



# **Attorney General's Department Discussion Paper**

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

October 2019

# About

The Australian Fresh Produce Alliance (AFPA) is made up of Australia's key fresh produce growers and suppliers. The members include:

- Costa Group,
- Perfection Fresh,
- Montague,
- One Harvest,
- Pinata Farms,
- Fresh Select,
- Mitolo Group,
- Mackay's Banana Marketing,
- Driscoll's,
- 2PH Farms,
- LaManna Premier Group,
- Rugby Farming,
- Freshmax, and
- Fresh Produce Group.

These businesses represent:

- half the industry turnover of the Australian fresh produce (fruit and vegetables) sector - \$4.5 billion of the \$9.1 billion total,
- a quarter of the volume of fresh produce grown in Australia - 1 million of the 3.9 million tonne total,
- more than a third of fresh produce exports - \$410 million of the \$1.2 billion export total,
- more than 1,000 growers through commercial arrangements, and
- more than 15,000 direct employees through peak harvest, and
- up to 25,000 employees in the grower network.

The key issues the AFPA is focusing on include:

- packaging and the role it plays in product shelf life and reducing food waste landfill,
- labour and the need for both a permanent and temporary supply of workers,
- market access to key export markets for Australian produce,
- product integrity both within and outside of the supply chain,
- pollination and research into alternative sources, and
- water security, including clear direction as to the allocation and trading of water rights.

The AFPA's aim therefore is to become the first-choice fresh produce group that retailers and government go to for discussion and outcomes on issues involving the growing and supply of fresh produce.

Products grown by AFPA Member companies include:

Apples	Broccoli	Fioretto	Oranges	Strawberries
Apricots	Broccolini	Green Beans	Peaches	Sweet Corn
Asparagus	Brussel	Herbs	Pears	Table grapes
Avocado	Sprouts	Lemons	Pineapples	Tomatoes
Baby Broccoli	Butternut	Lettuce	Plums	Water Cress
Baby Corn	Pumpkin	Mandarins	Potatoes	Wombok
Bananas	Cabbage	Mango	Cucumber	
Beetroot	Cauliflower	Mushrooms	Raspberries	
Blackberries	Celery	Nectarines	Salad leaf	
Blueberries	Cherries	Onions	Spinach	



## Executive Summary

Horticulture is the second largest and fastest growing sector in Australian agriculture. Horticulture exports are nearly \$2.2 billion for the last financial year – a 27 per cent increase on the previous year. Of the total \$13.2 billion Australian horticulture sector, fruit and vegetables (fresh produce) account for more than 70 per cent of the total. The Australian fresh produce industry has some of the strongest growth prospects into the future not only within agriculture but across the Australian economy.

In 2019, the Australian Fresh Produce Alliance (AFPA) formed to develop pragmatic solutions to the challenges facing industry. The Alliance members have made public commitments to take their industry forward. The AFPA industry perspective on underpayment is that the focus of any increased penalties should be targeted at ‘employers that knowingly underpay, or otherwise exploit, employees<sup>1</sup>’ and consider the current penalties ‘a cost of doing business<sup>2</sup>’.

The penalties for these actions must ensure that employees receive the correct compensation, and the fines must be commensurate with the ‘saving’ that the commercial entity has gained by underpaying workers. Additional or increased penalties for ‘clear, deliberate and systemic’ underpayment must bear a relationship to the potential benefit of saving from underpayment.

Personal responsibility is a foundation of the operation of modern Australian society. This principle is extended to business, companies and corporations whereby those entities are responsible for their decisions. Personal responsibility ensures that all Australians have the opportunity to determine their own futures, and are also accountable for their actions.

Keeping the objective in mind: that all Australians are employed and paid correctly and lawfully, a range of significant penalties coupled with compliance and enforcement action is the best path forward. The existence of penalties and their rigorous enforcement is a clear example of the law functioning to achieve a societal outcome. We do not seriously contemplate making the parents responsible for the criminal acts of their adult children, and so it is with accessorial liability, there are (appropriate) limits to the application of the legal and practical constructs extending liability away from a decision maker/employer.

