

PREAMBLE

- [1] The National Retail Association (**NRA**) is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth).
- [2] The NRA has over 5,000 members across Australia in the retail, fast food, hairdressing and beauty and hardware industries, representing 19,000 shop fronts and their operators.
- [3] As an advocate of employers in the retail and associated industries, NRA typically represents its members in the area of industrial relations, and in other areas of law only to the extent that there is a particular member interest or a direct impact on industrial relations.
- [4] NRA makes these submissions with respect to the new Subdivision 265-C in the *Taxation Administration Act 1953* which is proposed in Schedule 1, Part 1 of the *Treasury Laws Amendment (2018 Measures No. 4) Bill 2018*, as superannuation entitlements form a key element of the industrial relations landscape.
- [5] In these submissions, NRA will traverse the following concerns with respect to the proposed introduction of section 265-95:
 - [a] An unproven accusation levelled at a person is all that is required, under the proposed section 265-95, to give rise to an offence, contrary to the presumption of innocence;
 - [b] the statutory presumptions around the word ‘give’ in the *Acts Interpretation Act 1901* (Cth) and other Acts effectively remove the presumption of innocence in a criminal matter;
 - [c] requiring a defendant to show particular conduct prior to the conduct becoming relevant to a matter which may result in a criminal penalty, resulting in a provision that is contrary to principles of procedural fairness;
 - [d] the lack of any fault elements, or any requirement to otherwise prove that the defendant had actual knowledge of the instrument which gives rise to criminal liability, unjustifiably fails to recognise the difference in gravity of conduct between ignorance without ill intent and wilful disobedience of the law;
 - [e] by removing the question of the accuracy of information contained in a direction under section 265-90 from the question of criminal liability, and instead rendering this subject to an administrative appeal process, the proposed Subdivision 265-C unjustifiably disadvantages defendants and unnecessarily increases the costs associated with their defence;
 - [f] the proposed penalty of imprisonment, when viewed as part of the *Tax Administration Act 1953* (Cth) as a whole, is a significant departure from the penalties imposed for similar offences;
 - [g] the proposed penalty of imprisonment, if imposed upon a person, does nothing to discharge the outstanding liability, and in fact hinders the discharge of the liability;
 - [h] that the proposed penalty of imprisonment is contrary to the Commonwealth Attorney-General’s guidelines on the use of strict liability in the framing of offences, and does so without justifiable reason.

STATUS OF SUPERANNUATION UNDER INDUSTRIAL LAW

- [6] NRA’s members are substantially subject to regulation by the modern awards created and given force under Schedule 5 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth).

- [7] All modern awards contain a default clause imposing on employers the obligation to pay superannuation. The modern awards which apply to the majority of NRA’s members, and the clauses which impose a separate obligation to pay superannuation, are as follows:

Award	Clause
<i>Clerks – Private Sector Award 2010</i>	24
<i>Fast Food Industry Award 2010</i>	21
<i>General Retail Industry Award 2010</i>	22
<i>Hair and Beauty Industry Award 2010</i>	24
<i>Miscellaneous Award 2010</i>	19
<i>Restaurant Industry Award 2010</i>	30

- [8] Being incorporated into the modern award system, the failure to pay superannuation amounts to a contravention of the applicable modern award, and consequently a contravention of section 45 of the *Fair Work Act 2009*, this being a pecuniary penalty provision.
- [9] As such, an avenue presently exists whereby an employee or the Fair Work Ombudsman may prosecute an employer directly for a failure to pay superannuation and seek a court order for the imposition of a penalty on the employer.
- [10] Increasingly, the Fair Work Ombudsman is seeking injunctive orders in addition to orders requiring payments of outstanding liabilities¹, by which the regulator may seek imprisonment for contempt of court if the relevant employer continues to breach their obligations under the *Fair Work Act 2009*, including any obligation to pay superannuation referred to in an industrial instrument.
- [11] The success of the regulator to seek penalties of imprisonment was ably demonstrated in *Fair Work Ombudsman v Jorgensen* [2018] FCCA 1235, in which the court ordered that the recalcitrant employer be imprisoned for 12 months.
- [12] Consequently, NRA has concerns that the creation of additional avenues by which penalties may be imposed on employers is excessive and, in the terms contemplated, contrary to sound legislative and legal principles.

