper.

The Discussion Paper highlights the Governments view that it is *"unacceptable that there is a persistence of underpayment and exploitation behaviours by a small number of employers and consider there to now be a strong case the current penalty, compliance and enforcement framework for breaches of the Fair Work Act 2009 (Fair Work Act), established over a decade ago now, needs to be improved*."[1]

HIA does not support employers or businesses deliberately avoiding their obligations and intentionally failing to pay employee entitlements, however HIA disagrees that the current penalty, compliance and enforcement framework needs to be improved.

In responding to the Discussion Paper there are three key matters HIA would highlight:

1. Criminalisation of industrial matters is not an appropriate regulatory response

Criminalising matters of an industrial nature is inappropriate. Circumstances in which an employer fails to provide their employees with the full wage or salary to which they are entitled is an underpayment. Further, the use of the term 'wage theft' seeks to inappropriately attach criminal intent to an employment related matter. HIA opposes such an approach.

2. The existing framework provides for an appropriate mechanism of response

The notion that the current penalty, compliance and enforcement frameworks need to be improved is flawed.

The current consequences for a failure to comply workplace relations obligations are significant. Failure to pay employees wages and entitlements correctly can result in a penalty of up to $12,600 per contravention for an individual, and up to $63,000 per contravention for a company. In addition, serious contraventions of prescribed workplace laws attract higher penalties of up to $126,000 per individual, and up to $630,000 per corporation.[2]

Further the activities of the Fair Work Ombudsman (**FWO**) in response to a number of high profile incidents of breaches of workplace laws tend to demonstrate the adequacy of the current regime.

HIA is concerned that currently, there appears to be a trend towards the expansion of penalties in response to a perceived problem, rather than conducting an in depth assessment of the current regulatory frameworks. There is insufficient evidence, and lack of research and data available to support the need for further regulatory change. There is also a failure to assess and consider the impact that further changes may have.

The effect of the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (**Protecting Vulnerable Workers Act**), is yet to be fully realised. Only two years ago, these changes saw a tenfold increase in FW Act civil penalties, and an increase in the powers of the FWO.

[1] Discussion Paper, pg 2
[2] https://www.fairwork.gov.au/about-us/our-role/enforcing-the-legislation/litigation

Further, the 2019-20 Federal Budget, has allocated $9.2 million to the FWO to establish a sham contracting unit to *"educate employers about it, focus on problem areas and industries and provide assistance to workers affected by it."*[3] HIA welcomes the use of further educative practices to assist in ensuring compliance as compared to the alternative of further regulation.

3. Complexities of the workplace relations framework contribute to incidences of non-compliance with workplace laws

The current complexity of the workplace relations framework, including, for example, the difficulty in determining rates of pay is directly relevant to the incidence of non-compliance with workplace laws. In HIA's experience employers are attempting to comply, however in doing so are navigating through a myriad of complex regulatory instruments that includes legislation, regulations and modern awards.

2. GENERAL COMMENTS

There appears to be a perception that there is currently an 'underpayment crisis' and widespread 'wage theft', which requires an immediate legislative response.

As noted within the Discussion Paper, 'wage theft' has been widely used as an umbrella term to describe all kinds of underpayment. In HIA's view 'wage theft' is a term of art, the adoption of which seeks to inappropriately criminalise the underpayment of wages. HIA rejects its use within an industrial context.

HIA does support the important distinction made in the Discussion Paper that employers who fail to comply with workplace laws generally fall into one of two distinct groups, employers who have made genuine unintentional mistakes, and employers that knowingly underpay, or otherwise exploit employees.

In HIA's experience underpayments are generally a result of mistake or error.

For example, recent media articles about instances of the incorrect calculation of overtime and underpayments due to payroll errors by employers were not the result of a deliberate attempt to underpay staff and were remedied once the issues surfaced.

HIA is unaware of deliberate underpayment and exploitation behaviours occurring in the residential building industry. In HIA's experience employers in the residential building industry aim to do the right thing by their employees. Where underpayments are identified and an employer is made aware and agrees that an underpayment has occurred an employer moves to remedy the situation.

