



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

Submission - Franchise Redress, Wage Theft Australia | [REDACTED], [REDACTED]

Introduction

Thank you for the opportunity to provide a submission. Since we appeared as witnesses at the *Inquiry into wage theft in Queensland* as Franchise Redress in 2018, we established Wage Theft Australia due to the systemic and pervasive problem of underpayment in this country.

We are independent advocates and researchers with unique insights into the wage theft, underpayment and exploitation storm that Australia finds itself facing. We are self-funded and are not affiliated with any government department, union or group.

After helping to expose franchisor misconduct and/or underpayment at 7-Eleven, Domino's Pizza, Retail Food Group and Mortgage Choice, it became clear that the systems in place for underpaid or exploited workers were not adequately working.

Underpaid workers approach us regularly, often after they have already approached the Fair Work Ombudsman and other organisations. We are not opposed to the theory of criminalising wage theft in Queensland, but we do have concerns around how this might be carried out and which businesses might be targeted.

Unlawful Underpayment of Employees' Remuneration Inquiry

This year we made a submission to the *Unlawful Underpayment of Employees' Remuneration Inquiry*, which can be found here:

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Underpaymentofwages/Submissions (Submission 109).

Our submission covered some of what has happened since we appeared at the Queensland Inquiry in 2018. Notably, we expressed concerns with the Fair Work Ombudsman (FWO) "rarely administering a full dose" of their powers to businesses that knew they were, or ought to have known they were underpaying their workers, and that this enabled the "growth of superbug companies who have a business model that incorporates or relies on underpayments." One such company referred to in our submission was Chatime, and we provided a section of a Fair Work Document that points to the type of practice we are describing. The document alleges Chatime's current CEO was involved in contraventions associated with underpayments, but Fair Work did not take action.

Chatime's CEO responded to our submission and referred to Fair Work's activities in a complimentary tone. Had Fair Work taken action, he may not currently be CEO and have oversight of back payments. This is found on Pages 5-6 of Submission 109.

In August 2020, we would add that we are deeply concerned that the FWO will have their hands full with COVID-19 and may continue their practice of not holding all of those to account for the deliberate underpayment of workers.

We also focused on debunking myths that industry groups push, mainly the 'complexity' argument. Our conclusion is that companies like Woolworths, who have found nearly \$400 million in underpayment spanning years, ought to explain in detail how they made such an enormous underpayment if they intend to rely on the "too complex" argument. Almost every time we hear large companies running the 'award system is too complex' argument, it is after they have apparently solved the problem and found the underpayment.

Another myth perpetuated by industry is that it's just a few bad apples underpaying workers. In order to show the public how systemic underpayment is, we have started building a Timeline of underpayment, which can be found here: www.wagetheftaustralia.com.au/timeline. It is still in its infancy, but demonstrates that underpayment spans industries and is certainly not perpetuated by just a few employers.

Finally, we agree that a small business might make the odd mistake, miss a birthday, or incorrectly apply an Award, and we don't consider this wage theft. Our concern around criminalisation is that employers who have made a reckless mistake, might find themselves targeted and fighting criminal action.

However, it is not good enough for bigger or ASX-listed businesses to explain away considerable underpayment bills by saying it "was a mistake", as they have the capacity to engage external advice, can have payroll systems audited regularly, and can/should be hiring appropriately qualified and experienced industrial relations specialists to manage their payroll.

Criminalisation Of Deliberate Underpayments

There are many views on the strengths and weaknesses of the criminalisation of wage theft. Rather than dissecting the arguments for and against, we have taken the approach of highlighting examples of its potential use.

Many of the more serious problems with deliberate underpayment and exploitation seem to lie with more sophisticated business operations (Operators). Such as large businesses, ASX-listed companies, franchise networks, or an owner or owners of more than one business.

These operators often have a history of underpayments and exploitation in their businesses. They know how to manipulate the books, control the workers, and they know if the regulator comes knocking that it's unlikely to impact their business model.

The signs are there for many to see. Many staff will freely offer information to complete strangers. People only need to ask.

7-Eleven

A criminal investigation into the mass underpayments and management at 7-Eleven would likely have had more powers to collect hard drives and evidence from 7-Eleven head office, interview workers and interrogate the facts in much greater detail than the Fair Work Ombudsman. It is likely that a criminal investigation would have had a much different outcome for the company and its directors if these laws were in power at the time.

Fruit Shop

There is a fruit shop operator in Queensland that has a number of locations under various entities and business names. At least one of their locations is a 24/7 operation. The first thing you might notice if you visit the 24hr store is that all the workers are vulnerable migrants and there are a lot of them - more than would make commercial sense. It sells very cheap fruit and vegetables.

We became aware of a Fair Work underpayment complaint and we heard the operator was alleged to be threatening various people connected to the complainant. We also learned that a flat rate is paid to the workers regardless of day, night or hours worked. The workers are too fearful of speaking up and are now scared to talk to us.