PROPOSED SECTION 265-95

- [13] The draft Bill proposes to insert the following provision into the *Taxation Administration Act 1953* (Cth):

265-95 Offence

(1) *You commit an offence if:*

(a) *you are given a direction under subsection 265-90(1); and*

(b) *the liability to pay the amount set out in the direction is not discharged (whether by you or another entity) before the end of the period specified in the direction under paragraph 265-90(3)(c).*

Penalty: 50 penalty units or imprisonment for 12 months, or both.

(2) *An offence against subsection (1) is an offence of strict liability.*

Note: For strict liability, see section 6.1 of the Criminal Code.

(3) *Subsection (1) does not apply if both of the following apply:*

¹ See, for example, *Fair Work Ombudsman v Mahomet* [2017] FCCA 3000

- (a) you took all reasonable steps to comply with the direction before the end of the period specified in the direction under paragraph 265-90(3)(c);
- (b) you took all reasonable steps to ensure that the liability was discharged before the direction was given.

Note: A defendant bears an evidential burden in relation to the matter in subsection (3): see subsection 13.3(3) of the Criminal Code.

[14] This provision refers to an additional proposed provision, section 265-90, which empowers the Commissioner for Taxation to direct a person to pay the superannuation guarantee charge in the following terms:

265-90 Direction to pay superannuation guarantee charge

(1) The Commissioner may, by written notice, give you a direction requiring you to pay to the Commissioner:

- (a) an amount of superannuation guarantee charge that is payable by you under the Superannuation Guarantee (Administration) Act 1992; or
- (b) if an estimate under Division 268 in this Schedule of the amount of a liability of yours to pay superannuation guarantee charge for a quarter under section 16 of the Superannuation Guarantee (Administration) Act 1992 is in force as referred to in subsection 268-10(5) – the amount of the estimate.

Note: The direction does not create a separate liability to pay the amount. However, it may result in you committing an offence against subsection 265-95(1) if the amount is not paid.

[15] Subsections 265-90(2) and 265-90(3) deal with the matters the Commissioner must take into account when deciding to issue the direction, and the matters that must be included in the direction, respectively.

Elements of the offence

[16] In order for a prosecution under section 265-95 to be successful, the prosecutor must prove:

- [a] that the person was given a direction under section 265-90; and
- [b] that the amount stated in the direction was not paid within the time specified in the direction.

[17] Per subsection 265-95(2), this is an offence of strict liability. Under section 6.1(1) of the *Criminal Code*, if an offence is an offence of strict liability, there are no fault elements for any of the physical elements to the offence.

[18] This means that none of the elements defined in Part 2.2, Division 5 of the *Criminal Code* apply to the offence including, relevantly, the fault element of knowledge (see section 5.3 of the *Criminal Code*).

[19] NRA notes that per section 6.1(1)(b) of the *Criminal Code*, the defence of mistake under section 9.2 of the *Criminal Code* is available to a person accused of a strict liability offence.

DISPLACEMENT OF THE PRESUMPTION OF INNOCENCE

- [20] As an offence of strict liability, the offence created under section 265-95 does not require a prosecutor to show anything more than the two physical elements of the offence.
- [21] What is of particular concern to NRA is that by separating the offence of non-compliance with a direction under section 265-90 from the direction itself, in any prosecution of an offence under section 265-95 the direction to which the prosecution relates is not itself open to scrutiny.
- [22] As it currently stands, a person may be liable under section 265-95 without any the following matters required to be proven:
- [a] that the information contained within the direction under section 265-90 is correct, including:
 - [i] that the person is in fact, but for the direction under section 265-90, responsible in any way at law for the payment of the amount specified in the direction;
 - [ii] that the amount specified is in fact an accurate reflection of any liability that the person may have to pay an amount of superannuation guarantee charge.
 - [b] that the person received and had actual knowledge of the direction.

