

CRIMINAL CODE AND OTHER LEGISLATION (WAGE THEFT) AMENDMENT BILL 2020

July 2020

Executive Summary

The underpayment of wages is a difficult area driven by a diverse range of factors. Australia's workplace relations system is labyrinthine in its complexity, even businesses with the best of intentions who have the resources to pay for advice and interpretation can still end up making inadvertent mistakes.

The Chamber of Commerce and Industry Queensland (CCIQ) does not support the underpayment of wages and non-compliance within Australia's workplace relations laws. However, we do believe that the underpayment of wages is a complex area that should not be criminalised for a myriad of reasons.

Firstly, Queensland businesses will struggle under further complexity and duplication of legislation. Criminalising wage underpayment will only further complicate an already overly complex system. A civil penalty regime already exists at the federal level and there is the potential for further duplication with the federal government hosting industrial relations roundtables to discuss compliance reform.

Secondly, criminalising the underpayment of wages could lead to lower rates of self-reporting by businesses for unintentional underpayments and a reduction in businesses rectifying pay errors. Smaller businesses could also be reluctant to hire new staff due to uncertainty regarding compliance with the Fair Work Act 2009 (Cth) ('FWA').

Thirdly, there will be lower numbers of migrants willing to speak out against underpayment. Generally, migrants will not want to participate in criminal proceedings that may lead to associated immigration fears.

Finally, there isn't enough evidence showing that the increase of penalties in 2017 for wage underpayment has not effectively deterred employers. It takes time for these effects to flow through and change the sentiments of employers.

Incentives to reduce the incidence of wage underpayment should emphasise the creation of avenues that facilitate greater compliance by businesses rather than implementing more severe punishments or sanctions on businesses. The greatest push for enforcement should be through the effective dissemination of information to both employers and employees, and further cooperation where possible between regulators and employers.

CCIQ's Position:

- Workplace relation laws in Australia are already too complex
- This bill will cause duplication and further complicate our IR laws
- Uncertainty stemming from this Bill will be detrimental to business confidence
- There is insufficient evidence that warrants criminalisation as a deterrent
- The government should be looking at ways to educate and inform employers and employees of their obligations
- Research into the outcomes of the penalty increase in 2017 should be addressed before criminalisation is pursued

1 Introduction

CCIQ thanks the Education, Employment and Small Business Committee for the opportunity to provide commentary on the Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020 (the Bill).

CCIQ is Queensland's peak industry representative organisation for small and medium businesses. We represent over 448,000 Queensland small and medium businesses who employ 66% of Queenslanders working in the private sector

CCIQ works with the chamber network across Queensland to develop and advocate for policies that are in the best interests of Queensland businesses, the Queensland economy, and the Queensland community

CCIQ in no way supports the underpayment of wages and non-compliance within Australia's workplace laws. The cause of wage underpayment is a multifaceted and complex issue that will require an equally complex solution to adequately resolve.

Inquiries into wage underpayment have also been held in Western Australia and South Australia. Jurisdictions are beginning to criminalise 'wage theft', Victoria on 16 June 2020 passed the *Wage Theft Bill 2020*, making them the first jurisdiction to introduce a specific legislative model for 'wage theft'.¹

Business confidence in Australia is still at a low point. COVID-19 and the recent case of *Workpac v Rossato* have led to an atmosphere where businesses feel overwhelmed and uncertain about the parameters of the workplace relations landscape.

Australia has an extremely complex system of workplace laws. This is apparent within the numerous layers and intersecting requirements that businesses often need specialist advice to navigate.

In CCIQ's experience an overwhelming majority of compliance cases are due to genuine and inadvertent errors in the payment of wages and other entitlements stemming from the inherent complexities of the workplace relations system. Simply criminalising wage underpayment will not address the systemic difficulties within the workplace relations landscape and reduce the incidence of wage underpayments.

¹ <https://www.minterellison.com/articles/victoria-passes-legislation-to-ban-wage-theft#:~:text=for%20this%20conduct,-,On%2016%20June%202020%2C%20Victorian%20Parliament%20passed%20the%20Wage%20Theft,effective%20from%201%20July%202021.>

2 Contextual Factors

2.1 Increased vulnerability of Queensland businesses during COVID-19

2020 has not been kind to Queensland businesses with conditions that have led to high levels of unemployment² and steep falls in business confidence³. The COVID pandemic saw brick and mortar businesses across Australia closing their doors for months on end.

