Ai GROUP SUBMISSION

Victorian Government Consultation Process

Wage Theft Bill 2020

9 March 2020

About Australian Industry Group

The Australian Industry Group (Ai Group) is a peak national employer association representing and connecting thousands of businesses in a variety of industries and sectors across Australia. Our membership and affiliates include private sector employers large and small from more than 60,000 businesses employing over 1 million staff. Ai Group promotes industry development, jobs growth and stronger Australian communities. Our members have a common interest in creating more competitive businesses and a stronger economic environment. We provide advice, services, networks and advocacy to help members and industries thrive, and the community to prosper.

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Introduction

The Australian Industry Group (**Ai Group**) makes this submission in response to the Victorian Government's Consultation Paper for its proposed Wage Theft Bill 2020.

Ai Group supports and encourages lawful workplace practices by all parties and does not support any deliberate underpayment of wages or other entitlements. Most businesses devote substantial time and resources to ensuring that they pay their employees correctly.

This submission argues that:

1. In the form outlined in the Consultation Paper, the proposed Wage Theft Bill would operate very unfairly for Victorian businesses.

2. The proposed Bill is not appropriate and should be abandoned.

3. The existing regulatory system provides an appropriate framework for addressing underpayments of employees' remuneration and applies appropriate sanctions to the minority of employers who deliberately underpay their staff. The Protecting Vulnerable Workers Amendments to the *Fair Work Act 2009* (**FW Act**) increased maximum penalties for underpayments by 10 times and for breaches of the pay record requirements by 20 times. Given that the Amendments have only been in place for just over two years, there is inadequate evidence at this early stage to conclude that the measures will not be effective in addressing underpayments.

4. Over the past 12 months there has been a substantial increase in the number of underpayments self-reported to the Fair Work Ombudsman (**FWO**) and remedied by employers. As acknowledged in the FWO's 2018-19 annual report, this development suggests that 'compliance and enforcement activities are creating the desired effect'.[1]

5. The characterisation of underpayments as 'theft' is misleading and inappropriate.

6. Ai Group strongly opposes the introduction of criminal penalties for wage underpayments. While at first glance, the introduction of criminal penalties for underpayments that are 'dishonest' might seem like a good idea, there are many reasons why this is not in anyone's interests and needs to be rejected:

    a. Implementing criminal penalties for wage underpayments would discourage investment, entrepreneurship and employment growth;

    b. Exposing directors and managers of businesses to criminal penalties would operate as a major barrier to employers self-disclosing underpayments to the FWO; and

[1] Page 2.

c. Importantly, a criminal case would not deliver any back-pay to an underpaid worker. While a criminal case is underway, any civil case to recoup unpaid amounts would no doubt be put on hold by the Court until the criminal case is concluded. This means that underpaid workers could be waiting years for redress.

The existing statutory regime

The FW Act provides a national workplace relations system for Constitutional Corporations and is the principal piece of workplace relations legislation governing Australian workplaces, including Victorian workplaces.

The FW Act exposes employers to significant penalties in the event that they breach certain civil remedy provisions, including those relating to minimum rates of pay and the National Employment Standards. Failure to pay employees correctly can result in an individual receiving a penalty of $12,600 ($63,000 in the case of a corporation). These penalties can also apply where a modern award or enterprise agreement is not complied with.

The *Fair Work (Protecting Vulnerable Workers) Act 2017* (Cth) (**Protecting Vulnerable Workers Amendments**) amended the FW Act to introduce the concept of a 'serious contravention' of a workplace law. This applies where there is a 'knowing' contravention or the contravention formed part of a systematic pattern of conduct involving one or more persons. In such a case, the maximum penalties rise to $630,000 for a corporation. The amendments also gave the FWO stronger powers to collect evidence in investigations.

Workers who believe they have not received their correct entitlements under the FW Act have a number of options to achieve redress. Applications may be made to the Federal Circuit Court, the Federal Court of Australia or an 'eligible State or Territory court'. The Fair Work Commission also has a role in settling disputes about entitlements.

The FWO and the Australian Building and Construction Commission (**ABCC**) monitor compliance with, and investigates breaches of, the FW Act and Fair Work Instruments (including modern awards and enterprise agreements). The FWO and ABCC are very well-resourced and effective regulators.

The Protecting Vulnerable Workers Amendments increased maximum penalties under the FW Act for underpayments by 10 times and for breaches of the pay record requirements by 20 times. The increases applied from 15 September 2017.

Any changes to Australia's workplace relations system should be evidence-based. Given that the Protecting Vulnerable Workers Amendments have only been in place for just over two years, there is inadequate evidence at this early stage to conclude that the measures will not be effective in addressing underpayments.