2.1 COMPLEXITY

Mistakes or errors that give rise to underpayments and non-compliance, generally occur due to the complexity of the current workplace relations framework. The complexity of the workplace relations system is not an excuse for non-compliance but rather explains why there are instances of underpayments.

Employers in the residential building industry must comply with the safety net as set out by:

- The National Employment Standards (**NES**) under the FW Act.
- The Building and Construction General Onsite Award 2010 (**Onsite Award**).
- Individual Flexibility Agreements or Enterprise Agreements.
- Respective state Long Service Leave Acts including Portable Long Service Leave Acts for eligible workers.

[33] https://www.employment.gov.au/budget-2019-20

While employers must seek to understand how these different instruments interact, the complexities do not end there. Interpreting and applying modern awards also presents a number of challenges.

Modern Awards System

Most employers in the residential building industry are covered by the Onsite Award.

The Onsite Award presents a set of complicated and complex provisions, running at over 100 pages, which is not reflective of flexible and modern work practices and are incredibly difficult for small businesses to understand and apply.

Notably, Fair Work Commission (**FWC**) president Iain Ross has observed that the Award system, and language used within those awards, can be "tortuous"[4].

The FWC has also engaged in a plain language redrafting exercise of all Modern Awards, specifically research done by Sweeny Research found that small businesses view Modern Awards as:

- "Convoluted... Too long and unwieldy, suggesting a time intensive and difficult process;
- Complex... The language was difficult to understand, with 'legalese' and jargon;
- Ambiguous... Information provided was not clear, requiring too much interpretation;
- Of questionable relevance... Difficult to identify which award was most relevant when employees' roles varied and did not clearly fit into a single industry; and
- Not for them... Written for the benefit of "bureaucrats and lawyers", with no consideration of end-user needs or capability." [5]

In addition, issues of potential overlap between the coverage of modern awards, difficultly determining rates of pay and redundancy provisions at odds with the commonly accepted notion of 'redundancy' provide fertile ground for inadvertent underpayment of wages.

Cross coverage issues - paying under the incorrect award

Confusion as to the appropriate award coverage can cause payment errors.

During award modernisation the Australian Industrial Relations Commission was directed to "*create modern awards primarily along industry lines, but may also create modern awards along operational lines as it considers appropriate*." [6]

This was a significant shift in approach and in contrast to pre-reform awards rather than being clearly bound to an award, as a respondent (or within a class of respondents), employers are now required to determine the appropriate award coverage:

> "*Rather than using a concept of parties being 'bound' to awards…adopt two new key concepts which better reflect the new modern workplace relations system. These are:*
>
> - *That an instrument covers an employer and employee or organisation; (that is they fall within the scope of the instrument); and*
> - *The instrument applies to the employer and employee (that is, the instrument that actually regulates rights and obligations)."* [7]

[4] http://www.abc.net.au/news/2018-06-06/iain-ross-industrial-award-system-language-set-to-become-simpler/9833026
[5] Citizen Co-design with Small Business Owners (13 August 2014) Pg.6
[6] Award Modernisation Request 28 March 2008
[7] [2008] AIRCFB1000 at paragraph 12

This approach has caused uncertainty for employers operating across industries who engage employees across a variety of trades and who may be covered by more than one modern award, for example for those businesses carrying out both on and off-site work, determining the appropriate award to derive employment conditions from can be extremely difficult.

To that end, there are similarities between the occupations and classifications contained within the Timber Industry Award 2010 (**Timber Award**), the Onsite Award, and the Joinery and Building Trades Award 2010 (**Joinery Award**).

There are classifications that provide coverage for the following occupations in the Joinery, Timber and Onsite Award:

- Joiner
- Machinist
- Carver
- Special class trade

In light of this, disagreements can arise in relation to the most appropriate award coverage. Unsurprisingly, each award contains different employment conditions, including different rates of pay resulting in potential underpayments by virtue of a change in award coverage.

Rates of Pay

The calculation of a rate of pay under the Onsite Award is a complex matter.

The minimum rate of pay as prescribed by the award is rarely the actual rate of pay an employee is entitled to, in fact at a minimum there are at least 12 variables that influence the actual amount an employee is paid.