COVID has had a huge impact on regional Queensland. CCIQ's analysis of the labour force data released for the June Quarter further illustrates the high levels of unemployment being faced by the regions. The worst affected regions are Wide Bay (12.1%), the Outback (10.5%) and Toowoomba (9.6%) with each of them experiencing employment rates far higher than the state average (7.7%).

For the last 20 years, CCIQ has published a quarterly report indicating Queensland business sentiment. The June Quarter Pulse indicated that business confidence is at its second lowest point in the history of the survey (the lowest point being felt during the March quarter). The pulse found that:

- three in four businesses believe that the Queensland and National economies will deteriorate over the next 12 months
- two in three businesses indicated their sales and revenue have fallen
- two in three businesses reported that their profitability had declined
- nearly 20 per cent of businesses cited government policies, most notably the outcome of JobKeeper stimulus payments, as having the greatest influence on business confidence and economic performance looking forward.

Despite COVID being at the forefront of business consciousness, businesses also indicated that the complexity of industrial relations compliance is a major constraint on business growth across the state. In the qualitative data many businesses indicated that the complexity in Australia's industrial relations landscape still adversely affected them during the pandemic. Currently, Queensland businesses are extremely vulnerable and have low levels of confidence moving forward.

3 Summary of the Bill

3.1 The objectives of the Bill

The objectives of the Bill are to implement the underlying policy intent of the recommendations made in the committee's report titled *A fair day's pay for a fair day's work? Exposing the true cost of wage theft in Queensland*, tabled on 16 November 2018⁴. The two recommendations being:

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

The objectives of the Bill are to be achieved through:

² CCIQ labour force data analysis, June Quarter 2020

³ CCIQ Pulse June Quarter 2020

⁴ <https://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2018/5618T1921.pdf>

- enabling the prosecution of wage theft as stealing under the Criminal Code;
- increasing the maximum penalties in the Criminal Code for the offences of stealing and fraud relating to wage theft; and
- facilitating the Industrial Magistrates Court's jurisdiction for wage recovery matters, including the small claims wage recovery procedure for matters of not more than \$20,000 under section 548 of the FWA.

4 What causes underpayment of wages

4.1 Difficulties with the complexity of rules for employment and the calculation and application of minimum wages in Australia

The Australian Industrial Relations landscape is very complex and many businesses have difficulties navigating it. These complexities were also noted by former Fair Work Ombudsman Natalie James, who in 2019 stated:

"The sheer number of different pay rates and payments triggered by a range of factors makes it very challenging to capture and systemise those events and ensure that workforces are appropriately paid.

*While complexity is no excuse for non-compliance, especially by large and established businesses, surely we must ask: if the system is so complex that large organisations are unearthing these legacy underpayments, is it not time to really take a look at the system?"*⁵

Our system is more complex than the workplace laws that can be found in some of our OECD economy counterparts (the United Kingdom, the European Union, New Zealand, the United States of America, Canada, Japan etc.) who share comparable or superior standards of living or retirement and enjoy rights and freedoms at work without highly detailed and overlapping regulations that are difficult to comprehend, apply and comply with.⁶

Further complicating the workplace relations landscape is the inclusion of subjective criteria in assessing the grade of workers and their comparable pay. This means that the precise pay rate for some employees require specialised interpretation. For example, in the Broadcast, Recorded Entertainment and Cinema Award 2010 – the difference between four grades of pay is a person's level of 'maturity'⁷. This would be very difficult for a business to ascertain without specialized interpretive assistance from a human resources advisor or employment lawyer.

Complexity also exists in each of the awards individually through the sheer number of circumstances provided for and their corresponding rates of pay. For example, there are 19 possible rates of pay for a level 1 Food and Beverage Attendant, casual employee, over 20 years (Table 1). This does not include allowances, which would alter the pay rate even further.

⁵ <https://www.afr.com/work-and-careers/workplace/ir-system-hits-workers-and-business-20190625-p520yp>

⁶ <https://www.australianchamber.com.au/wp-content/uploads/2019/11/2019-10-25-ACCI-Subn-Disc-Paper-Compliance-Final.pdf>, page 22,24.

⁷ Ibid, page 22.