Over FWO's last reporting period there has been a substantial increase in the number of underpayments self-reported to the FWO and remedied by employers. As acknowledged in the FWO's 2018-19 annual report, this development suggests that *'compliance and enforcement activities are creating the desired effect'*.[2]

The Final Report of the Migrant Workers' Taskforce recommended that the Australian Government *'give a greater priority to build an evidence base… to better understand the extent, nature and causes'*[3] of underpayments. In making this recommendation, the Taskforce acknowledged that the current evidence base is inadequate.

Many underpayments are the result of genuine misunderstandings and payroll errors. Even businesses that promote themselves on the basis of a social conscience agenda and/or with being closely aligned with unions, have been identified as making very large underpayments to employees, allegedly due to errors or misunderstandings of legal entitlements (e.g. Maurice Blackburn Lawyers).

The FWO's National Compliance Monitoring Campaign conducted an audit of businesses which had previously been found in breach of workplace laws. The repeat audits found the majority of businesses to be compliant. Of those that were not, most had made clear efforts to comply, with only minor errors detected.

The proposal to criminalise certain underpayments and the concept of 'wage theft'

The treatment of underpayments of wages and entitlements as a criminal offence is incongruous with the history of industrial relations law in Australia and harmful to the *'balanced framework for cooperative and productive workplace relations'*[4] the FW Act endeavours to establish as the main statute governing the employment relationship.

Ai Group strongly opposes the introduction of criminal penalties for wage underpayments.

While at first glance, the introduction of criminal penalties for underpayments that are 'dishonest' might seem like a good idea, there are many reasons why this is not in anyone's interests:

- Implementing criminal penalties for wage underpayments would discourage investment, entrepreneurship and employment growth.

- Exposing directors and managers of businesses to criminal penalties would operate as a major barrier to employers self-disclosing underpayments to the FWO and undo the positive developments that have been taking place in this area, as discussed earlier in this submission.

[2] Page 2.

[3] Recommendation 22.

[4] *Fair Work Act 2009* (Cth) s. 3.

- Importantly, a criminal case would not deliver any back-pay to an underpaid worker. Where a criminal case is underway, any civil case to recoup unpaid amounts would no doubt be put on hold by the Court until the criminal case is concluded. This means that underpaid workers could be waiting years for redress.

The proposed Bill uses the term 'wage theft'. This is an inappropriate and misleading term.

Most ordinary people equate 'theft' with the taking of a 'thing' with knowledge that the object taken rightfully belongs to someone else. To break down this necessary distinction between the civil and criminal legal systems would be a retrograde measure, returning the civil law system to a bygone era where a party could be arrested and imprisoned for failure to pay a debt. In a 1969 report on Supreme Court procedure, the NSW Law Reform Commission made the following comment regarding 'arrest and attachment of the person' for enforcement of an order for the payment of money:

> "Imprisonment for debt is the survival of an archaic procedure and we think that it has no place in a modern system".

Exposing an employer to imprisonment for non-payment of a debt to an employee constitutes a regressive development in the system of workplace relations reversing more than a century of modernisation since the abolition of debtors' prisons in the middle of the nineteenth century.

Criminal legislation already contains penalties which deal with 'theft'. For example, section 72 of the *Crimes Act 1958* (Vic) requires dishonest appropriation of property belonging to another with the intention of permanently depriving the other of that property, in order for the meaning of the term to be satisfied. It is inappropriate to disturb an existing legal framework by extending the concept of 'theft' beyond its current definition.

Also, characterising underpayments as 'wage theft' is likely to discourage employers from self-disclosing underpayments they have discovered due to error and may discourage constructive remedial actions being taken to rectify past underpayment errors for fear of criminal prosecution and conviction against both employers and individuals.

If the Victorian Parliament decides to introduce criminal penalties for certain conduct relating to wage underpayments, despite Ai Group's strong opposition, the penalties should only apply to **dishonest, deliberate, serious and systematic** conduct.

The Government's proposed definition of 'dishonesty'

The Consultation Paper states that a *'new and distinct definition of 'dishonesty' will be a central feature of the Bill'.* The proposed definition would not require that the accused person intended to underpay an employee but rather would incorporate an objective standard to assess whether the employer 'should have known' what the employee's correct legal entitlements were.

The argument in the Consultation Paper that the existing definition of 'dishonesty' is insufficient because it does not allow consideration of whether the conduct is *'an expression of wilful blindness'*, fails to acknowledge the state of the law surrounding this matter. 'Wilful blindness' can lead to an inference being drawn about actual knowledge, even under criminal law.[5]

The Victorian Government's proposed approach would operate very unfairly for employers. Exposing directors and managers to potential imprisonment if they fail to implement the necessary systems to ensure compliance would be extremely harsh and inappropriate. This is particularly so given the complexity of Australia's workplace relations system.