Accuracy of information

- [23] The first of the above points is seemingly acknowledged by the note to subsection 265-90(1), which expressly explains that a direction under section 265-90 does not create a separate liability to pay the amount, but failure to comply with the direction nevertheless constitutes an offence punishable by imprisonment.
- [24] As such, a direction under section 265-90 may expose a person to imprisonment without that person being otherwise liable, at law, to pay the amount of superannuation guarantee charge.
- [25] It is therefore possible for the Commissioner of Taxation to direct a person, who has no connection whatsoever to the relevant liability, to discharge a liability properly owed by another person.
- [26] This presumes a level of faith in the accuracy and infallibility of the systems and processes of the Australian Taxation Office which is not merely excessive, but absurd.

Practical effect of the lack of any proof of material in the direction

- [27] In a practical sense, a direction under section 265-90 is an accusation – that is, the Commissioner of Taxation levels an accusation at an individual that, in the opinion of the Commissioner, they owe an amount of superannuation guarantee charge to the Commissioner.
- [28] Describing the direction as synonymous with an accusation is accurate in the view of NRA, as there is no requirement at any stage of prosecution for the Commissioner of Taxation to prove that anything contained within the direction is correct.
- [29] As such, all that the prosecutor of an offence under s 265-95 needs to show is that an unproven accusation was levelled against a person for the first element of that offence to be satisfied.
- [30] It is irrelevant to a prosecution under section 265-95 if a person is in fact innocent at law from any liability to pay the amount to which the direction relates, but for the direction itself. As such, the offence created in subsection 265-95(1) offends the presumption of innocence.
- [31] We note that provision is made, in subsection 265-90(3)(e) for the direction itself to be challenged separately to the criminal offence under section 265-95. The adequacy of these

processes to protect persons from unjustifiable exposure to deprivation of liberty is discussed further below.

Actual knowledge of the direction

- [32] Under the terms of section 265-95 in its present form, a person may be guilty of the offence under that section and liable to imprisonment even in circumstances where the person was completely unaware of the direction under section 265-90.
- [33] With respect to this, paragraph 265-95(1)(a) provides that the relevant element of the offence is that the person is 'given' a direction.
- [34] Section 28A of the *Acts Interpretation Act 1901* defines how a person may be 'given' a document or any other object.
- [35] In particular, under subsection 28A(1) a document may be 'given':
- (a) *on a natural person:*
 - (i) *by delivering it to the person personally; or*
 - (ii) *by leaving it at, or by sending it by pre-paid post to, the address of the place of residence or business of the person last known to the person serving the document; or*
 - (b) *on a body corporate – by leaving it at, or sending it by pre-paid post to, the head office, a registered office or a principle office of the body corporate.*
- [36] The common element in each of the above paragraphs, save for 28A(1)(a)(i), is that it is sufficient for the document (in this case, the direction under s 265-90) to leave the hands of the Commissioner of Taxation (or their delegate). Actual proof of receipt by the person to whom the direction is directed is not required.
- [37] Section 29(1) of the *Acts Interpretation Act 1901* provides further regulation with respect to service by post, providing that:
- Where an Act authorises or requires any document to be served by post, whether the expression "serve" or the expression "give" or "send" or any other expression is used, then the service shall be deemed to be effected by properly addressing, prepaying and posting the document as a letter and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.*
- (emphasis added)
- [38] By allowing the presumption of service to be rebutted, the onus of proof is shifted to the person named in the directive – the accused – the prove that the document was not in fact delivered.
- [39] The practical effect of this is that, rather than being required to prove all elements of the offence beyond a reasonable doubt, the prosecutor is entitled to the benefit of a statutory presumption, whilst requiring the accused to discharge an evidentiary burden.
- [40] It should be noted that various appellate courts have drawn the distinction between non-delivery and non-receipt, and determined that it is not enough for a person to have not received a document – the document must have itself not been delivered at all².

