HOUSING INDUSTRY ASSOCIATION

Submission to the
Committee Secretary
Education, Employment and Small Business Committee

Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020
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HOUSING INDUSTRY ASSOCIATION

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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 15 July 2020, the Minister for Education and Minister for Industrial Relations, the Hon Grace Grace MP, introduced the *Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020* ('Wage Theft Bill') into the Legislative Assembly. The Wage Theft Bill was referred to the Education, Employment and Small Business Committee for detailed consideration and report by Friday 28 August 2020.

The explanatory notes state that the objectives of the Wage Theft Bill are to implement the underlying policy intent of the recommendations made in the Education, Employment and Small Business Committee report titled 'A fair day's pay for a fair day's work? Exposing the true cost of wage theft in Queensland' ('the report'), tabled on 16 November 2018. The two recommendations of the report that require legislative amendments are:

- Recommendation 8 (Simple, quick and low-cost wage recovery process for workers), and
- Recommendation 15 (Criminalisation of wage theft).

HIA takes this opportunity to provide comments in relation to the proposed Wage Theft Bill.

HIA opposes the criminalisation of industrial relations matters as outlined under the Wage Theft Bill. These matters should remain within the remit of civil laws and penalties. Further, the scope of the proposed legislation goes well beyond that recommended in the report, and if pursued, must be revised to ensure its application is clear in order to avoid any unintended consequences.

Any attempt by the State Government to intervene in employment related matters should be treated with caution. The regulation of industrial relations already falls squarely within the realm of the Federal jurisdiction. To alter these current arrangements will cause significant confusion for both employers and employees and significantly may be unconstitutional.

HIA is also concerned that the establishment, through the state court system, of an alternative pathway to resolve underpayment issues as outlined in the proposed legislation entrenches disadvantages for small businesses when faced with legal challenges.

While HIA does not support employers or businesses deliberately avoiding their wage and superannuation obligations, and intentionally failing to pay employee entitlements, HIA disagrees that any further measures need to be taken to address the underpayment of employee entitlements. The current Federal regime, compliance and enforcement frameworks can appropriately respond to instances of underpayment.

The introduction of the Wage Theft Bill, comes at a particularly uncertain time. The current COVID-19 pandemic is creating an economic crisis that right now has no clear end point. What is obvious is that it will be detrimental for both the Queensland and Australian economy.

The impact on consumer sentiment and spending is already obvious for many HIA members who are sharing feedback that customer enquiries have reduced, contracts cancelled or postponed and in some cases, work has already ceased. Employment has been and will continue to be affected.

Now is not the time to introduce punative legislative reforms. Now is the time for Governments to focus on measures to bolster demand for new homes which has the advantage not only of stimulating a sector that employs one in ten workers, creating lasting assets but as the bulk of building components are manufactured locally, it supports a wider group of businesses.

HIA submits that the consideration of this legislation be delayed until the economic outlook is clearer.

2. GENERAL COMMENTS

'Wage theft' has widely been used as an umbrella term to describe all types of underpayment. 'Wage theft' is a recently invented term, the adoption of which seeks to sensationalise and inappropriately criminalise the occurrence of underpayment of wages. HIA rejects its use within an industrial context.

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

For example, recent media articles about instances of the incorrect calculation of overtime[1] and underpayments due to payroll errors[2] 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 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 THE FEDERAL GOVERNMENT IS RESPONDING

The Federal Government is in the process of considering and responding to 'underpayment of wages' and claims of 'wage theft'. There have been numerous separate inquires in response, including:

- The Attorney Generals Industrial Relations Consultation, including the discussion papers on '*Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance'* (Non Compliance Discussion Paper), and *'Improving protections of employees' wages and entitlements: further strengthening the civil compliance and enforcement framework'* (Civil Compliance and Enforcement Discussion Paper); [3]
- The Senate Inquiry into the causes, extent and effects of unlawful non-payment or underpayment of employees' remuneration[4];
- The Senate Inquiry into Corporate Avoidance of the FW Act; and
- The Senate Inquiry into the Superannuation Guarantee.[5]