Under Australia's extremely complex workplace relations system, it is incumbent on employers to navigate 122 Federal industry and occupational awards, the lengthy and complex FW Act, State and Territory legislation governing long service leave and, depending on the organisation, an intricate web of common law contracts and policies.

For those employers covered by one or more awards, it is worth noting that the Fair Work Commission's (**FWC**) current 4 Yearly Review of Modern Awards has continued for over six years so far, with a long way to go. The Review has uncovered countless competing interpretations of award terms, including coverage terms and provisions relating to penalties and allowances. Many employers, particularly SMEs, lack dedicated human resources personnel to assist in ensuring that each employee is paid correctly. Most businesses devote substantial time and resources to ensuring that they pay their employees correctly.

The Migrant Workers' Taskforce Report recommended that criminal sanctions be introduced for the 'most serious forms of exploitative conduct, such as where that conduct is 'clear, deliberate and systemic'.

The Consultation Paper refers to 'dishonesty', but no mention is made of the conduct needing to be deliberate, serious or systemic. The proposed approach is not appropriate.

Corporate liability and complicity

The Consultation Paper highlights that directors and managers of corporations would be able to be held criminally liable for underpayments based on such vague notions as *"the existence of a corporate culture within the body corporate that….tolerates or leads to the relevant conduct being carried on"*. The Consultation Paper states that:

> 'If the body corporate is liable, criminal liability may also be attributed to corporate decision makers unless the officer is able to demonstrate that they took reasonable precautions and exercised due diligence to prevent the conduct'.

[5] For example, see *Pereira v Director of Public Prosecutions* [1988] HCA 57.

The proposed approach is unfair and inappropriate. Exposing directors and managers to potential imprisonment if they fail to implement the necessary systems to ensure compliance would be extremely harsh and inappropriate, particularly given the complexity of Australia's workplace relations system.

The Consultation Paper states that the *'Government intends that Part II, Division 1, (1) of the Crimes Act 1958 (Vic) will apply to the wage theft offences'.* However, the protections afforded to accused persons under these provisions, would appear to be very substantially undermined by the Government's proposed approach regarding corporate liability.

Also, the examples in the Consultation Paper about franchisors and supply chain contracting appear to be inconsistent with the above provisions of the Crimes Act. It is very important that the protections for accused persons in Part II, Division 1 of the Crimes Act are not undermined by the provisions in the proposed Bill.

Implementing criminal penalties for underpayments is not in anyone's interests. The idea needs to be rejected.

Defences

The Consultation Paper indicates that defences will be included in the Bill to ensure that the *'offences will not capture employers who have done their best to comply with the law'.*

While appropriate defences are important, if the Bill proceeds despite Ai Group's strong objections, such defences do not detract from the need for the offence provisions to be fair and only applicable to dishonest, deliberate, serious and systematic conduct.

Enforcement

Ai Group does not support the proposal to give Wage Inspectorate Victoria the power to prosecute offences under the proposed Wage Theft Bill.

If criminal legislation is enacted by the Victorian Parliament, despite Ai Group's strong opposition, the Director of Public Prosecutions would be the appropriate body to pursue prosecutions.

Overlap with pending Federal laws

On 18 February 2020, the Commonwealth Attorney-General, the Hon Christian Porter MP, announced that:

> Legislation will be introduced in the coming weeks that will criminalise the most serious forms of deliberate worker exploitation and wage underpayments and introduce significant jail terms and fines.

It is very likely that the Victorian Government's proposed Bill will overlap with the proposed Federal laws. Accordingly, the proposed Victorian Bill should not proceed until it is clear what the content of the Federal Bill will be, and whether the Federal Bill will be passed by the Commonwealth Parliament.

To proceed with the Victorian Bill at the current time would add yet another layer to Australia's already extremely complex workplace relations system, resulting in more uncertainty, confusion and injustice.

Conclusion

As highlighted above, there have been a number of recent, major changes to federal laws in order to address instances of underpayment. The laws are working, as is evident from the large number of employers that have recently carried out detailed payroll audits, disclosed underpayments and back-paid employees. There is no need for a Victorian Wage Theft Bill.

The proposed Bill is not appropriate. In the form outlined in the Consultation Paper, the proposed Bill would operate very unfairly upon Victorian employers.

The Bill would operate as a significant barrier to investment and employment in Victoria, and it should be abandoned.

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