² See, for example, *Deputy Commissioner of Taxation v Meredith* [2007] NSWCA 354; *Healy v Deputy Commissioner of Taxation* [2015] WASCA 44

- [41] A person will therefore be deemed to have been 'given' the direction, and therefore the first element of the offence proven, even in circumstances where:
- [a] the person's address changed between the date of the direction being sent and the date on which it arrived, or the person has otherwise not updated their address;
 - [b] the person is, for whatever reason, not present at the relevant address in order to receive and peruse the direction and understand its contents.
- [42] Further, the *Electronic Transactions Act 1999* is relevant in circumstances where the Commissioner for Taxation elects to issue the direction other than personally or by post. In particular, section 14A of that Act identifies the time of receipt of a document sent electronically in the following terms:
- (1) *For the purposes of a law of the Commonwealth, unless otherwise agreed between the originator and the addressee of an electronic communication:*
 - (a) *the time of receipt of the electronic communication is the time when the electronic communication becomes capable of being retrieved by the addressee at an electronic address designated by the addressee; or*
 - (b) *the time of receipt of the electronic communication at another electronic address of the addressee is the time when both:*
 - (i) *the electronic communication has become capable of being retrieved by the addressee at that address; and*
 - (ii) *the addressee has become aware that the electronic communication has been sent to that address.*
- [43] Again, there are various situations in which the direction may be 'received' by the person's email address, and therefore deemed to have been 'given', without the person being aware of the notice.
- [44] This situation may occur where, for example, the person has ceased to use as email address previously provided ('designated') to the Commissioner of Taxation. The email address is still 'designated' for the purposes of the provision, but in a practical sense delivery to that address does not provide meaningful communication to the person named in the notice.

Practical effect of prosecutor's reliance on statutory presumptions

- [45] Whilst the administrative convenience of these deeming provisions, and the necessity of such convenience, is not disputed by NRA, NRA submits that a person should never be liable to imprisonment merely because a legal presumption operates to satisfy some or all elements of the prosecution's case.
- [46] The requirement that the prosecution need only prove 'delivery', rather than 'receipt', and thereafter rely on a presumption by operation of the above provisions of the *Acts Interpretation Act 1901* effectively overrides the presumption of innocence with respect to the first element of the offence under subsection 265-95(1).
- [47] The presumption of innocence is a fundamental element of human rights law, in particular Article 11 of the *Universal Declaration of Human Rights* and Article 14(2) of the *International Covenant on Civil and Political Rights (ICCPR)*.

- [48] Although the High Court has repeatedly found³ that a reversal of the presumption of innocence does not render a statutory provision invalid, the reversal of the presumption of innocence for mere administrative convenience is repugnant to the notions of responsible and democratic government, and should only occur when it is absolutely necessary for the administration of justice.
- [49] Certainly, the presumption of innocence should never be displaced, either in technical or practical terms, with respect to any matter where the accused may be liable to the deprivation of their liberty.

ADEQUACY OF DEFENCES

- [50] Subsection 265-95(3) provides that a person does not commit an offence against subsection 265-95(1) if:
- [a] the person took all reasonable steps to comply with the direction before the end of the period specified in the direction; AND
 - [b] the person took all reasonable steps to ensure that the liability was discharged before the direction was given.
- [51] Despite providing this ostensible defence, when taking this subsection and the proposed provision as a whole, there is in truth no practical defence created.

Reasonable steps to comply with the direction

- [52] A key flaw in the first element of the defence – that the person take reasonable steps to comply with the direction – fails to consider the possibility that the person may not have a separate liability to discharge the superannuation liability referred to in the direction.
- [53] The requirement in the direction is to pay an amount of superannuation guarantee charge. Therefore, in order to comply with the direction, the person needs to take reasonable steps to pay the liability specified in the direction.
- [54] It is therefore not enough for the person to take reasonable steps to disclaim or otherwise demonstrate that they are not in fact liable, but for the direction, to pay the amount specified unless a potentially lengthy administrative appeal process is commenced (this will be discussed further below).
- [55] As such, even if a person is able to show that the information contained in the direction is completely inaccurate in every respect, the fact that they failed to comply with the letter of the direction will render them liable to imprisonment, as the fact of their innocence from liability is irrelevant to the defence under subsection 265-95(3).