Prior to COVID-19 the Federal Government had also indicated that the drafting of legislation to criminalise certain forms of worker exploitation was underway. The Non Compliance Discussion Paper sought views from interested parties to inform the drafting of these provisions.[6]

Further, the 2019-20 Federal Budget provided greater funding for measures to protect vulnerable workers[7] through a commitment to establish a National Labour Hire Registration Scheme and, the Fair Work Ombudsman (FWO) with additional capacity to conduct investigations and take enforcement action, and focus on educating vulnerable and migrant workers about their workplace rights.

Since COVID-19, compliance and enforcement are a clear focus of the federal government. The federal government has established five industrial relations working groups to find ways to regrow lost jobs.[8] One of the

[1] http://www.abc.net.au/news/2017-04-04/george-calombaris-apologises-after-restaurant-staff-underpaid/8412852
[2] https://www.theguardian.com/australia-news/2018/jul/17/lush-cosmetics-payroll-error-underpaid-staff-by-2m
[3] Australian Government, Attorney-General's Department, September 2019; and February 2020
[4] Senate Standing Committees on Economics, November 2019
[5] Senate Inquiry into the Superannuation Guarantee, Senate Economics References Committee, 2017
[6] Hon Christian Porter MP, Speech, Committee for Economic Development of Australia's State of the Nation Conference, 19 September 2019
[7] https://www.employment.gov.au/budget-2019-20
[8] https://www.attorneygeneral.gov.au/media/media-releases/memberships-ir-working-groups-announced-11-june-2020

five working groups charged with finding ways of getting the economy moving again is on compliance and enforcement.

2.2. STATE REGULATION IS NOT THE ANSWER

HIA is concerned by the apparent trend towards further regulation as the appropriate response to a reported problem or issue.

There is no evidence to clearly identify that further regulation will be effective in solving underpayment issues. There are a plethora of existing laws, regulations and regulatory agencies to adequately deal with the matter. Given that the Committee's report was delivered in late 2018 and the Federal government is responding to the issue, HIA is concerned that the current government response is misplaced.

HIA contends there has been a failure to assess and consider the impact that further legislative changes may have.

Firstly, any efforts to legislate at a state level against 'wage theft' or 'underpayment of wages' are not only an unnecessary duplication of effort and cost already expended at a Federal level, but also has the real potential of being constitutionally unsound, leading to inadequate outcomes for all parties.

The provisions of the *Fair Work Act 2009* (FW Act), particularly section 26(1) and 30, excludes state or territory industrial laws as they would otherwise apply in relation to a national system employee, or national system employer. Under section 109 of the Australian Constitution '*when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid*.'

Chapter 4 of the FW Act, deals with the compliance and enforcement provisions which apply to national system employees and employers. Queensland by way of the *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* (QLD), has referred most of its industrial relations powers to the Commonwealth.

Whether the Wage Theft Bill is constitutionally sound is unclear, and certainly has not been adequately addressed.

Secondly, any attempt to establish state based legislation will create further layers of uncertainty for employers and employees regarding industrial relations related matters. Employers and employees will be understandably confused as to who is the appropriate regulator for employment related matters, and will undoubtedly utilise valuable Government resources in determining their appropriate course of action.

Overall, the notion that the current penalty, compliance and enforcement frameworks do not respond appropriately, and further regulation is therefore required at a state level is flawed, the FW Act and FWO have the capacity to and are already responding to instances of underpayment.

3. CURRENT COMPLIANCE FRAMEWORK

Under the FW Act the underpayment of wages is a civil offence and penalties can be imposed for being found to have carried out such actions.

Recent amendments to the FW Act through the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Protecting Vulnerable Workers Act) have significantly increased penalties for the underpayment of wages where the actions are deliberate and systemic.[9]

[9] Fair Work Amendment (Protection of Vulnerable Workers) Act 2017

The Protecting Vulnerable Workers Act introduced:

- 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.

