Ai GROUP SUBMISSION

Queensland Education, Employment and Small Business Committee

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

30 July 2020

Introduction

The Australian Industry Group (**Ai Group**) welcomes the opportunity to respond to the request for submissions on the *Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020* (**Wage Theft Bill**) which was introduced on 15 July 2020 and referred to the Education, Employment and Small Business Committee (**Committee**) for consideration.

Ai Group participated in the inquiry into wage theft in Queensland (**Inquiry**) which was referred to the Committee by the Queensland Legislative Assembly on 17 May 2018 by filing a written submission and participating in the hearings conducted in the same year.

Since the Committee commenced its Inquiry, there have been numerous consultations undertaken at both the State and Federal level looking into the issue of underpayment. These include:

- An inquiry into Wage Theft in Western Australia undertaken by Mr Tony Beech, former Chief Commissioner of the Western Australian Industrial Relations Commission;
- An inquiry into Wage Theft in South Australia undertaken by the Select Committee on Wage Theft in South Australia;
- A Commonwealth Attorney-General Discussion Paper aimed at improving protections of employees' wages and entitlements;
- A Commonwealth Economic References Committee's Inquiry into the causes, extent and effects of unlawful non-payment or underpayment of employees' remuneration;
- A Victorian Government consultation for its *Wage Theft Bill 2020*;
- The Migrant Workers' Taskforce which issued its final report in March 2019; and
- A current Commonwealth Industrial Relations Reform process which involves five working groups of employer representatives (including Ai Group) and union representatives, chaired by the Commonwealth Attorney-General, the Hon Christian Porter MP. One of these working groups is considering compliance and enforcement matters, including potential criminal penalties for deliberate and serious underpayments.

Ai Group has participated in each of these consultations and expressed the view that passing legislation to criminalise underpayments by employers is not an appropriate way in which to support and encourage lawful workplace practices. For the reasons outlined in our submission responding to the initial Inquiry, Ai Group considers that the Wage Theft Bill would operate unfairly for employers in Queensland and operate as a significant barrier to investment and employment.

The existing regulatory system provides an appropriate framework for addressing underpayments of employees' remuneration and applies appropriate sanctions to the small minority of employers who deliberately underpay their staff.

In recent times, 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]

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

- 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
- 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 arguments against introducing legislation exposing employers to criminal penalties for underpayment are even more compelling in the present economic circumstances where it is essential that no barriers are imposed on investment and employment.

The outbreak of Coronavirus (**COVID-19**) and the measures which have been implemented by the State and Commonwealth Governments for containing its spread have had a profound economic impact. The impact on the nation's society and economy have been unprecedented and have led to numerous business closures and job losses. Although restrictions have been eased in Queensland, the impact on employment is likely to be ongoing. The Reserve Bank Governor, in a 2 June 2020 Statement on the Board's monetary policy position recently said:

> *'The Australian economy is going through a very difficult period and is experiencing the biggest economic contraction since the 1930s. In April, total hours worked declined by an unprecedented 9 per cent and more than 600,000 people lost their jobs, with many more people working zero hours. Household spending weakened very considerably and investment plans are being deferred or cancelled.*
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> *However, the outlook, including the nature and speed of the expected recovery, remains highly uncertain and the pandemic is likely to have long-lasting effects on the economy. In the period immediately ahead, much will depend on the confidence that people and businesses have about the health situation and their own finances.'*

[1] Fair Work Ombudsman, *Annual Report 2018-19* p. 2.

In a later speech on 21 July 2020, the Reserve Bank Governor warned that the unemployment rate is likely to increase further, even with a recovery underway.[2]

In June 2020, the Queensland unemployment rate climbed to 7.9% the second highest in the country, significantly higher than its pre-coronavirus level of 5.3% in December 2019 and the highest figure recorded in the State since March 2003.[3]

As the Commonwealth Government's JobKeeper scheme is gradually phased out, the unemployment rate is likely to increase as employees currently working zero hours are included in the figure. In such an economic climate, it would be inappropriate to introduce legislation that would further discourage employers from engaging more staff.