Under the Onsite Award an employee's rate of pay depends on whether the employee is:

- Engaged as a daily hire, weekly hire, or casual employee; and
- Which of the following are applicable (some of which are compulsory):
    - clause 19.1—Minimum wages;
    - clause 21.1—Special allowance;
    - clause 21.2—Industry allowance;
    - clauses 20.1—Tool and employee protection allowance;
    - clause 21.3—Underground allowance;
    - clause 21.11—Air-conditioning industry and refrigeration industry allowances;
    - clause 21.12—Electrician's licence allowance; and
    - clause 21.13—In charge of plant allowance.

An employer must determine if each allowance is applicable in order for it to form a part of the employee's actual minimum rate of pay.

Further, some allowances are payable for 'all purposes' of the award, and will be payable when for example, an employee works overtime, but some are not. Finally, the Onsite Award contains a range of other skill, expense and disability allowances that, depending on the circumstances, an employer will be required to pay, potentially changing an employee's rate of pay on a daily basis.

Redundancy pay in the residential building industry

The Onsite Award provides that a redundancy exists if employment ceases for any reason other than misconduct or refusal of duty, this includes if an employee resigns.

This is at odds with the definition of redundancy under the NES which occurs when employment ends because the employer has determined that the employee's job no longer exists, is not needed, or if the employer becomes insolvent or bankrupt.

Further, small businesses are exempt from paying redundancy under the NES, however under the Onsite Award they are not.

The NES reflects the ordinary and commonly accepted meaning of 'genuine redundancy' as devised by the then Australian Conciliation and Arbitration Commission in the 1984 Termination, Change and Redundancy Case (**TCR Case**).

In the TCR case it was made clear that the right to redundancy referred to situations caused at the initiative of the employer, whether directly as a result of technological change or company restructuring or indirectly because of insolvency or liquidation. This was again confirmed in the 2004 Redundancy Case in which it was stated that the intended operation of severance pay was primarily directed at ameliorating the 'inconvenience and hardship' of sudden job loss and compensation for non-transferable credits.

However, the construction industry through the Onsite Award has its own (and much broader) definition.

This means that an employer is obliged to pay severance whether the employee is terminated by the employer, resigns, retires, loses a required qualification, becomes totally incapacitated for work, dies or is retrenched (just to name a few scenarios).

This is a significant complexity faced specifically by the residential building industry within the current workplace relations framework presents a risk of inadvertent non-compliance, and therefore an unintentional underpayment.

3. CIVIL PENALTIES IN THE FAIR WORK ACT

3.1 CURRENT APPROACH TO DETERMINING PENALTIES

HIA opposes any increases to existing civil penalties under the FW Act.

As outlined at the outset the current consequences for a failure to comply with workplace relations obligations are significant.

There is insufficient evidence, and lack of research and data available to support the need for further increases to the existing penalty regime, and a lack of assessment of the impact that any further changes will have. For example, the impacts that any further increase in penalties may have on future and ongoing employment, and the continued viability of business, in particular small business.

In 2016 the Government established the Migrant Workers Taskforce (**Taskforce**), as part of their commitment to protect vulnerable workers. The Taskforce was asked to *"identify further proposals for improvements in law, law enforcement and investigation, and other practical measures to more quickly identify and rectify any cases of migrant worker exploitation."*[8]

HIA understands that the Migrant Workers Taskforce Report (**Report**) made 22 recommendations, which the Government has accepted in principle, including the recommendation that *"the general level of penalties for breaches of wage exploitation related provisions in the FW Act be increased to be in line with those in other business laws, especially consumer laws."*

[8] https://www.ag.gov.au/industrial-relations/migrant-workers-taskforce/Pages/default.aspx

HIA is therefore genuinely concerned that the findings of the Report are being inappropriately generalized to substantiate an increase in civil penalties more broadly.

As noted within the Report, the Taskforce primarily focused on matters that fall within civil law, including the FW Act and related Commonwealth legislation, and prioritised its efforts on unsponsored visas, particularly the working holiday and international student visas.[9]

The premise that civil penalties should have a blanket increase to accommodate exploitation of migrant workers is inappropriate. The Taskforce recommendations should only justify a changed approach to contraventions relating to migrant workers, and not more generally.