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

The effect of the Protecting Vulnerable Workers Act is yet to be fully realised. It was just a year ago that the FWO finalised their first case under the protecting vulnerable workers provisions.[10]

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."*

It is clear the consequences for a failure to comply workplace relations obligations under the FW Act 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 for individuals, and up to $630,000 for companies.

Role of the Fair Work Ombudsman

In 2019, the FWO announced a new 'firm but fair approach to non-compliance' with the FWO issuing an updated Compliance and Enforcement Policy, and committing to the increased use of compliance notices.[11]

[10] Fair Work Ombudsman v A & K Property Services Pty Ltd & Ors [2019] FCCA 2259 (16 August 2019)
[11] Address by the Fair Work Ombudsman, 2019 Annual National Policy-Influence-Reform Conference

The FWO consequently reported in 2018-19 their 'intelligence-led approach' to education and compliance activities resulting in recoveries of over $40 million for nearly 18,000 workers, as compared to recoveries of almost $30 million for nearly 13,400 workers in 2017-18.

In recent times the FWO have taken a more transparent and proactive approach. A range of high profile cases that have highlighted systemic breaches of workplace relations laws have, in HIA's view established the FWO as visibly and proactively undertaking the role of identifying and recovering underpayments.

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."*[12]

The Ombudsman has 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.

It is clear the FWO is moving towards a stricter and more proactive approach in compliance and enforcement. With further time, appropriate analysis will be able to be taken to determine how these measures have influenced and changed behaviours in employment.

Role of Queensland Labour Hire Licencing laws

The Labour Hire Licensing Act 2017 (LHLA) has been in effect in Queensland for a number of years. Under this legislation the government already has the ability to investigate the underpayment of wages and take away licenses. An operator operating without a labour hire license is subject to substantial fines and criminal provisions.

As noted by the Committee's report 'A fair day's pay for a fair day's work? Exposing the true cost of wage theft in Queensland':

> *Queensland has legislated to address wage theft and other unscrupulous practices in the labour hire industry by establishing a mandatory labour hire licensing scheme, under the Labour Hire Licensing Act 2017. During introduction of the legislation, the Minister stated that the scheme was intended to promote the integrity of the industry and better protect workers from exploitation, citing cases of wage theft including underpayment, unauthorised deductions, sham contracting, and avoiding worker entitlements through phoenixing*.[13]

This legislation covers many businesses in Queensland and provides an existing mechanism for the QLD government to achieve what it intends with the Wage Theft Bill.

To date it appears that there has been only one prosecution under this legislation.[14]

[12] Fair Work Ombudsman 2018-19 Annual Report, pg 2

[13] Education, Employment and Small Business Committee report 'A fair day's pay for a fair day's work? Exposing the true cost of wage theft in Queensland', tabled on 16 November 2018, Page 12

[14] Minister for Education and Minister for Industrial Relations, Media Statement, 18 June 2019, 'Rogue labour hire provider convicted'.

The existing compliance and enforcement regime appears more than adequate to respond to those circumstances deemed to be 'wage theft' and the scarcity of prosecutions under that existing regime sits at odds with calls for further criminal sanctions targeting the same behaviours.

4. CRIMINALISATION OF INDUSTRIAL MATTERS IS NOT APPROPRIATE

HIA maintains the view that criminalising matters of an industrial nature is simply political grandstanding. These matters should remain within the remit of civil laws and 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. Further, the use of the term 'wage theft' seeks to inappropriately attach criminal intent to an employment related matter.

HIA opposes such an approach.

As noted above, the FWO has initiated a 'firm but fair approach to non-compliance' which has seen an increase in self-disclosures of instances of underpayments.

In HIAs view the criminalisation of employment related matters is more likely to result in less self-disclosure of underpayments to the FWO, due to the risk of criminal sanctions, undermining the efforts of the FWO remedying workplace breaches to ensure compliant workplaces into the future. The criminalisation could potentially also decrease employee reporting due to the serious personal consequences for employers and the likely closure of the business and therefore end to employment.