Recalling the objective, continuing to extend accessorial liability does not increase liability directly to the decision maker or direct employer. In our view, extending accessorial liability to third parties does increase pressure in the fresh produce supply chain but is not the most efficient or effective method in the short term, adds cost to the supply chain and is not demonstrated to achieve long term outcomes in our industry.

The immediate priority should be the application of significant penalties for ‘clear, deliberate and systemic<sup>3</sup>’ underpayment by commercial operators. Once implemented, the impact of these changes should be considered and reviewed prior to the consideration of criminal sanctions. In time, if criminal sanctions were to be applied to underpayment of wages, the threshold for the application of criminal penalties should be high.

Criminal penalties must not apply to employers that have made genuinely unintentional mistakes, for instance due to the complexity of the industrial relations system, which have led to miscalculations and underpayments, but are rectified once identified. Criminal penalties should only apply where it can be proven that underpayment was part of a systemic pattern of conduct where the intent was to underpay employees to minimise business costs.

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<sup>1</sup> Page 2, Discussion Paper, Improving protections of employees' wages and entitlements: Strengthening penalties for non-compliance

<sup>2</sup> Page 5, Discussion Paper, Improving protections of employees' wages and entitlements: Strengthening penalties for non-compliance

<sup>3</sup> Page 10, Recommendation 6, Report of the Migrant Workers' Taskforce March 2019



# 1. Introduction

Horticulture is the second largest and fastest growing sector in Australian agriculture. Horticulture exports are nearly \$2.2 billion for the last financial year – a 27 per cent increase on the previous year. Of the total \$13.2 billion Australian horticulture sector, fruit and vegetables (fresh produce) account for more than 70 per cent of the total. The Australian fresh produce industry has some of the strongest growth prospects into the future not only within agriculture but across the Australian economy.

In 2019, the Australian Fresh Produce Alliance (AFPA) formed to develop pragmatic solutions to the challenges facing industry. The Alliance members have made public commitments to take their industry forward, including:

- Continuing to develop opportunities for Australians, particularly young people, to work in the industry,
- Improving the sector's employment practices and reputation, including through proactively meeting all health and safety, employment, and duty of care requirements and obligations, and developing practical solutions to build a workforce, and
- Collaborating to mitigate the risks of modern slavery and poor labour practices in member businesses and their supply chains, and reporting under the Modern Slavery Act 2018.

The Migrant Workers Taskforce report identified horticulture as a high risk sector in relation to poor practices among labour hire operators, and recommended a national registration scheme for labour hire firms<sup>4</sup>. The Australian Fresh Produce Alliance has supported these proposals and is working toward the adoption of sophisticated business practices across the entire horticulture industry<sup>5</sup>.

This submission provides input from our perspective on the range of issues highlighted in the discussion paper.

## Part I: Civil penalties in the Fair Work Act

### 2. Current approach to determining penalties

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

#### **AFPA Response:**

The AFPA industry perspective on underpayment is that the focus of any increased penalties should be targeted at 'employers that knowingly underpay, or otherwise exploit, employees<sup>6</sup>' and consider the current penalties 'a cost of doing business<sup>7</sup>'.

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<sup>4</sup> Recommendation 14, Page 11, Migrant Workers Taskforce Report

<sup>5</sup> <https://rest.siteplus.com/filestorage-api-service/21577c0bbab07e3e2059d502fcb6b1a8/ps-integrated-systems-and-harmonised-auditing-for-ethical-sourcing.pdf?dl=1>

<sup>6</sup> Page 2, Discussion Paper, Improving protections of employees' wages and entitlements: Strengthening penalties for non-compliance

<sup>7</sup> Page 5, Discussion Paper, Improving protections of employees' wages and entitlements: Strengthening penalties for non-compliance



There are anecdotal reports of this approach being used by unscrupulous operators in the broader Australian horticulture industry. Where there is ‘clear, deliberate and systemic<sup>8</sup>’ underpayment by commercial operators, the penalties for such behaviour must be a clear deterrent. For some commercial operators with evidence of clear underpayment which also results in worker exploitation, the commercial benefit of some of these arrangements are significant.

The penalties for these actions must ensure that employees receive the correct compensation, and the fines must be commensurate with the ‘saving’ that the commercial entity has gained by underpaying workers.