It is also inappropriate to pass the Wage Theft Bill at a time when the Commonwealth Government is undergoing a separate consultation with a working party of employer representatives (including Ai Group) and union representatives to consider whether any changes are needed to existing laws dealing with wage underpayments.

For the reasons outlined in these submissions, Ai Group considers that the Wage Theft Bill should be withdrawn. Nevertheless, Ai Group has reviewed the draft Bill and has noted a number of significant concerns. If the Committee determines to recommend the passing of the Bill, Ai Group urges the Committee to address these concerns to minimise the detrimental impact on employment and investment.

Conflict with Commonwealth laws

In making its recommendations regarding the Wage Theft Bill, the Committee should be mindful of the problems which are likely to emerge from passing legislation that is inconsistent with Commonwealth laws dealing with the same subject matter.

The Bill potentially conflicts with the Federal industrial relations regime which applies to the vast majority of Queensland employees. If the Bill is passed, questions regarding the validity of the laws would likely give rise to costly litigation.

A Commonwealth law which leaves no room for the operation of a State or Territory law dealing with the same subject matter may be considered to "cover the field". Where this is the case, there can be no question of those laws having a concurrent operation with the Commonwealth law.[4] Section 109 of the *Commonwealth of Australia Constitution Act* deals with inconsistency between Commonwealth and State laws. It states:

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[2] *Sydney Morning Herald*, 'Path ahead is expected to be bumpy': RBA governor warns unemployment to rise' 21 July 2020.

[3] ABS Labour Force Survey.

[4] *Work Health Authority v Outback Ballooning Pty Ltd* [2019] HCA 2; *Momcilovic v The Queen* [2011] HCA 34.

> *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.*

In *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation*, Mason J said:[5]

> *although a provision in a Commonwealth statute which attempts to deny operational validity to a State law cannot of its own force achieve that object, it may nevertheless validly evince an intention on the part of the statute to make exhaustive or exclusive provision on the subject with which it deals, thereby bringing s 109 into play.*

Numerous provisions in the *Fair Work Act 2009* (Cth) (**FW Act**) express an intent that national system employers not be exposed to penalties under State laws for underpayments. Section 26 of the FW Act provides 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 a national system employer. A 'State or Territory industrial law' is defined in the FW Act to include an Act of a State or Territory that applies to employment generally and provides as one of its main purposes 'providing for the establishment or enforcement of terms and conditions of employment'.[6]

Including criminal penalties for underpayments in the *Criminal Code* could bring the relevant aspects of the legislation within the class of excluded laws described under s. 29(2)(b)(ii) of the FW Act. It should also be noted that s. 30 of the FW Act provides that Division 2 of Part 1-3 does not serve as a complete statement of the circumstances under which the FW Act is intended to apply to the exclusion of State or Territory laws. The explanatory memorandum to the Fair Work Bill explains this provision as making clear that:

- where no express provision is made about the relationship between the Bill and State or Territory laws and instruments, other provisions of the Bill might nevertheless, by implication, leave no room for the operation of a State or Territory law or instrument; and
- the existence of clauses 26, 27 and 28 does not affect the drawing of such an implication.

A comprehensive enforcement regime for non-compliance with modern awards, enterprise agreements and employment contracts is provided for under the FW Act. Under Part 4-1 of the Act, a person may apply to a court for an order for a pecuniary penalty or other order against a wrongdoer if a civil penalty provision is contravened. This part deals with remedies and penalties available to courts in enforcing civil remedy provisions, including those which relate to underpayment through non-compliance with a 'fair work instrument' or a 'safety net contractual entitlement'. The explanatory memorandum to the Fair Work Bill states that having a single compliance framework "ensures consistency across the Bill in terms of when particular persons can apply for orders and the types of orders that the courts can make". Orders which a court may make as a result of a party's contravention of a civil remedy provision are dealt with in Subdivision B, Division 2 of Part 4-1. A separate small claims procedure is also provided for under s. 548 which

[5] [1977] HCA 34.