In HIA's view if the government begins the 'slippery slope' towards criminalising industrial relations issues there is a range of egregious actions that should be considered for criminal sanctions. The 'Royal Commission into Trade Union Governance and Corruption'[15] following on from the Cole Royal Commission found a range of behaviours by trade unions lacking.

4.1 THE CURRENT WORKPLACE RELATIONS FRAMEWORK IS COMPLEX

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 required to navigate through a myriad of complex regulatory instruments that includes legislation, regulations and modern awards.

The average small business builder/principal contractor spends significant hours each week often after hours attending to paperwork and compliance arising from regulatory requirements that span national, state and local obligations. The compliance obligations not only include workplace relations requirements but also include GST, PAYG, payroll tax compliance, state based training regulations that apply to apprentice employees, workplace health and safety management, occupational licensing laws, planning regulations and state-based residential construction laws and requirements.

[15] 'Royal Commission into Trade Union Governance and Corruption, Final Report, 28 December 2015, https://www.royalcommission.gov.au/royal-commission-trade-union-governance-and-corruption

In HIA's experience, most employer non-compliance simply relates to the misinterpretation of the relevant Modern Award and FW Act obligations, due to the complex nature of the workplace relations system.

As the productivity commission found in its review of the workplace relations system "The legislation is complex and there are meaty pickings for lawyers and workplace practitioners on all sides."[16] As reported by the ABC in an interview with Justice Ross (head of the Fair Work Commission) "Australia's complex awards system is a real barrier to workers being paid properly by small businesses, the head of Australia's industrial relations umpire says."[17]

5. WAGE THEFT BILL

Notwithstanding HIAs strong opposition to the Wage Theft Bill, HIA provides the following comments.

5.1 DEFINITION OF STEALING

The Wage Theft Bill proposes to insert the following into the QLD Criminal Code (s391):

(6A) For stealing that is a failure to pay an employee, or another person on behalf of the employee, an amount payable to the employee or other person in relation to the performance of work by the employee—

(a) the amount is a thing that is capable of being stolen; and

(b) subsection (6) does not apply; and

(c) the amount is converted to the person's own use when—

(i) the amount becomes, under an Act, industrial instrument or agreement, payable to the employee or to the other person on behalf of the employee; and

(ii) the amount is not paid.

……

special property, in a thing, includes—

(a) a charge or lien on the thing; and

(b) a right arising from or dependent on holding possession of the thing, whether by the person entitled to the right or by another person for the other person's benefit; and

(c) a right of an employee, in relation to the performance of work by the employee—

(i) to be paid the thing; or

(ii) to have the thing paid to another person on behalf of the employee.

HIA has a number of concerns with the proposed definition.

Intention

HIA contends that the proposed definition is not what the Committee report recommended. The Committee report recommended that the Queensland government legislate to make wage theft a criminal offence *"…where the conduct is proven to be deliberate or reckless."*

The definition, as is, criminalises underpayment regardless of intention (i.e. whether it is deliberate or reckless). Further, the explanatory notes are silent on the role of 'intention' in relation to the operation of the offence and on a plain reading an underpayment caused by a mistake could result in criminal liability.

While current section 23 of the Qld *Criminal Code Act 1899* provides a defence where there is a lack of intention, in HIA's view this does not suffice given the complexity associated with industrial relations issues.

[16] Productivity Commission report into 'Workplace Relations Framework', 21 December 2015, page 6, https://www.pc.gov.au/inquiries/completed/workplace-relations/report

[17] "Tortuous' language in industrial awards needs to go, says Fair Work boss' ABC news, 6 June 2018, https://www.abc.net.au/news/2018-06-06/iain-ross-industrial-award-system-language-set-to-become-simpler/9833026

For example, in 2018 it was reported that Maurice Blackburn underpaid approximately 400 staff around $1 million dollars.[18] It was also reported that this was done unintentionally (similar to other large organisations that unintentionally made underpayment errors). However, based on the definition set out in the Wage Theft Bill:

- There was a failure to pay employees;
- It was in relation to the work that the employees performed;
- It was not paid on time in accordance with the industrial instrument and therefore the amount would have been 'converted to a person's own use' (as per 6A(c)).