This approach signifies a concerning trend towards the expansion of penalties as a reaction to a perceived issue, or an issue which only effects a small portion of the cohort of whom the legislation applies.

Some further examples of this trend are highlighted within the Discussion Paper such as the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019, Treasury Laws Amendment (2018 measures No. 3) Bill 2018*, which made recent amendments to numerous pieces of legislation to increase and amend penalty frameworks[10].

The cumulative impact of changes to penalty frameworks should not be underestimated.

Further, there is no evidence to suggest any further increase to the existing civil penalty regime could assist in generating greater compliance, in fact a focus on voluntary compliance would seem to have greater demonstrable impacts.

As noted in the FWO 2018-19 Annual Report, the FWO has seen an increase in self-reporting of underpayments, with the Fair Work Ombudsman Sandra Parker noting *"I welcome self-disclosures, as they suggest our compliance and enforcement activities are creating the desired deterrence effect."*[11]

The Ombudsman also expressed in relation to self-disclosures *"we expect non-compliant employers as a minimum to enter into a court enforceable undertaking (EU) and immediately pay back money plus interest owed to workers*."

In 2018-19, the FWO entered into 17 Enforceable Undertakings (**EU's**), as compared to 7 EU's in 2017-18. EU's require employers to admit liability, express contrition, and agree to remedy breaches as well as secure ongoing compliance.

EU's draw significant public attention, through the FWO website publication, and often attracts media attention which can portray the business, and business owners negatively threatening the future viability of the business (for example, the widely reported George Calombaris matter).[12]

Notwithstanding these risks, the substantial increase in employers voluntarily reporting underpayments to the FWO, supports the notion that the current penalties are having a significant deterrent effect.

HIA would support the continued primacy of voluntary compliance, partnership and cooperation in improving compliance with the FW Act, and changing the behaviours of employers who underpay their workers.

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[9] Pg 16 of the Report
[10] Discussion Paper, pg 5
[11] Fair Work Ombudsman 2018-19 Annual Report, pg 2

Alternative methods of calculation

HIA agrees with the note in the Discussion Paper that, *"overly prescriptive calculation methods may limit the broad discretionary powers conferred on the courts by the Fair Work Act*."[13]

The introduction of alternative methods for the calculation of maximum penalties, like those for the *Competition and Consumer Act 2010* (Cth), and the *Taxation Administration Act 1953* (Cth), in the workplace relations context is inappropriate.

Alternative maximum penalties such as 'the benefit value amount' or 'degree of fault' do not account for the conduct and behaviours which give rise to a penalty. In circumstances such as an underpayment, the quantum of an underpayment does not correlate with the severity of the conduct, i.e. the higher the value of the underpayment does not mean that more severe action should be taken.

For example, a minor administrative error or award interpretation issue which applied over sometime and to a large workforce can equate to a significant underpayment, as compared to a scenario where an employer deliberately underpays their employees in lieu of supporting their working visa arrangements.

In the case of *Mason v Harrington Corporation Pty Ltd t/as Pangaea Restaurant & Bar*[14], Federal Magistrate Mowbray identified a non-exhaustive range of factors[15] to be taken into consideration when determining penalties:

- the nature and extent of the conduct;
- the circumstances in which the conduct took place;
- the nature and extent of any loss or damage;
- whether there had been similar previous conduct by the respondent;
- whether the breaches were properly distinct or arose out of one course of conduct;
- the size of the respondent company;
- the deliberateness of the breaches;
- the extent to which senior management was involved in the breach;
- the corporation's contrition, corrective action and co-operation with enforcement authorities; and
- deterrence.

HIA maintains that the sentencing principles are well established, are working sufficiently in the context of the current penalty regime, and should continue to be maintained.

Grouping of penalties

HIA is of the view that penalties for multiple instances of underpayment across a workforce and over time, should continue to be grouped by civil penalty provision.

As matters progress for determination, the court appropriately uses sentencing principles, and already considers factors such as 'number of affected employees' and 'period of the underpayments' in determining penalty orders.