Retrospective consideration of pre-liability conduct

- [56] Under subsection 265-95(3), a person who makes genuine efforts to comply with the direction will nevertheless be liable for a criminal conviction, and potentially deprivation of liberty, unless they also made reasonable efforts to discharge the liability before the notice was given.
- [57] It is essential that the Committee remember that the offence created under subsection 265-95(1) is not that the person has failed to pay an amount of superannuation guarantee charge. The offence created by that provision is that the person has failed to comply with the direction given under section 265-90. The note to section 265-90 expressly provides that it

³ See, for example, *Williamson v Ah On* [1926] HCA 46; (1026) 39 CLR 95; *Milicevic v Campbell* [1975] HCA 20; (1975) 132 CLR 307; *Leask v Commonwealth* [1996] HCA 29; (1996) 187 CLR 579

- [58] As such, whilst the person's conduct prior to the direction being given may have resulted in the decision to issue the direction, that conduct is completely separate and distinct from the question of whether the person has complied with the direction.
- [59] As the person is not liable to criminal sanction under section 265-95 until the direction under section 265-90 has been given, the effect of subsection 265-95(3) is to retrospectively penalise, at criminal law, conduct which was not relevant to a criminal charge at the time the conduct occurred.
- [60] It is contrary to fundamental principles of justice, in particular the principle of procedural fairness, to retrospectively render a person at risk of or liable to criminal liability and deprivation of liberty.
- [61] This is particularly so in this case, as one might reasonably expect that if a person had taken or was taking reasonable steps to discharge their liability prior to the issue of the direction under section 265-90, this would have been taken into consideration by the Commissioner and in all likelihood result in a direction not being issued (and therefore criminal liability would never arise).
- [62] The only circumstance in which something of this nature would be reasonable to include in a criminal charge is if a preliminary step was included, that being that:
- [a] the Commissioner of Taxation notifies the person that they are considering issuing a direction under section 265-90 in relation to an amount of superannuation guarantee charge; and
 - [b] that notice advises the person that if a direction under section 265-90 is made, they may be liable to criminal sanctions including imprisonment for non-compliance; and
 - [c] for the purposes of paragraph 265-95(3)(b), only conduct occurring between this preliminary notice and the issue of the direction under section 265-90 may be taken into account.
- [63] Moreover, this provision encounters the same problems as paragraph 265-95(3)(a) when considering a person who, but for the direction, is otherwise not liable to pay the liability.
- [64] Again, paragraph 265-95(3)(b) makes it irrelevant whether the person is in fact innocent of any liability to pay the amount specified in the direction. This paragraph refers to 'the' liability – that is, the liability specified in the direction given under section 265-90 – not the person's actual liability at law if the direction is incorrect.
- [65] It therefore becomes a vexed issue if a person can take reasonable steps to discharge a liability that is not theirs to discharge prior to being given a direction that makes them responsible for the discharge of that liability. NRA is of the view that it is not possible to show reasonable steps in this circumstance, and an innocent person may be rendered liable to imprisonment in repugnance of fundamental and ancient principles of our democracy.

Availability of 'mistake' not a viable defence

- [66] Section 6.1(1)(b) of the *Criminal Code* expressly provides that where an offence is an offence of strict liability, the defence of mistake under section 9.2 of the *Criminal Code* is available.
- [67] Section 9.2 of the *Criminal Code* provides as follows:

9.2 Mistake of fact (strict liability)

- (1) *A person is not criminally responsible for an offence that has a physical element for which there is no fault element if:*

- (a) *at or before the time of the conduct constituting the physical element, the person considered whether or not facts existed, and is under a mistaken but reasonable belief about those facts; and*
- (b) *had those facts existed, the conduct would not have constituted an offence.*

- [68] Given the generality of the physical elements of the offence under subsection 265-95(1), it is difficult to see what mistake of facts could give rise to a reasonable defence of mistake under section 9.2 of the *Criminal Code*.
- [69] With respect to the first element of the offence – that the person has been given a direction under section 265-90 – there is no true aspect of the element about which a mistake of fact can be made.
- [70] In order for the defence to be available, the person must first consider whether they have been given such a direction. A person is highly unlikely to consider whether they have been given such a direction unless they have actually received it.
- [71] Having received the direction, the first element of the offence is satisfied. The first element of the offence by its very nature precludes the defence of mistake being applicable to that part of the offence.
- [72] The second element of the offence requires only that the liability stated in the direction not be discharged by the date specified in the direction.
- [73] With respect to this point, the defence of mistake is theoretically available if the person is under a mistaken belief that the amount was paid before the time specified in the direction – for example, the payment has been authorised, but was not processed by their financial institution.
- [74] An alternative situation – that the person forms the mistaken belief that they do not have to comply with the direction because the liability to which it refers is not theirs – does not fall within the ambit of the defence of mistake.
- [75] Because of the structure of the offence provision in section 265-95, there is no scope for the defence of mistake to be available if the person forms the reasonable view that the direction has been issued to them in error. As previously mentioned, the accuracy or inaccuracy of the information contained in the direction is irrelevant for the purposes of the offence.
- [76] As such, the availability of the defence of mistake is of cold comfort to any person charged with an offence under subsection 265-95(1).