Prime facie such an instance could expose an employer to a claim of criminal culpability. Such allegations can easily be weaponised by injured parties in a dispute and will be used to devastating effect against businesses, particularly small business.

HIA recommends that a higher threshold be provided within the legislative provision to make it clear that it does not apply to genuine mistakes.

Scope

The scope of the proposed offence is unjustifiably broad.

The Committee report noted that the offence is one committed by employers and the working definition of 'wage theft' was:[19]

> *"Recognising that a comprehensive consideration of ways to address this serious issue should examine the full spectrum of circumstances in which it may occur, the committee thus adopted a broad definition of wage theft as:*
>
> > *the underpayment or non-payment of wages or entitlements to a worker by an employer, encapsulating a range of activities that deny workers their legal entitlements."*

The Committee report further observed that:

> *The committee believes criminalising wage theft is an appropriate way to deter the very worst and deliberate instances of wage theft by employers, to protect workers' entitlements.* [20]

It is clear the Committee's adopted definition and recommendation was intended to limit the scope of 'wage theft' to an offence to be committed by employers.

The Wage Theft Bill is not so limited and unjustifiably exposes parties, other than employers, to prosecution.

Also problematic is that what can be 'stolen' is not set out in the Wage Theft Bill. Instead the explanatory notes indicate, that:

> *An amount payable to an employee or other person, in relation to the performance of work by the employee, is not defined in the Bill but is intended to capture a broad range of payments and entitlements, including:*

[18] 'Maurice Blackburn's $1 million pay muck up short changes 400 staff' Sydney Morning Herald, July 20, 2018, https://www.smh.com.au/business/workplace/maurice-blackburn-s-1-million-pay-muck-up-short-changes-400-staff-20180720-p4zspi.html

[19] Education, Employment and Small Business Committee report 'A fair day's pay for a fair day's work? Exposing the true cost of wage theft in Queensland', tabled on 16 November 2018, Page 22

[20] Education, Employment and Small Business Committee report 'A fair day's pay for a fair day's work? Exposing the true cost of wage theft in Queensland', tabled on 16 November 2018, Page 175

- *unpaid hours or underpayment of hours;*
- *unpaid penalty rates;*
- *unreasonable deductions;*
- *unpaid superannuation;*
- *withholding entitlements;*
- *underpayment through intentionally misclassifying a worker including wrong award, wrong classification or by 'sham contracting' and the misuse of Australian Business Numbers; and*
- *authorised deductions that have not been applied as agreed.*

This would also appear to indicate that the offence is intended to apply to situations beyond an employment relationship.

The approach proposed in the Wage Theft Bill is not only at odds with the underlying consensus as to when 'wage theft' may occur but is also at odds with the approach taken in Victoria under their *Wage Theft Act 2020* which is expressed to cover employers.

Applying the Wage Theft Bill to the case of *Moffet v Dental Corporation Pty Ltd [2019] FCA 344*[21] sheets home the problematic nature of what is proposed.

In that case there was an allegation that a worker engaged as an independent contractor was an employee under the FW Act, a worker for the purposes of long service leave (NSW) legislation, and an employee for the purpose the Superannuation legislation.

The court found that Moffett:

- Was an independent contractor for the purposes of the FW Act;[22]
- Was not a 'worker' for the purposes of the Long Service Leave Act;[23] but
- Was an 'employee' for the purposes of the Superannuation legislation.

This case illustrates some threshold technicalities involved in determining what entitlements may be applicable under existing state and federal legislation and that under the current drafting businesses could be prosecuted for payments not made to independent contractors (such as superannuation). This is beyond what was intended by the Committee's report.

