Ai GROUP SUBMISSION

Queensland Parliament

Inquiry into Wage Theft in Queensland

30 July 2018

About Australian Industry Group

The Australian Industry Group (Ai Group) is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing, engineering, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, defence, mining equipment and supplies, airlines, health, community services and other industries. The businesses which we represent employ more than one million people. Ai Group members operate small, medium and large businesses across a range of industries. Ai Group is closely affiliated with many other employer groups and directly manages a number of those organisations.

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Introduction

On 17 May 2018, the Queensland Legislative Assembly referred an inquiry into wage theft in Queensland (**Inquiry**) to the Education, Employment and Small Business Committee (**Committee**).

Ai Group appreciates the opportunity to respond to the Inquiry. Ai Group supports and encourages lawful workplace practices by all parties, and does not support any deliberate underpayment of wages or other entitlements.

Ai Group urges the Committee to acknowledge that most businesses divert substantial time and resources to ensuring that they meet their obligations to their staff and urges the Committee not to support any proposals designed to demonise employers. Private industry constitutes a vitally important sector of the Queensland economy, accounting for 86% of total employment in the State. The trend unemployment rate in Queensland was above the national average in June 2018 at 6.1% (the second highest in the country). It is essential that Queensland laws encourage businesses to invest and employ.

This submission responds to the terms of reference for the Inquiry and make the following broad points:

- The characterisation of underpayments as 'theft' is misleading, inappropriate, and has the potential to unfairly brand every failure to correctly calculate an employee's pay as criminal.
- The existing regulatory system provides an appropriate framework for oversight and enforcement of penalties directed against the small minority of employers who deliberately underpay their staff. The current regulatory system governing workplace relations in Australia is federally based. State and Territory legislation designed to circumvent the Commonwealth system is unwelcome and would add to an already overly complex system.
- Criminalisation of underpayments is inappropriate. Many instances of incorrect payment are a result of misunderstanding or error. Employers should not be at risk of being labelled a 'thief' for such mistakes. Exposure to criminal penalties, including imprisonment, for underpayments would discourage investment and employment in Queensland.

The Concept of 'Wage Theft'

A departmental brief published by the Queensland Office of Industrial Relations for the Inquiry defines 'wage theft' as occurring 'when an employer fails to provide their employees with the full wage or salary to which they are entitled including benefits such as the superannuation guarantee'.

The characterisation of such behaviours in terms of 'theft' is misleading, inappropriate and has the potential to unfairly brand every failure to correctly calculate an employee's pay as criminal. Most ordinary people are likely to equate 'theft' with the taking of a 'thing' with knowledge that the object taken rightfully belongs to someone else.

Section 391 of the *Criminal Code 1899* (Qld) includes a definition of 'stealing' which encompasses conduct which includes fraudulently taking a thing capable of being stolen. Importantly, some form of intent which is fraudulent is required. It is inappropriate to extend the concept of 'theft', which may be equated with 'stealing', beyond the current definition.

'Wage theft' is a highly emotive term which denigrates the status of anybody carrying out the act to that of a thief. Such a label is inappropriate for use in the context of underpayment of wages and entitlements. As such, Ai Group disagrees with the title of the Inquiry as well as the manner in which the 'Terms of Reference' have been framed.

The Existing Statutory Regime

The *Fair Work Bill 2008* was passed in by the Commonwealth Parliament in March of 2009 and most of the provisions in the *Fair Work Act 2009* (Cth) (*FW Act*) came into operation on 1 July 2009. The legislation provides a national workplace relations system for Constitutional corporations.

On 19 November 2009, the Queensland Legislative Assembly passed the *Fair Work (Commonwealth Powers) and Other Provisions Bill 2009*. The explanatory memorandum accompanying the Bill explained that the legislation would 'result in greater efficiencies for employers by removing duplication from the Australian industrial relations system'. The memorandum stated that any 'Queensland law relating to industrial relations is likely to be rendered ineffective in so far as it applies to the referred private sector'. In his second reading speech in support of the legislation, Cameron Dick (then Attorney-General and Minister for Industrial Relations) stated that the national regime established by the *FW Act* 'restores the balance of power to best look after the interests of both employers and employees'.

Given the Queensland Government's referral of industrial relations in the private sector to the Commonwealth, the purpose of initiating an Inquiry into methods of tackling what is now a Federal issue is unclear.

The statutory regime currently in place under 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 potentially 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) 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 penalties rise to $126,000, for an individual, and $630,000 for a corporation. The amendments also gave the Fair Work Ombudsman (FWO) stronger powers to collect evidence in investigations.