Table 1:

Possible pay rates: Level 1, Casual employee, over 20 years

Hours	Rate	Allowance	Rate
Hourly Rate	\$25.08	Meal allowance	\$13.38 for a meal
Saturday	\$30.09 per hour	Laundry reimbursement	reimbursement of the demonstrated costs of laundering special clothing
Sunday	\$30.09 per hour	Working away from usual workplace - travelling time allowance	payment at the ordinary pay rate for the time occupied in travelling between the employer's place of business and work or between the employee's residence and work
Public holiday	\$50.15 per hour, with a minimum payment of 2 hours	Special or protective clothing reimbursement	reimbursement of the cost of purchasing special clothing such as coats, dresses, caps, aprons, cuffs
Late night - Mon to Fri - 10pm to 12am	\$25.08 per hour plus \$2.27 per hour or part of an hour	Working away from usual workplace - country or seaside work involving 80km or more of travel	payment for transport to and from the workplace
Early morning - Mon to Fri - 12am to 6am	\$25.08 per hour plus \$3.41 per hour or part of an hour		
Overtime - Mon to Fri - first 2 hours	\$30.09 per hour		
Overtime - Mon to Fri - after 2 hours	\$40.12 per hour		
Overtime - Saturday - first 2 hours	\$35.11 per hour		
Overtime - Saturday - after 2 hours	\$40.12 per hour		
Overtime - Sunday	\$40.12 per hour		
No meal break - Mon to Fri - 6am to 10pm	\$35.11 per hour, from 6 hours after starting work until the meal break is given or the shift ends		
No meal break - Saturday / Sunday	\$40.12 per hour, from 6 hours after starting work until the meal break is given or the shift ends		
No meal break - Public holiday	50% of the ordinary rate plus the appropriate public holiday rate per hour, from 6 hours after starting work until the meal break is given or the shift ends		
No meal break - Late night - Mon to Fri - 10pm to 12am	\$35.11 per hour plus \$2.27 per hour or part of an hour, from 6 hours after starting work until the meal break is given or the shift ends		
Mon to Fri - midnight to 6am	\$35.11 per hour plus \$3.41 per hour or part of an hour, from 6 hours after starting work until the meal break is given or the shift ends		
No meal break - Overtime	50% of the ordinary rate plus the appropriate overtime rate per hour, from 6 hours after starting work until the meal break is given or the shift ends		
Working through a meal break - Mon to Fri - 6am to 10pm	\$35.11 per hour, from the time the meal break was scheduled to start until it's given or the shift ends		
Minimum break after overtime	overtime rates until a break of 8 hours is given		

(as found on FWO Pay and Conditions Tools)

The amount of detail that is required to explain how pay should be calculated in some awards is extremely complex and therefore, the size of the Fair Work Ombudsman's Pay Guide can be about the same length as the award. Two examples of this are, the Hospitality Industry (General) Award 2010 which is 99 pages long with its FWO Pay Guide being 90 pages long. The Building and Construction General On-site Award 2010 is not so bad with 147 pages and its Pay Guide which has 103 pages⁹.

The Australian Payroll Association found that almost 90% of payroll managers find the current workplace laws difficult to apply to real-world situations and are unsure of how to interpret the wording of awards and legislation.¹⁰ The complexity of Australia's Industrial Relations landscape is pervasive throughout businesses nation-wide. Small businesses are exposed to greater risk as they have less resources to invest in hiring industrial relations specialists to ensure their business's compliance.

4.1.1 The system is complex for small businesses

Small businesses are adversely affected by the complexity inherent in our workplace relations system. That is business with 19 or less employees have smaller budgets that they can put towards human resources or legal advice on compliance with their employment obligations. Many small businesses rely on the resources delivered by the Fair Work Ombudsman when attempting to comply with their workplace obligations to their employees.

⁸ <https://www.australianchamber.com.au/wp-content/uploads/2019/11/2019-10-25-ACCI-Subn-Disc-Paper-Compliance-Final.pdf>, page 23.

⁹ Ibid, page 24.

¹⁰ www.smartcompany.com.au/finance/payroll-managers-confused/

4.1.2 The system is complex for large businesses

Larger businesses are better resourced and therefore it would be expected make fewer mistakes regarding calculating and applying the awards to their employees, however, this does not seem to be the case. Maurice Blackburn, a leading employment law firm underpaid 400 current and former part-time workers almost \$1 million in July 2018. The ABC, Qantas, the Commonwealth Bank, Michael Hill and the Red Cross also inadvertently underpaid workers during 2019.¹¹ These organisations pay for employment law and human resource advice to ensure that they are compliant, despite this, they still unintentionally underpaid their staff. This further solidifies that genuine and inadvertent errors occur in the payment of wages due to the inherent complexities of Australia's workplace relations system.