FAILURE TO DISTINGUISH BETWEEN IGNORANCE AND WILFUL DISOBEDIENCE

- [77] As previously raised, there is no requirement for a prosecutor of an offence under subsection 265-95(1) to prove that the person named in the direction had actual knowledge of the direction and their obligations under it.
- [78] The lack of any fault elements to the offence, as an offence of strict liability, means that a person may be liable to imprisonment in circumstances where they are completely unaware of any such liability.
- [79] Whilst this is a factor which will be taken into consideration by a court in sentencing, in NRA's view the lack of any distinction between genuine ignorance and wilful disobedience may result in the courts being required to consider circumstances where minimal penalties are imposed due to the matter of a person's ignorance.

- [80] NRA submits that it is in the public interest, with a view to ensuring judicial consideration and expense of public funds only with respect to the most egregious conduct, that the offence created in subsection 265-95(1) include an element of actual knowledge of the direction.

ACCURACY OF DIRECTION AS ADMINISTRATIVE, RATHER THAN CRIMINAL, MATTER

- [81] NRA notes that there are various mechanisms by which a person may challenge a direction given to them under section 265-90.
- [82] This process commences with a tax objection under section 265-110, and may progress if necessary an appeal to the Administrative Appeals Tribunal (**AAT**) and/or the Federal Court of Australia (**FCA**) under Part IVC, Division 4 or Division 5 respectively of the *Taxation Administration Act 1953*.
- [83] NRA's concern with this process is that the question of whether the person is in fact liable to pay the amount specified in the direction is treated as an administrative matter, distinct from the criminal matter under section 265-95.
- [84] Our concern is that whilst a person may be able to obtain legal aid to defend the criminal matter under section 265-95, this form of assistance is not typically available for matters of administrative law.
- [85] As such, a person may be required to expend far more of their own resources to prove that they are in fact innocent of any liability to pay the amount specified in the direction, whereas in the criminal matter – where they may obtain legal aid – the question of the innocence of this liability is irrelevant.
- [86] Whilst it is true that a director of a multi-national corporation may have the resources to engage legal representation in an administrative law matter all the way to the FCA, not all employers with superannuation liabilities are so blessed.
- [87] For example, NRA is aware of at least one business in which the owner pays employee entitlements out of his own superannuation benefits. Such a person would not have the resources to challenge any direction under section 265-90 through the administrative appeal process.
- [88] The Committee ought to consider that employers come in varying sizes with vastly different levels of resources, and as such separating these two matters may not be sufficient to ensure that justice is in fact done.
- [89] As such, NRA is of the view that in order for the penalty of imprisonment to be justifiable, the offence under subsection 265-95(1) should be amended to **at least** require the prosecution to prove the accuracy of the information contained within the direction given under section 265-90.
- [90] If such an amendment is made, persons liable to prosecution for the offence under subsection 265-95(1) will be able to avail themselves of the benefit of legal aid where necessary for the purposes of challenging what is, in NRA's view, a critical element of the offence in the interests of justice.

DISHARMONY WITH OTHER ELEMENTS OF THE TAXATION ADMINISTRATION ACT 1953

- [91] It is in the interests of transparency and public confidence in the administration of taxation and justice that penalties be consistent across particular areas of regulation.
- [92] In that sense, the penalty proposed for subsection 265-95(1) – that being imprisonment – is far removed from any other provision of the *Taxation Administration Act 1953*.
- [93] For example, under section 8E of the *Taxation Administration Act 1953*, a person is only liable to imprisonment for a failure to comply with their taxation obligations if, and only if, the court

imposing the penalty is satisfied that they have been convicted of similar offences on two prior occasions.