For example, where a commercial operators is fined \$50,000 and the weekly ‘benefit or savings’ from underpayment of a group of employees is \$50,000, the fine or penalty is not a credible deterrent or cost. If the commercial operator has been operating this arrangement for 20 weeks, the potential ‘benefit or saving’ from underpaying workers is significant.

Additional or increased penalties for ‘clear, deliberate and systemic’ underpayment must bear a relationship to the potential monetary benefit of saving from underpayment. Coupled with criminal sanctions (discussed later), this approach will be an appropriate response to intentional employee underpayment, and also support broader compliance by establishing appropriate penalties for flagrant abuse of the law.

- *QUESTION: What are some alternative ways to calculate maximum penalties? For example, by reference to business size or the size of the underpayment or some measure of culpability or fault.*

**AFPA Response:** (See response immediately above)

- *QUESTION: Should penalties for multiple instances of underpayment across a workforce and over time continue to be ‘grouped’ by ‘civil penalty provision’, rather than by reference to the number of affected employees, period of the underpayments, or some other measure?*

**AFPA Response:** Penalties should be demonstrably different for unintentional mistakes which are immediately rectified, compared to clear, deliberate and systemic breaches of the law.

For unintentional mistakes which are immediately rectified, the grouping of civil penalties should continue to apply however there is cause to consider the scale and time period of the breaches. There may be potential for more significant penalties for multi-year arrangements which resulted in underpayment. These legislative or regulatory changes could be implemented in consultation with the Australian business community.

Clear, deliberate and systemic breaches of the law should not be grouped.

There may be parallel provisions which consider affected employees, time period and other measures which will provide the courts with flexibility in applying penalties. In combination, these measures will provide more substantive penalties to address the issues.



### 3. Fair Work Amendment (Protecting Vulnerable Workers) Act 2017

- *QUESTION: Have the amendments effected by the Protecting Vulnerable Workers Act, coupled with the FWO's education, compliance and enforcement activities, influenced employer behaviour? In what way?*

**AFPA Response:** The increase in penalties under the amendments to the Protecting Vulnerable Workers Act has, and will, act as a disincentive for unscrupulous behaviour. Some of the specific provisions are particularly relevant to the fresh produce industry and encourage continued adoption of sophisticated and legally compliant business practices (rather than informal practices).

Continued education, compliance and enforcement activities are valuable as they support culture change in the Australian fresh produce industry. Educative and informational measures are particularly important to inform business in parallel with an increase in compliance and enforcement activity.

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

**AFPA Response:** Consistent with the approach to parallel questions on penalties, the 'serious contravention' category of penalties is likely to have a deterrent effect.

### 4. Extending liability

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

**AFPA Response:** Personal responsibility is a foundation of the operation of modern Australian society. This principle is extended to business, companies and corporations whereby those entities are responsible for their decisions. Personal responsibility ensures that all Australians have the opportunity to determine their own futures, and are also accountable for their actions.

The discussion paper outlines that 'As a general legal concept, a person is an accessory to an unlawful act (or omission) of another person where they participated in, but did not directly commit, the unlawful act (or omission) to such an extent that it would be appropriate to hold that person liable'.

In the context of the Fair Work Act and the operations of the Fair Work Ombudsman, one could argue that there is a strong reliance on accessorial liability provisions to prosecute cases, in the absence of strong deterrent penalties. The discussion paper seeks feedback on the use of stronger penalties.

Keeping the objective in mind: that all Australians are employed and paid correctly and lawfully, a range of significant penalties coupled with compliance and enforcement action is the best path forward. The existence of penalties and their rigorous enforcement is a clear example of the law functioning to achieve a societal outcome. We do not seriously contemplate making the parents responsible for the criminal acts of their adult children, and





so it is with accessorial liability, there are (appropriate) limits to the application of the legal and practical constructs.

The current arrangements are sufficient to address the requirements of their immediate employees, and contractors on the physical premises of lead firms/head contractors.

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

**AFPA Response:** Actual knowledge, knowing involvement or any kind of active and direct participation in the contravention should be the decisive factor or threshold for liability in considering whether to extend liability to another person or company.

Recalling the objective, continuing to extend accessorial liability does not increase liability directly to the decision maker or direct employer. In our view, extending accessorial liability to third parties does increase pressure in the fresh produce supply chain but is not the most efficient or effective method in the short term, adds cost to the supply chain and is not demonstrated to achieve long term outcomes in our industry.