Section 557(3) of the FW Act allows for penalties not to be grouped for repeat under payers, which is appropriate as a further deterrent for repeat behaviour.

[13] Discussion Paper, pg 6
[14] [2007] FMCA 7
[15] Paragraphs 24 - 55

3.2 FAIR WORK AMENDMENT (PROTECTING VULNERABLE WORKERS) ACT 2017

As highlighted in the Discussion Paper, the Protecting Vulnerable Workers Act was recently passed in September 2017.

Although HIA understands that this legislation was largely driven to address the apparent systemic underpayment of workers by some employers operating under franchising business models, much of the new legislation applies to all businesses. The increases in civil penalties apply to all employers, including small business, even though there had been no demonstrated case made that such blanket increases were necessary.

The new provisions saw:

- increased penalties for record-keeping and payslip failures;
- a significantly higher scale of penalties for serious contraventions of workplace laws;
- prohibitions on 'cashback' from employees or prospective employees;
- a reverse onus of proof to disprove wage claim; strengthened FWO powers to collect evidence;
- new penalties for giving the FWO false or misleading information, or hindering or obstructing investigations; and
- new franchisor and holding company responsibilities for workplace laws.

HIA understands that on 16 August 2019 the FWO finalised their first case under the protecting vulnerable workers provisions[16]. In this case, A & K Property Services Pty Ltd was the first test of new reverse onus of proof provisions set out in section 557C of the FW Act requiring employers to disprove underpayment claims if they have not kept adequate records.

The employees, South Korean nationals on visa arrangements, were employed by small business A & K Property Services Pty Ltd sushi stores in Queensland. A & K Property Services Pty Ltd had underpaid workers almost $27,000 over three months, and failed to pay leave entitlements, keep accurate records, and pay slips, and were found to have acted recklessly, but not deliberately in this case.

A & K Property Services Pty Ltd was ordered to pay $108,000 in pecuniary penalties, and the three directors required to pay penalties totaling $24,750 for failing to pay leave entitlements, and record-keeping and pay slip breaches.

As noted by the presiding Federal Circuit Court Judge Michael Jarrett, these penalties act as a significant deterrent:

> *"I accept that these matters all demand a penalty in the present case that recognises the need to deter others in this industry who might be tempted to treat their workers and their obligations to comply with workplace laws in the same way as the respondents in this case."*

Given only one set of findings have arisen from the protecting vulnerable workers provisions, it is premature to make an assessment for further regulatory change, and to 'undertake a review of penalties of the FW Act' more generally. In the absence of any evidence based rationale to support the need for further changes to the current penalty framework, HIA submits any such action would be untimely, and costly to the Government and wider community.

[16] Fair Work Ombudsman v A & K Property Services Pty Ltd & Ors [2019] FCCA 2259 (16 August 2019)

3.3 EXTENDING LIABILITY

In canvassing this matter the Discussion Paper uses the terms 'contractors' and 'employees' interchangeably.

For absolute clarity any discussion regarding the extension of liability must be confined to the direct employment relationship. The suggestion that businesses should have control over the operations and employment arrangements of their contractors is inappropriate, undermines the notion of operating as an independent contractor and does not correlate with the common law approach to independent contractor arrangements.

Accessorial liability

The existing arrangements within the FW Act adequately allow action to be taken in relation to third parties.

As noted within the Discussion Paper, section 550 of the FW Act allows third parties to be held responsible for contraventions of the FW Act. Such persons can include a company director, a human resources manager or other manager, a payroll officer, an accountant or a business involved in the company's supply chain.[17]

A person or company can be held responsible if they were 'involved in' an employer's contravention (accessorial liability) which:

- assisted, recommended or caused the contravention;
- influenced the contravention (e.g. by making threats or promises);
- was concerned in or was a party to the contravention; or
- conspired with others, which resulted in the contravention.

The amendments through the Protecting Vulnerable Workers Act introduced new provisions to hold franchisors liable where their franchisee didn't follow workplace laws (franchisor liability); and are a holding company and their subsidiary didn't follow workplace laws (holding company liability)[18]. As noted above, the impact of changes under the Protecting Vulnerable Workers Act are only now starting to come to fruition. Accordingly it is premature to consider if any further regulation is needed in supply chain arrangements.