4.1.3 The system is complex for the Fair Work Ombudsman

If any organisation were to easily navigate Australia's workplace relations system, it would be the Fair Work Ombudsman. However, there are two high profile cases where businesses (AllTrades and Mondelez) relied on the advice and interpretation of legislation from the Fair Work Ombudsman, which was subsequently found by the courts to be incorrect. If the Fair Work Ombudsman in some cases is unable to properly interpret awards, how are small businesses supposed to navigate Australia's workplace relations landscape. Queensland businesses need the government to understand that the complexity of workplace laws is a barrier for businesses who are genuinely trying to pay and provide their workers with their entitlements.

5 Stakeholder Feedback

5.1 Queensland Business difficulties with complexity and compliance

CCIQ formulated a survey to its members examining employment law complexity and compliance as these are underpinning conditions causing many unintentional wage underpayments. 66 per cent of the respondents were from small businesses (19 employees or less), 30 per cent were from medium-sized (20 – 249 employees) and 4 per cent were from large businesses (250+).

In the survey 60 per cent of respondents reported that interpreting and complying with Modern Awards and other instruments was the most difficult area of employment law to comply with. Many respondents mentioned that they had wished there was an 'all of the above' option as they found understanding their rights as an employer under the Fair Work Act, understanding their obligations around workers compensation and managing claims arising out of termination of employment equally as challenging.

When asked to provide examples of modern award clauses that were difficult to interpret many respondents stated that allowances were difficult to calculate, finding the right award to apply to their employees and categorising people within modern awards were areas that caused them difficulty.

Businesses stated that they would find it easier to comply with modern awards if they were simplified and written in plain English so that interpretation was not necessary. This would make it easy for both employers and employees to understand and discuss their obligations. Many respondents also remarked

¹¹ <https://www.sbs.com.au/news/the-feed/here-s-a-running-list-of-australian-businesses-that-have-underpaid-staff-in-2019>

that they wished that there was a way they could be notified if their awards underwent any amendments so that they could remain compliant.

56 per cent of businesses responded that there were not enough services and information sources available to help them determine their employment conditions. Many respondents complained that finding adequate information was time consuming and often required them to pay more money than they had budgeted for.

Very few businesses have been audited and found to be non-compliant. Of the few that were the reasons for inadvertent non-compliance included misinterpretation of the award, misunderstanding of the award and conflicting advice being given.

6 Unintentional Consequences

6.1 Overlapping and duplicated legislation

An issue with the Bill is that the criminalisation and derogation of civil claims to the Industrial Magistrates Court for wage underpayment further complicates Australian workplace laws. The state-legislated criminal sanctions and the use of the state court for civil claims, overlap with the current process of the federal civil penalty regime progressed through the Federal Circuit Court of Australia. Furthermore, the Federal Government has created five Industrial Relations roundtables that are working to resolve some of the complications and complexities that are evident in Australia's workplace regulations. These groups are still in deliberations but may come forward with reforms causing further duplication of industrial relations legislation.

6.1.1 Potential for Constitutional Challenge

In Victoria, academics Melissa Kennedy and Professor John Howe have strongly argued that the Victorian and New South Wales applications of 'wage theft' are likely to "face constitutional challenges based on inconsistency between State law and Commonwealth law"¹².

The potential for unconstitutionality primarily relates to the Fair Work Act applying to the exclusion of all State and Territory industrial laws as they already 'cover the field' resulting in any state industrial relation regulations being deemed inconsistent with the federal regime¹³. Section 26(1) of the FWA states that the "Act is intended to apply to the exclusion of all State or Territory industrial laws so far as they would otherwise apply in relation to a national system employee or national system employer". Industrial laws include those "providing for the establishment or enforcement of terms and conditions of employment" and therefore, would include any laws relating to the criminalisation of underpayment of workers.

This means that a 'wage theft' offence under a state law will be directly inconsistent with section 26 of the FWA, leading to constitutional invalidity on the basis of section 109 of the constitution. This creates

¹² <https://www.theage.com.au/business/workplace/criminalisation-of-wage-theft-likely-to-backfire-say-experts-20181212-p50lto.html>

¹³ Ibid.

further complexities for businesses to navigate and if the legislation is found to be invalid it will cause unnecessary stress and worry for Queensland businesses.