HIA recommends that the scope of the Wage Theft Bill be strictly limited to employment situations as defined by well-established legal principles.

Lack of Defences

There are no defences provided under the Wage Theft Bill. The harshness of the penalties and the apparent broad nature of the proposed offences makes it essential that defences be available.

Threshold for prosecution

HIA submits that valid consideration needs to be applied to the costs versus the benefits in relation to the initiation of criminal proceedings.

The Wage Theft Bill fails to contemplate this as there appears to be no threshold proposed in relation to the quantum of the alleged underpayment when initiating enforcement processes.

[21] This case was appealed by both parties but upheld by the Full Federal Court: *Dental Corporation Pty Ltd v Moffet [2020] FCAFC 118*

[22] Moffet v Dental Corporation Pty Ltd [2019] FCA 344 at 72

[23] Moffet v Dental Corporation Pty Ltd [2019] FCA 344 at 79

For example, when initiating proceedings consideration should be given to whether the employee's likelihood of recovery of the alleged underpayment will be impeded by the commencement of proceedings.

In many cases small businesses will be unable to carry the costs associated with defending legal proceedings of a criminal nature. In many cases these businesses may have no option other than to stop operating, resulting in potential job losses and limiting potential recovery action for employees. The possible impact of state prosecutions placing employees into insolvency may also impact on existing schemes to ensure funds are available to affected employees.

5.2 FRAUD

Clause 6 amends the offence of fraud in section 408C(2) to insert new paragraph (e) to provide that the offender is liable to 14 years imprisonment if the offender is or was an employer of the victim. This maximum penalty is equivalent to the maximum penalty under section 408C (2) (b) where the offender is an employee of the victim.

For the reasons outlined elsewhere in our submission HIA does not believe this provision is necessary as conduct by employers is already subject to heavy government regulation and supervision.

5.3 AMENDMENT OF INDUSTRIAL RELATIONS ACT 2016

The duplication of avenues for parties to seek redress for underpayment issues is a concern (as outlined previously).

The Wage Theft Bill has the potential to create a distorted playing field when it comes to representation of parties. This would be particularly acute for small businesses seeking legal representation.

Representation

The *Queensland Industrial Relations Act 2016* (s530) makes it very clear that:

- A party may only be legally represented in certain circumstances including for prosecution of an offence.
- A party cannot be legally represented in certain circumstances including an arbitration hearing for a certified agreement.
- Leave of the industrial tribunal is required in other circumstances and when such leave should be given.

The Wage Theft Bill provides an automatic right of a party to a claim to be represented by an industrial association.

However, given the complexity of underpayment claims and the potential criminal consequences for such decisions, as a matter of natural justice a party accused of underpaying their employee should be afforded an automatic right to be represented in the court, without limitation.

Dual proceedings

The Wage Theft Bill does not make it clear whether a party is able to proceed in two jurisdictions simultaneously or to try and fail in one before proceeding to another.

For example, there does not appear to be any limitation on a claimant:

- Pursuing their claim in the federal jurisdiction and, failing a successful outcome;
- Pursuing their claim in the state jurisdiction; or
- Vice versa.

A claimant should be prevented from commencing proceedings in two jurisdictions for the same matter and further being able to commence proceedings for a matter already determined.

6. CONCLUSION

Whilst HIA does not support employers or businesses deliberately avoiding their wage and superannuation obligations, and intentionally failing to pay employee entitlements, HIA disagrees that any further measures need to be taken to address the underpayment of employee entitlements. The current Federal regime, compliance and enforcement frameworks can appropriately respond to instances of underpayment.

HIA opposes the criminalisation of industrial relations matters as outlined under the Wage Theft Bill. These matters should remain within the remit of civil laws and penalties.

The state government's attempt to intervene in employment related matters is ill-considered and smacks of political grandstanding. The regulation of industrial relations already falls squarely within the realm of the Federal jurisdiction. To alter these current arrangements is, at best, a duplication of legal avenues for dispute resolution and at worst, unconstitutional.