- [94] Section 8H imposes the penalty of imprisonment for failure to comply with an order of the court. This is by no means unusual and is similar to the penalty for contempt of a court of original jurisdiction.
- [95] Section 8R, which imposes a penalty for contraventions of sections 8N and 8Q (which deal with recklessly making false statements or keeping incorrect records) allows the imposition of imprisonment only if the person has at least one prior conviction for a similar offence.
- [96] Section 8V allows for imprisonment on a first conviction for contraventions of sections 8T and 8U, which deal with conduct which is intentionally misleading or deceiving.
- [97] Sections 8WA to 8XA allow for conviction on a first offence for improper or unauthorised dealings with respect to tax file numbers or unauthorised access to tax records.
- [98] Section 14R allows for imprisonment if a person contravenes a departure prohibition order, this being a reasonable impost to prevent a person from leaving Australia without discharging their tax liabilities.
- [99] Section 20-35 allows for imprisonment on a first offence for providing a false copy of a payment summary.
- [100] Section 325-55 allows for imprisonment if an officer of the ATO discloses protected information.
- [101] Section 355-155 allows for imprisonment if a person who is not a tax officer discloses protected information.
- [102] Section 355-265 allows for imprisonment if a person discloses protected information which was acquired by a breach of a taxation law.
- [103] Broadly, these offences can be categorised as follows:
- [a] bare failures to comply with taxation obligations – section 8E;
 - [b] contempt of court – section 8H;
 - [c] reckless inaccuracy – section 8R;
 - [d] deliberate deceit – sections 8V and 20-35;
 - [e] attempts to access, utilise or disclose personal information of a taxpayer without authorisation – sections 8WA – 8XA, 355-155 and 355-265;
 - [f] practical necessity in management of flight risk – section 14R;
 - [g] unauthorised disclosure of information by an officer of the ATO – section 325-55
- [104] As can be seen from these provisions, a failure to meet taxation obligations does not render a person liable to imprisonment unless they first have a history of prior convictions.
- [105] Recourse to exposure to imprisonment without prior convictions is typically only available if the conduct complained of involves deliberate acts of deception or the unauthorised disclosure of a taxpayer's personal information.
- [106] The exception to this is section 14R, which is aimed at managing flight risks and which NRA concedes is a reasonable impost in the circumstances of managing flight risk. The objective of section 14R is imprisonment as a form of risk management rather than as a penalty in and of itself.

[107] In this context, the matter for which a person is exposed to imprisonment under section 296-15 is fundamentally a failure to meet taxation obligations, similar in many ways to section 8E.

[108] Whilst understanding the need for deterrence, the impost under section 296-15 is such a drastic departure from the treatment of similar offences under section 8E results in an inconsistent approach to like offences.

[109] As observed by Chief Justice Gleeson in *Wong v R* (2001) 207 CLR 584:

The administration of criminal justice works as a system; not merely as a multiplicity of unconnected single instances. It should be systematically fair, and that involves, amongst other things, reasonable consistency.

[110] Whilst his Honour was referring to discretionary sentencing practices, the observation is apt to apply to legislative imposts on judicial discretion. Where criminal offences are created, similar offences ought properly be given similar penalties, otherwise the penalties imposed for these offences begin to take a Draconian tone.

[111] As such, NRA is of the view that if a penalty of imprisonment is to be imposed under subsection 265-95(1), it ought to be on terms similar to section 8E – that is, only where the person has prior convictions against taxation law.

PROBLEM OF RECOVERY EXACERBATED

[112] In NRA's view, whilst deterrence is a worthy consideration for the creation of an offence, the root of the issue which section 265-90 is seeking to address is a failure to pay superannuation.

[113] Naturally, a failure to meet superannuation obligations has flow-on effects to multiple individuals, namely those to whom the superannuation is owed.

[114] In that sense, whilst mandating very specific timelines in which such an obligation must be discharged by providing a direction under section 265-90 is appropriate. However, rendering someone incapable of discharging the liability by incarceration does not result in the relevant payments being made.

