

12 May 2023

Department of Employment and Workplace Relations
GPO Box 9828
Canberra ACT 2601

Via email: WRSubmission@dewr.gov.au.

Re: Criminalising wage underpayments and reforming civil penalties in the Fair Work Act 2009 Consultation Paper

To Whom It May Concern

The Association of Digital Service Providers Australia New Zealand (DSPANZ) welcomes the opportunity to make this submission on behalf of our members and the business software industry.

About DSPANZ

Digital Service Providers Australia New Zealand is the gateway for the government into the dynamic, world-class business software sector in Australia and Aotearoa New Zealand. [Our 90+ members](#) range from large, well-established companies to new and nimble innovators working at the cutting edge of business software and app development on both sides of the Tasman.

Our feedback relates to where changes may impact Digital Service Providers (DSPs), including how they operate and support employers. In summary:

- Penalties for wage underpayments should be limited to those involving intention and should apply equally to overpayments;
- Creating offences at both the federal and state level should be avoided;
- DEWR should consider the impact changing data retention practices across Australia could have on the ability to investigate both record-keeping misconduct and wage underpayments.

Considering there are several employment-related policy changes currently happening across different government agencies that DSPs will ultimately deliver over the next few years, DSPANZ encourages DEWR to continue consulting with DSPs, DSPANZ and other representative bodies. We also welcome the opportunity to provide further feedback on our submission.

Yours faithfully,

**Matthew Prouse,
President & Director
DSPANZ.**



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

DSPANZ believes any penalties for wage underpayments or incorrect payments should be limited to those involving intention. Penalties should apply equally to overpayments, given the complexities involved in rectifying an overpayment for employers and employees.

DSPs providing payroll, award interpretation and workforce management software play an important role in assisting employers with meeting their regulatory requirements around paying their employees. While DSPs help facilitate these processes and interactions, software can only reflect the employer's level of knowledge and understanding of their obligations and requirements. Ultimately, it is up to the employer to pay employees the correct wages and entitlements. For this reason, penalties related to incorrect payments should not apply to DSPs.

The government should recognise that Australia's award system is inherently complex and open to interpretation which can result in errors, unintended consequences and differing perspectives on classifications and entitlements. We recommend that the government reviews complexities within the current award system that can lead to incorrect payments.

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?

Given that Victoria and Queensland have their own provisions, we want to avoid different offences at the federal and state level. Further, we would appreciate a consistent approach to record-keeping requirements nationally.

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?

If there is to be a recklessness-based offence, which we oppose, then it should be a defence that the party took reasonable steps to prevent a contravention.

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?

DSPANZ does not support extending the bar to proving ancillary liability of officers of bodies corporate.

The increased focus on wage underpayments is resulting in skilled payroll workers [looking to leave the industry](#) due to this increased risk. Introducing a criminal offence will ultimately drive more skilled workers out of the industry while discouraging payroll and workforce management software providers from providing innovative solutions to assist employers with meeting their obligation.

If this change happens, we recommend that DEWR consults with DSPs through DSPANZ to work through any unintended consequences for DSPs and their employees.

Question 9: Should criminal offences for record-keeping misconduct be introduced to complement a criminal offence for wage underpayments?

DSPANZ opposes introducing a criminal offence for record-keeping misconduct outside of situations where there is intentional non-compliance with record-keeping obligations to disguise incorrect wage payments. However, if an offence for record-keeping misconduct is introduced, DEWR should consider how the following may impact the ability to investigate incorrect wage payments and record-keeping misconduct.

What records would employers keep and for how long?

We recognise that current record-keeping requirements for employment and tax records can be complex and challenging for employers and DSPs to navigate. While retention periods are typically 5 to 7 years, other data may need to be kept for extended periods, for example:

- Employers needing to calculate long service leave entitlements must access employee data for their organisational tenure.
- Employers may need to keep records of worker's compensation claims indefinitely, even after an employee leaves the organisation.
- Employers needing to maintain records of disciplinary action.

DEWR should provide guidance on what records employers must keep to demonstrate compliance with record-keeping requirements and how long employers must keep these records.

Changing attitudes towards data retention

Recent cyber attacks and the rising cost of data storage are changing DSP and customer attitudes towards data retention. As a result, DSPANZ is currently consulting with DSPs about record-keeping obligations and how long they are required to retain certain records. We anticipate that the outcome of these conversations will result in DSPs looking to change their data retention practices for specific datasets and customers no longer using their software.

DEWR should recognise that data may be deleted or minimised outside of required data retention periods to reduce security risks and the costs of storing no longer needed data.

Impacts of changing software

Over time, many employers will change the systems and software they rely upon to manage their business and employees. When switching software, some data may be lost if it is not portable or only aggregated data is transferred.

DEWR should consider that some datasets may be lost when employers change their software.

DSPANZ believes that reviews or investigations should have a limited window, as there is no guarantee that the data required to support a review or investigation will still be available.

While DSPs assist employers with their record-keeping obligations, employers are ultimately responsible for ensuring they retain their records. For this reason, penalties should not apply to DSPs for record-keeping misconduct.