[6] *Fair Work Act 2009* (Cth) s. 26(2)(b)(ii).

limits the amount which may be awarded to an applicant. Section 571 of the FW Act prohibits a court from ordering a person to serve a sentence of imprisonment if the person fails to pay a pecuniary penalty imposed by the Act. It would be incongruous for the Federal compliance system to countenance State criminal penalties, which include imprisonment, for underpayment particularly taking into account the broader exclusion provided for under s. 30.

Given the comprehensive and detailed framework for compliance and enforcement mandated under the FW Act for national system employers and the intent to 'cover the field' in this area, it is likely that laws introducing criminal penalties for underpayment by national system employers would be rendered inoperative by s. 109 of the *Commonwealth of Australia Constitution Act*.

Due to the significant risk of inconsistency and the likelihood that the criminal penalties proposed by the Wage Theft Bill would be invalid, passing such a law is not appropriate.

Ai Group urges the Committee to recommend that the Bill be withdrawn.

Overlap with potential new Federal laws dealing with underpayment

On 18 February 2020, the Attorney-General's Department announced that the Commonwealth Government is soon to introduce a Bill that will criminalise the most serious forms of underpayment and introduce significant jail terms and fines. In its response to the Migrant Workers' Taskforce Report, the Commonwealth Government announced:

> *In a clear and strong signal that workplace exploitation will not be tolerated by this Government, the Government will consider the circumstances and vehicle in which criminal penalties will be applied for the most serious forms of deliberate exploitation of workers.*
>
> *This complements existing offences for serious criminal forms of labour exploitation, including forced labour, servitude and debt bondage in the Criminal Code 1995 (Cth).*
>
> *By adding criminal sanctions to the suite of penalties available to regulators for the most egregious forms of workplace conduct, the Government is sending a strong and unambiguous message to those employers who think they can get away with the exploitation of vulnerable employees.*
>
> *The Government agrees that our new regime of increased penalties for underpayment and other exploitation of workers should be reviewed once it has had time to take effect. If it is apparent that these penalties are not deterring such exploitation, the Government will also consider options for increasing penalties further.*

Although the precise wording of any pending legislation was not public knowledge at the time of filing this submission, it is likely that Commonwealth legislation targeting underpayment would overlap with any State laws introduced to address the same topic. As such, Ai Group considers the Queensland Government's proposed legislation would be superfluous in light of legal reforms which may take place at the Federal level.

Additionally, many of the issues which the Wage Theft Bill is designed to address are the subject of a working party of employer representatives (including Ai Group) and union representatives, established by the Federal Government to consider whether any changes are needed to existing laws dealing with compliance and enforcement. In light of the continuing discussions taking place at the Federal level, it is not appropriate for Queensland legislation to be implemented that would result in additional layers of regulation, further complicating the process for achieving justice and redress where underpayment takes place.

Definition of 'stealing'

'Stealing', as defined in the Wage Theft Bill, creates additional complexities, taking into account the existing provisions dealing with payment in industrial instruments and the FW Act. The ordinary concept of theft assumes an object which is capable of being stolen. There are inherent difficulties in defining 'stealing' to encompass underpayment of employees' wages and salary. Provisions dealing with the method and frequency of payment are present in most awards, enterprise agreements and employment contracts. In the event that an employer fails or is late in paying an employee's wages, penalties can apply. The FW Act assumes some flexibility in the timeframes allowed for payment, prescribing amounts paid in relation to the performance of work on an at least monthly basis.[7]

Failure to pay an employee at least monthly is a civil remedy provision under the FW Act.[8] Although Ai Group considers it unnecessary on this basis to institute criminal penalties for such conduct, additional concern relates to the definition in proposed s. 391(6A) of the *Criminal Code*. Defining 'stealing' to include a failure to pay an employee "an amount payable" to an employee or other person in relation to the performance of work ignores the fact that wages and salary may be payable over an extended period of time. In order for an amount to be converted to a person's own use, the legislation sets a low threshold of failure to pay an amount which has become payable under an Act, industrial instrument or agreement. No clarity is present in the provision as to whether a simple delay in paying wages would legitimately give rise to criminal liability under proposed s. 391(6A). Ai Group considers that a more appropriate test would require a clear intent to withhold owed amounts rather than a mere failure to pay.