It is clear that the liability arrangements in place already have a substantial penalty and effect. The FWO 2018-19 Annual Report states that:

> *"Where operators deliberately ignore exploitation in their supply chains, we use every lever available to ensure they are held accountable."*
>
> "*During the year, we secured penalties of $168,071 in a matter involving a cleaning supply chain in Melbourne. Penalties of $17,926 were ordered against two former directors of the since-deregistered cleaning company for breaches of sham contracting, frequency of payment and pay slip provisions. The head contractor (who supplied labour from the cleaning company to the customer at the top of the chain) admitted to having been involved in underpayment contraventions and was ordered to pay penalties of $132,218. As a result of the FWO investigation, the head contractor also undertook measures to increase transparency and compliance in its supply chain."*[19]

[17] https://www.fairwork.gov.au/about-us/our-role/enforcing-the-legislation/litigation/accessorial-franchisor-and-holding-company-liability#franchisor

[18] FW Act section 558B

[19] Pg, 22

As reported on the FWO website[20], the FWO regularly commences litigation against employers and individuals under section 550 of the FW Act. For example from July 2019, the FWO has received the following findings in relation to accessorial liability:

- *Fair Work Ombudsman v A & K Property Services Pty Ltd & Ors*[21]: Underpayments and failure to issue payslips or keep records, with the following penalties: $125,700 ($108,000 against A & K Property Services Pty Ltd, $10,600 against Yong Sin Kim, $3,550 against Hyun Jun Kang and $3,550 against Jungpyo Lee);
- *Fair Work Ombudsman v Nobrace Centre Pty Ltd & Anor (No.2)*[22]: Failure to comply with a compliance notice, penalty of $5,355 against Ari Masters; and
- *Fair Work Ombudsman v A & S Wholesale Fruit & Vegetables Pty Ltd & Ors*[23]: Underpayments, failure to provide pay slips, false and misleading records, making use of false and misleading records and unreasonable hours, with the following penalties: $243,000 ($200,000 against A & S Wholesale Fruit & Vegetables Pty Ltd, $30,000 against Stephen Fanous and $13,000 against Etherah Louli).

Any change to accessorial liability need to be to be evidenced based. It is clear the FWO is effectively using the current provisions of section 550 of the FW Act, and there is no demonstrable shortfall to support any expansion of these provisions.

On this basis, HIA opposes any expansion of section 550 of the FW Act.

Compliance throughout the supply chain

Employers and business should only be held responsible for what they can direct and control including their direct employment obligations.

It is unreasonable to expect a business, including small businesses to check the compliance of another businesses employment arrangements due to their operation within a supply chain.

It is well known that the residential building industry, in particular the detached housing and renovation markets, rely on the use of subcontractors.

In commercial construction, whilst there is a large number of subcontracting firms, the overwhelming majority of those working are actually employed by these subcontracting firms. Further subcontracting occurs only in specialist areas.

By contrast, in the housing industry, subcontracting predominates down to the lowest levels, so that there are relatively few employees on a low or medium density housing site.

The flexibility of the subcontract system and the highly competitive nature of the residential building industry have interacted to secure a high degree of efficiency and productivity.

There are around 25 different trades involved on-site in the building of a house.

The familiar ones are of course concreters, bricklayers, framing carpenters, plumbers, electricians, roof tilers and painters. Others include the contractor who pegs out the site, backhoe operators, drainers, termite system installers, plasterboard fixers, plasterers, floor tilers, glaziers, kitchen installers, the fitting out carpenter, the floor sander, the brick cleaner and finally the garage door fixer.

[20] https://www.fairwork.gov.au/about-us/our-role/enforcing-the-legislation/litigation/accessorial-franchisor-and-holding-company-liability
[21] [2019] FCCA 2259 (16 August 2019)
[22] [2019] FCCA 2144 (6 August 2019):
[23] [2019] FCCA 1838 (4 July 2019)

The contractor may be the last in a long line of supply chain participants from those processing the raw materials, to the component manufacturers who make the raw materials into building materials, to the material suppliers, then in some cases retailers. There is also the handling and transport processes to and from each stage.