‘Recklessness’ requires that the offender was aware of the risk as opposed to actual knowledge of or knowing involvement. Therefore, recklessness on the part of a third party could essentially result from a lack of exercising proper due diligence in their dealings with another person or company. This does not constitute a fair ‘decisive factor’ in the consideration of whether to extend accessorial liability.

- *QUESTION: What degree of control over which aspects of a business is required before a business owner should be expected to check the compliance of contractors further down the supply chain?*

**AFPA Response:** In the consideration of employment issues and the extension of accessorial liability it is useful to consider the broader range of issues. Those contractors doing work on the physical premises of a business (such as tradespeople, cleaners) receive a high duty of care as their personal safety and security is provided by the business for the period of time that they are on the premises. In contrast, for a supplier to a business of services or goods that does not involve the provision of labour to that business, there may be little to no physical contact between the businesses, and the visibility of the respective business operations by each party may be very low. An occasional supplier to a business is very different to a tradesperson visiting weekly.

Before embarking on significant additional consideration of accessorial liability it will be important to review and consider the reporting under the Modern Slavery legislation and what if any progress is made in addressing the issues this legislation specifically seeks to address.



- *QUESTION: What are the risks and/or benefits of further extending the accessorial liability provisions to a broader range of business models, including where businesses contract out services?*

**AFPA Response:** Consistent with earlier points:

- Liability should apply to the decision making or entity directly responsible and therefore liable for the action (or inaction), and
- Any extension of accessorial liability should consider what the actual objective and measurement of that objective is, and the relevance of accessorial liability to furthering that objective.

Risks of further extending accessorial liability are significantly increasing costs for business due to a regulatory burden imposed and a slow-down in business operations without any clear public benefit. Legal action focussed on accessorial liability has not been as successful or straightforward as some may have thought.

If there is a perceived benefit in extending accessorial liability this must be tested against a course of action such as increasing compliance and enforcement against entities, with higher penalties.

## 5. Sham contracting

- *QUESTION: Should there be a separate contravention for more serious or systemic cases of sham contracting that attracts higher penalties? If so, what should this look like?*

**AFPA Response:** If sham contracting arrangements are to be viewed as a deliberate attempt by an employer to knowingly place workers beyond the reach of basic industrial standards such as the minimum wage, annual leave, sick pay etc. and therefore results in what amounts to ‘wages theft’, then this warrants investigation of a separate contravention attracting higher penalties for more serious or systemic cases.

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

**AFPA Response:** The subsection does not need to be amended.

## Part II: Criminal sanctions

- **QUESTIONS:**
  - *In what circumstances should underpayment of wages attract criminal penalties?*
  - *What consideration/weight should be given to the whether an underpayment was part of a systematic pattern of conduct and whether it was dishonest?*
  - *What kind of fault elements should apply?*
  - *Should the Criminal Code [see the Schedule to the Criminal Code Act 1995 (Cth)] be applied in relation to accessorial liability and corporate criminal responsibility?*
  - *What should the maximum penalty be for an individual and for a body corporate?*





- *Are there potential unintended consequences of introducing criminal sanctions for wage underpayment? If so, how might these be avoided?*
- *Are there other serious types of exploitation that should also attract criminal penalties? If so, what are these and how should they be delivered?*

**AFPA Response:** The immediate priority should be the application of significant penalties for ‘clear, deliberate and systemic<sup>9</sup>’ underpayment by commercial operators. Once implemented, the impact of these changes should be considered and reviewed prior to the consideration of any criminal sanctions.

If criminal sanctions were to be applied to underpayment of wages, the threshold for the application of criminal penalties should be high. Criminal penalties must not apply to employers that have made genuinely unintentional mistakes, for instance due to the complexity of the industrial relations system, which have led to miscalculations and underpayments, but are rectified once identified.

Criminal penalties should only apply where it can be proven that underpayment was part of a systemic pattern of conduct where the intent was to underpay employees to minimise business costs.

In terms of other matters where criminal sanctions might apply, further consideration should be given to applying criminal sanctions to the ‘clear, deliberate and systemic’ employment of persons without valid working rights.