6.1.2 Attorney-General's Roundtables on Compliance and Enforcement

In response to issues that have arisen from COVID the Attorney General has created five working groups focusing on enterprise agreements, award complexity, greenfield agreements, compliance and enforcement and casual employees. The reforms that will be made after these negotiations cease could duplicate the Bill and cause further complexity for businesses in Queensland.

6.2 Disincentives for Businesses

The criminalisation of the underpayment of wages is likely to discourage employers from self-reporting underpayments they have discovered due to error and may discourage constructive remedial actions being taken to rectify pay errors. This is due to employers fearing jail and a criminal record making them less likely to come forward. Businesses may also be reluctant to employ new staff, especially small businesses. NAB Chief Executive Ross McEwan stated that a small business will spend up to 18.4 hours on compliance before hiring their first employee, and that this was five times as much as what a large business (with 200+ employees) would.¹⁴ The preventative effects of the criminalisation of underpayment of wages will cause unintended consequences for businesses and could result in inadvertent cases not being rectified.

6.3 Disincentives for migrants

As was discussed in the Report tabled in 2018, migrant workers are highly vulnerable to the underpayment of work. This higher risk of exploitation is due to them having 'lower proficiency in English skills, lack of awareness of their rights in the workplace and a reluctance to reveal exploitation in circumstances where the migrant is in breach of the *Migrant Act 1958* (Cth), for example, by exceeding prescribed limits on hours.¹⁵

The imposition of criminal penalties will reduce the likelihood of temporary migrant workers speaking up and alerting authorities to non-compliant behaviour¹⁶. Temporary migrant workers already have high levels of fear speaking up and will be even more reluctant to do so if criminal sanctions are introduced for wage underpayment. Migrant workers fear being part of a subsequent criminal proceeding and have associated immigration fears¹⁷. The introduction of criminal sanctions for wage underpayment could reduce the incidence of wage underpayments reported by migrants.

¹⁴ R. Gluyas, 2020, Coronavirus: NAB offers SME reform blueprint to help small and medium-sized businesses, The Australian, 16 July

¹⁵ A Fair Day's Pay for a fair day's work? Exposing the true cost of wage theft in Queensland, page 5.

¹⁶ <https://www.theguardian.com/australia-news/2018/oct/29/a-third-of-australias-foreign-workers-paid-less-than-half-minimum-wage-study>

¹⁷ M. Kennedy, Improving Protections of Employees' Wage and Entitlements: Strengthening Penalties for Non-Compliance, page 12.

7 Insufficient evidence indicating that underpayment of wages should be criminalised

7.1 No evidence that the 2017 increase to penalties have failed and warrant the introduction of criminal punishment

The full effect of the amendments made to the Fair Work Act in 2017 still have not been fully realised. Not enough time has passed for us to see the effectiveness of this increase and it takes time for incidences of this nature to flow through into sufficient prosecutions, penalties and reporting to:

- Function as any form of additional deterrent
- Provide a clarified body of law or judicial approach that can be communicated to employers, and
- Have any real impact on the thinking of employers

The report the Bill relies on was undertaken in 2018. When those determinations were made, not enough time had passed to show sufficient evidence that the increase in penalties was not acting as an adequate deterrent to employers. More research and further study should go into the effects of the 2017 amendments before criminal sanctions are pursued for 'wage theft'.

8 Conclusion

CCIQ do not in any way support the underpayment of wages nor do we support business non-compliance with Australia's workplace laws. The underpayment of wages is a multifaceted issue and the complexity of our workplace relations system is a massive barrier to businesses trying to comply with their obligations.

In our experience, the majority of wage underpayment cases occur due to businesses making inadvertent mistakes, misinterpretations or miscalculations. The criminalisation of the underpayment of wages will have a myriad of unintended consequences that will affect Queensland businesses, specifically those that are smaller and not well resourced. These effects will be exacerbated by the current conditions, uncertainty and lack of confidence felt by businesses.

Businesses in Queensland will struggle under further complexity and duplication of workplace relations legislation. Reducing the incidence of wage underpayment should emphasise preventative strategies rather than implementing more severe punishments or sanctions on businesses. The Queensland Government should work with industry association and businesses to effectively disseminate information on obligations and entitlements to employers and employees.

CCIQ thanks the Education, Employment and Small Business Committee for the opportunity to provide commentary on the Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020. If there are any questions in relation to the submission, please contact [REDACTED] (Policy Advisor) at [REDACTED]