If an operator like this is ordered by Fair Work to back pay workers, it is very likely that the workers will be told by the operator to pay the money back and perhaps even pay the fines. The reality for the workers is likely that they will be sacked as a result and still out of pocket. The fear in the voices of people in these positions is palpable.

It would be fair to say this operation may be better suited for a criminal investigation over a civil investigation. A criminal charge and or sentence is much more likely to limit the unlawful activities of operators like this and stop them from doing harm to others. The outcome could be incarceration.

These types of operators are likely to be involved in other unlawful activities as well.

Advisors

Throughout our research, various advisory or industry groups have been mentioned as having had a role in advising on a number of businesses' payroll, before the business was caught underpaying workers. We became aware that one industry group gave questionable advice to a small business owner who had unknowingly underpaid their full-time worker. This same industry group is said to have provided the payroll advice around a much bigger company that was recently exposed for a very large underpayment bill. Our recommendation would be for any investigation into a criminal act of wage theft to include investigating the industry and advisory groups that provide formal advice to these businesses who are caught underpaying.

There may even be an opportunity to have a similar mechanism to the Transport industry's Chain of Responsibility laws.

The chain of responsibility concept initially developed out of a recognition that unlawful behaviour by truck drivers is influenced and often controlled by the actions of other parties. Concerns arose that transport laws had often focussed on the actions of drivers while failing to sufficiently recognise and regulate the actions of other key parties. Chain of responsibility laws therefore seek to provide that these other parties cannot encourage, create incentives for, demand or allow drivers to undertake unlawful actions.¹

Other methods of restitution

Where the Fair Work Ombudsman is unable to or doesn't take a worker's underpayment matter further, workers can choose to seek back pay through taking legal action. Having spoken to a number of workers who have attempted this route, it can be difficult, timely, expensive, and they face backlash, reputation smears, and it could often be all for nothing. We also are less enthusiastic about individual workers taking on individual actions as it does not necessarily expose the business if there is a wider, systemic underpayment problem, and other workers can continue to face exploitation.

Class Actions

Some workers have recently taken advantage of Australia's class action system, where litigation funders take on the financial risk to bring legal action against a business that is underpaying a group of workers. Notable class actions involving underpayment include Domino's Pizza² (Phi Finney McDonald), and Woolworths³ (Adero Law). Class actions provide a more holistic approach in terms of a solution to the underpayment problem. All workers eligible can seek backpay, not just an individual taking individual legal action. It also provides an extra layer of protection for workers' reputations, as they are protected by the group numbers. They are more likely to avoid backlash if a class action is available to them.

¹ https://en.wikipedia.org/wiki/Chain_of_responsibility

² <https://www.comcourts.gov.au/file/Federal/P/VID685/2019/actions>

³ <https://www.comcourts.gov.au/file/Federal/P/NSD2004/2019/actions>

Class actions are also often closely followed by the media, meaning poor systems and practices by the business are more likely to be exposed in the public interest.

Class actions and litigation funding is before a parliamentary inquiry. Further regulation of litigation funding poses a big threat to workers who have experienced wage theft, underpayment or exploitation.

Even without further regulation, class actions are difficult to bring to fruition, and most underpaid workers do not have the opportunity to participate in one. Employers know this. This means criminalisation in deliberate instances of wage theft would be an important deterrent. But we would hope that even with criminal action, that exploited workers would have the choice to take civil action, too.

Proposal of Recommendation 8 (recovery processes)

We would encourage this Recommendation to consider the inclusion of group action; where a number of workers have chosen to group together (not necessarily in a class) to take legal action against their employer. A mechanism that supports this type of action, which would also reduce the burden on the court, could subdue some fears many underpaid and exploited workers feel in pursuing unpaid wages on their own.

We would strongly support waiving or reducing current court filing fees for wage theft matters. Even where workers, who choose to take individual legal action, are able to find pro bono representation, they are still required to pay court fees. This is often enough of a deterrent for many underpaid workers to take action.

We would also support a dedicated industrial division within the Queensland Magistrates Court. However support mechanisms would need to be considered, especially for vulnerable workers such as young and migrant workers.

Final Word

It is common in interactions we have - particularly with vulnerable workers - that workers are unsure of their entitlements or don't know how much they are being underpaid. Criminalisation might not have the desired effect if workers are too fearful of coming forward, or are ignorant to their wage entitlements and therefore don't come forward.

We would suggest an educational campaign be run to inform workers that wages are often regulated under the Award System. Any campaign would likely need to be run in various languages to ensure migrant workers are aware of their rights.

We would also suggest that any criminalisation aspect be made very clear to employers before it comes into effect in Queensland. We understand there would likely be a discussion around amnesty, as well.

We support other methods that inform workers of their rights. After being exposed for wage theft, 7-Eleven required their business owners to include a poster in the back-room that detailed what workers were entitled to under the law. This is a relatively easy thing for employers to do, where practical (such as in a back-room or office), and should also include steps workers can take if they feel they are being underpaid.

There could also be an outcome where employers are less likely to participate in wage theft and underpayment if there are clear, visible posters informing workers of their wage entitlements.

If there is a call for witnesses as part of this Inquiry, we would welcome being called.