[115] Indeed, incarceration is likely to do little more than ensure that payment of superannuation entitlements is further delayed, particularly with respect to small businesses. Whilst larger businesses may be able to operate, and generate profit with which to pay the relevant money, despite the imprisonment of a particular individual, a sole trader or small proprietary company is not going to be able to engage in any such business if the person authorised to transfer the relevant funds is incarcerated.

[116] In that sense, NRA questions whether the impost of imprisonment will actually assist in achieving the policy objective of recovery.

CONTRADICTION WITH ATTORNEY-GENERAL'S GUIDELINES

[117] The Commonwealth Attorney-General's department has published *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, with the last revision publicly available being the September 2011 edition.

[118] At page 23 of these guidelines, it states that:

Application of strict or absolute liability to all physical elements of an offence is generally only considered appropriate where all of the following apply:

- *The offence is not punishable by imprisonment.*

[119] The adoption of this guideline follows from the 2002 report of the Senate Standing Committee for the Scrutiny of Bills in its *Inquiry into absolute and strict liability offences in Commonwealth Legislation (Sixth Report of 2002)*.

[120] At page 263 of this report, the Committee put the following principle for the application of strict liability:

strict liability offences should be applied only where the penalty does not include imprisonment ...

[121] The Committee also determined, at page 284, that:

strict liability should not be justified on the sole ground of minimising resource requirements ...

[122] The offence under subsection 265-95(1), in its present form, applies strict liability to all elements of the offence.

[123] Whilst NRA can accept that there is an element of cost saving to making the offence one of strict liability, the level of proof required for the prosecution to prove the various elements is so low by virtue of the application of various legal presumptions that cost saving alone cannot be sufficient justification for the application of strict liability in such cases.

[124] In particular, NRA considers it reasonable to require the prosecution to prove the facts alleged in the direction issued under section 265-90 in any prosecution for a failure to comply with such a direction, given that this information ought to be readily available to the Commissioner of Taxation at little or no additional cost.

[125] Conversely, requiring a person to disprove the facts contained in a direction under section 265-90 through an administrative, rather than criminal, process imposes an exceptional cost on the person, for which legal aid assistance is not generally available.

[126] Ironically, by incarcerating individuals for failing to pay superannuation, it is likely that more tax monies will be expended on their imprisonment than is required to be paid by the individual; a requirement that the individual, by their imprisonment, cannot discharge.

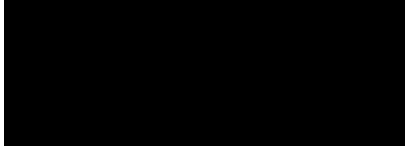
RECOMMENDATIONS

[127] As a consequence of the above, NRA recommends that section 265-95 be amended in any or all of the following ways:

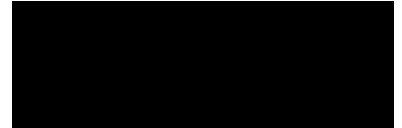
- [a] any reference to imprisonment be removed from the provision;
- [b] alternatively, that the penalty of imprisonment only be available if the person has prior convictions for similar conduct;
- [c] any reference to conduct prior to the giving of a direction under section 265-90 be removed from the provision;
- [d] alternatively, that an additional provision (eg. 265-90A) be included to require the Commissioner of Taxation to provide a person with notice that:
 - [i] the Commission is considering giving a direction under section 265-90; and
 - [ii] the potential penalties to which the person may be liable if they fail to comply with such a direction; and
 - [iii] that their conduct from the date of the notice under section 265-90A may be relevant to their liability;

- [e] that the prosecution be required to prove that the information contained in the direction with which it is alleged the person has not complied is an accurate reflection of the person's liability to pay superannuation guarantee charge;
- [f] that the prosecution be required to prove the person had actual knowledge of the direction under section 265-90 with which it is alleged the person has failed to comply;

[128] We thank the Committee for their consideration of these submissions.



Dominique Lamb
Chief Executive Officer
National Retail Association



Alexander Millman
Lawyer/Senior Workplace Advisor
National Retail Association