Each supply chain, for each product and for each contractor will differ.

Central to the notion of subcontracting arrangements and the use of independent contractors is that that contractor supplies their own material. This means that the supply chain for materials is equally diverse.

Any expectation that a business is required to check the compliance of contractors further down the supply chain is unreasonable, and unnecessarily would add complexity to contracting arrangements.

As such HIA opposes any further expansion of the accessorial liability provisions.

3.4 SHAM CONTRACTING

HIA agrees with the characterisation of Sham Contracting in the Discussion Paper.

However it is equally important to identify what is not "sham contracting", as this term is commonly misused to delegitimise all contracting arrangements.

A common mistake is to conflate "sham contracting" with some employees being misclassified as contractors. This is a mistake that may often be made because of the dense and confusing law that governs this distinction.

For workplace relations purposes, the FW Act relies on the common law approach.

The Commonwealth superannuation guarantee laws unfortunately move beyond the common law providing that if a person works under a contract that is wholly or principally (more than half) for the labour of the person, the person is deemed to be an employee of the other party to the contract.

Whilst subsequent case law and SGR Rulings have elucidated a contract for a result was outside the scope of the description 'a contract that is wholly or principally for the labour of the person', there remains considerable uncertainty about who is an employee and who is a contractor for superannuation purposes.

The income tax legislation adopts the Alienation of Personal Services Income Test (APSI). This test differentiates independent contractor arrangements in relation to taxation from PAYG employees.

At a state level, a contractor can be separately defined under payroll tax laws, workplace health and safety laws, workers compensation laws, long service leave:

- workplace health and safety legislation imposes duties on beyond the traditional concept of the employment relationship applying obligations on "person as carrying out a business or undertaking" regardless of whether or not they are an employer;
- workers' compensation legislation applies benefits to certain workers under a "contract for service";
- harmonised payroll tax provisions covers contractors performing work other than pursuant to a trade or business which they carry on and do not sub-contract to anyone else;
- anti-discrimination legislation applies to both contractors and employees; and
- construction industry long service leave in some jurisdictions extends to "labour only" subcontractors.

The differing legislative approach at state and Commonwealth levels have led to uncertainties about the status of contractors, imposed considerable costs on industry and progressively eroded the independent status of subcontractors.

The fact that a contracting arrangement may be subject to a state or Commonwealth law that deems certain workers to be employees for some purposes, such as payroll tax, superannuation or workers compensation does not make it a sham.

Misclassification as a result of interpreting and applying a complex raft of legislation is quite different from deliberating engaging contractors in sham arrangements. In fact, the FWO in their 2011 report *'Sham contracting and the misclassification of workers in the cleaning services, hair and beauty and call centre industries'* importantly distinguished contraventions of the FW Act sham arrangements provisions with the misclassification of employees as independent contractors.

To avoid conflating them into the one term, the FWO used the term "sham arrangements" to describe behaviour that contravenes the sham arrangements provisions of the FW Act and "misclassification" to describe a situation where the worker is considered an employee but no deliberate falsehood is apparent.

Penalties

HIA considers that the current FW Act provisions provide sound and effective measures against sham contracting

HIA is not convinced that a case has been made to justify increasing the civil penalties for sham contracting. Nor is there any evidence that a certain level of penalty would serve as an appropriate deterrent to stop employers from engaging in sham contracting arrangements.

Recent large penalties levied against businesses that engage in sham contracting practices demonstrate that these laws are working.[24]

Further neither the 2012 Post Implementation Review of the Fair Work Legislation[25] or the Productivity Commission review of the Workplace Relations Framework[26] recommended changes to the penalty regime penalties.

On this basis, HIA does not support a change to the current penalty provisions for sham contracting.

Defences

HIA opposes suggestions that the current defences available under section 357(2) of the FW Act be watered down and recklessness no longer be an element of the defence. In fact the general misunderstanding as to what is sham contracting lends against any changes to the current provisions.