Workers have access to a number of options if they believe they have not received their correct entitlements under the *FW Act*. Applications may be made to the Fair Work Commission (FWC) and Industrial Magistrates Courts. In some cases, a matter may be taken to the Federal Court or Federal Circuit Court.

The FWO has the role of monitoring compliance with the *FW Act* and Fair Work Instruments (including modern awards and enterprise agreements), inquiring into and investigating any act or practice that may be in breach of the *FW Act*, a fair work instrument or a safety net contractual entitlement and commencing proceedings in a court to enforce the *FW Act*, a fair work instrument or a safety net contractual entitlement.

The FWO's Annual Performance Statement 2016-2017 reported that 'the average time taken to resolve requests for assistance has been reduced to 15 days, as compared with 19 days in 2015–16'. In the same period, the FWO resolved 25,332 disputes through its dispute resolution service, the majority of these within 7 days. The FWO recovered $30.6 million for 17,000 employees in 2016-17, representing a significant increase on the FWO's recovery of $27.3 million for 11,158 workers in 2015-16.

The existing regulatory regime will not be improved by State Government legislation directed at addressing underpayments. Any such legislation would add an extra layer of complexity to a system which the Queensland Government supported with a view to decreasing confusion and increasing efficiency for both employers and employees.

Criminalisation of Underpayments of Wages and Entitlements

Throughout 2017 and 2018, a number of unions and political parties commenced calling for the characterisation of underpayments as 'wage theft', with applicable penalties potentially encompassing imprisonment. The treatment of underpayment 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'[1] the *FW Act* endeavours to establish as the main legislation governing the employment relationship.

It is incumbent on employers to navigate a complex system of over 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 an Award, it is worth noting that the FWC's 4 yearly review of modern awards has uncovered many competing interpretations of award terms, particularly in respect of coverage matters and calculations relating to penalties, overtime and allowances. Many employers, particularly small and medium sized businesses, lack dedicated human resources personnel to assist in ensuring that each employee is paid correctly. The vast majority of employers strive to pay their workers correctly and often join industry groups like Ai Group for advice about how to do so.

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. Lush Cosmetics and Maurice Blackburn Lawyers).

[1] Section 3 of the *Fair Work Act 2009*.

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.

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 Departmental Brief produced by the Queensland Office of Industrial Relations for the Inquiry suggests that some deliberate underpayments may be characterised by employers as mistakes. The Brief states: 'mistakes identified by the FWO have consistently favoured employers … genuinely innocent errors could be expected to include some proportion of overpaid employees'. It is not at all surprising that the majority of complaints received by the FWO come from employees complaining of underpayment, rather than complaints about overpayments.

It is necessary to take into account how wide the net may be cast in any prosecution relating to criminal offences concerning underpayment. The recent case of an HR manager fined $21,760 after a finding that she was liable as an accessory in underpayment of her employer's staff indicates that any inclusion of jail time in criminal offence provisions may extend wider than those who may be considered part of the 'controlling mind' of an organisation.[2] It is worth noting that on 7 April 2018, the Federal Shadow Minister for Employment and Workplace Relations stated: 'Whilst there are certain extreme forms of conduct by employers that will attract criminal penalties including modern slavery and labour trafficking, the normal course of events is that industrial relations should be in the civil law realm.'

Placing employers at risk of imprisonment for underpayments would impose a serious disincentive on employing staff. The increased penalties introduced in the case of a 'serious contravention' of a civil remedy provision by the *Fair Work (Protecting Vulnerable Workers) Act 2017*, more appropriately balances the interests of employers, employees and the broader community.

[2] *Fair Work Ombudsman v NSH North Pty Ltd trading as New Shanghai Charlestown* [2017] FCA 1301.

Ai Group strongly opposes criminal offences for underpayment of wages or entitlements. Such matters should remain civil matters and continue to be dealt with through the Federal system.

Conclusion

The necessity to provide fairness to employers whilst ensuring adequate protections are in place to workers was a factor relevant to the passage of the *Fair Work (Protecting Vulnerable Workers) Act 2017* through the Commonwealth Parliament. The Federal legislation addresses the same issues that are being considered by this Inquiry. The current regulatory system would not be improved by amendments to Queensland State legislation.

The term 'wage theft' is inappropriate. It risks inappropriately branding employers who mistakenly underpay their employees as criminals.

Criminalising underpayments would represent a major unnecessary and unwarranted change to the industrial relations system. The prospect of jail terms for failure to calculate correct entitlements would create a strong disincentive to employment.

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