A shift of this nature would see circumstances in which an employee has been misclassified as an independent contractor turned into significant breaches of the FW Act. Such an approach is unjustified for many reasons, including:

- It is at odds with the basis on which sham contracting provisions were inserted; that being to prevent an employer from seeking to avoid taking responsibility for legal entitlements by disguising that relationship as a contractor relationship as opposed to an employment arrangement.;[27]

[24] See for instance the $124,00 in fines levied in the matter of Fair Work Ombudsman v Australian Sales and Promotions Pty Ltd & Anor [2016] FCCA 2804 (10 November 2016), and the $58,000 in fines levied in the matter of the Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd (No 4) [2017] FCA 580 (7 June 2017)

[25] Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation, 15 June 2012

[26] 30 November 2015

[27] Also see Workplace Relations Minister's Second Reading Speech on the *Independent Contractor Bill 2006*

- Where an employee has been misclassified as a contractor, there are a raft of penalties and provisions aimed at rectifying this situation, such as claims for the underpayment of wages; and
- To impose a further penalty in circumstances that are void of a positive intent to deceive turns sham contracting provisions into something more akin to a strict liability offence.

The current legislative approach remains appropriate.

HIA understands some are concerned with the use of "reckless". Whilst HIA does not agree with these concerns, they could be addressed by the inclusion of a definition of this term in the FW Act.

Further the Discussion Paper does not attempt to assess the effectiveness of the existing statutory framework. HIA strongly submits that such an assessment be carried out prior to any changes being made. This is particularly important given that in HIA's view this has been the result of confusion about what precisely "sham contracting" is and attempts to expand the current legal definition.

4. CRIMINAL SANCTIONS

HIA does not support employers or businesses deliberately avoiding their obligations and intentionally failing to pay employee entitlements. Such actions are, and should continue to be subject to civil penalty.

However, criminalising matters of an industrial nature is inappropriate.

HIA does not believe there are any circumstances in which the underpayment of wages should attract criminal penalties.

Circumstances in which an employer fails to provide their employees with the full wage or salary to which they are entitled is an underpayment. The use of the term 'theft' seeks to inappropriately attach criminal intent to an employment related matter. HIA opposes such an approach.

As noted in a Departmental Brief from the Office of Industrial Relations, in the Queensland Inquiry in Wage Theft[28] *"there has been a long-standing principle that criminal law has no place in an industrial context".*[29] Such a major departure from traditional civil remedy provisions relating to underpayment issues would require significant justification, which HIA submits is currently not available.

The offence of theft (whether that occurs in the workplace or in a non-industrial context) is a matter of criminal law. Prosecutions for theft and other criminal offences should only be instituted by public prosecutors and should take place before a proper criminal court with a criminal onus of proof and normal rights of appeal.

Public policy, including workplace relations legislation should continue to be focused on the actions of employers and employees in the workplace, including the fundamental duty to pay an employee what they are owed for the labour provided.

Fault element

If the Government is minded to introduce criminal sanctions for breaches of certain workplace laws HIA agrees and would highlight the importance of the need for any *"new offence to be carefully framed to target only the most serious and culpable underpayment cases – rather than unintentional mistake or miscalculation".*

[28] https://www.parliament.qld.gov.au/work-of-committees/committees/EESBC/inquiries/past-inquiries/Wagetheft
[29] https://www.parliament.qld.gov.au/documents/committees/EESBC/2018/Wagetheft/bp-07Jun2018.pdf

Certainly to attract a criminal sanction, behaviour should be intentional and deliberate. Further, those engaging in such behaviour should have actual knowledge that what they are doing is in breach of the law. Anything less than this would have the potential to unintentionally capture those not the target of such sanctions.

Attributing criminal liability

It is a fundamental principle of company law in Australia (and elsewhere) that a company is a separate legal person, independent of its directors and shareholders. A company is responsible for its own debts and liabilities. The corporate form enables a business to carry on with a perpetual existence and make long term decisions, incorporation enables much of the entrepreneurship, investment and innovation that facilitates economic growth.

To 'pierce the corporate veil' by criminalising the underpayment of wages and making directors personally criminally liable, is ill-advised.

HIA have serious concerns that a move to criminalise the underpayment of wages by a company will undermine the ongoing viability of the corporate form, and will undoubtedly affect decisions to employ, and the general (appropriate) risks taken by business.