For industrial instruments which assume a periodic reconciliation to ensure correct amounts are paid to an employee, it is unclear when an employer would be in breach of proposed s. 391(6A). For example, under cl. 28.5(b) of the *Vehicle, Repair, Services and Retail Award 2020*, special provisions applicable to persons principally employed to sell vehicles, enable commission payments to be used to satisfy an employer's obligation to pay a vehicle salesperson in respect of hours required to be worked in excess of 38 in any week. An employer is required to ensure compliance with their payment obligations pursuant to this clause every 3 months and make up any shortfall within 21 days of the last day of the relevant month. Here, the provision assumes that amounts payable could take over 3 months to be reconciled. As currently worded, the proposed

[7] *Fair Work Act 2009* (Cth) s. 323(1)(c).

[8] *Fair Work Act 2009* (Cth) s. 323, Note 1.

criminal offence might expose an employer to criminal sanction for much of this period. Given the very different approach assumed under this Federal award, it would be unfair for criminal penalties to apply for such conduct.

Punishment for stealing

Section 398 of the Criminal Code contains a range of offences under the heading 'punishment in special cases' which attract higher penalties than the general offence of 'stealing'. The proposed amendment to this provision would include a separate category of 'stealing by employers' where the offender is liable for imprisonment for ten years if the offender is or was an employer and the thing stolen is the property of a person who is or was the offender's employee.

It is unfair to provide a separate category, attracting a higher penalty, where the offender is or was the employer and the thing stolen is their current or former employee's property.

The 'special case' outlined in s. 398, as it is proposed to be amended also relates to 'stealing' that is far broader than the offence referred to in proposed s. 391(6A). The Wage Theft Bill proposes a separate offence primarily dealing with underpayment of salary and wages. There is no finding which emerges out of the Committee's former Inquiry or any known policy consideration which would justify a higher penalty for 'stealing' in general where there is no relationship to unpaid salary or wages.

Moreover, Ai Group considers the 'special' penalty proposed by the Wage Theft Bill to be manifestly excessive. Liability for 10 years' imprisonment (double that for the more general punishment for stealing in s. 391(1)) is included in the *Criminal Code* for offences which are clearly of a more serious nature including:

- Owner etc. permitting abuse of children on premises if the child is of or above the age of 12 years (s. 213(2));
- Abuse of persons with an impairment of the mind (s. 216(2));
- Using internet etc. to procure children under 16 (s. 218A);
- Grooming children under 16 (s. 218B(2));
- Taking child for immoral purposes (s. 219);
- Assault occasioning bodily harm if the offender does bodily harm and is or pretends to be armed with any dangerous or offensive weapon or instrument (s. 339(3));
- Sexual assault (s. 352).

Ai Group considers a custodial sentence to be inappropriate for underpayment, particularly in light of the extreme complexity of the workplace relations framework in Australia where interpretations are frequently disputed.

Requisite degree of knowledge

The Report which arose out of the Inquiry - *A fair day's pay for a fair day's work? Exposing the true cost of wage theft in Queensland* recommended that the Queensland Government legislate to make 'wage theft' a criminal offence, where the conduct is proven to be deliberate or reckless. In its response to the Report, the Queensland Government accepted the recommendation in-principle, subject to further consideration of the constitutional jurisdiction and implementation implications.

The significant complexity of the workplace relations system in Australia should persuade the Committee in favour of ensuring that employers are not exposed to criminal liability for inadvertent or accidental underpayment. An employer's workplace entitlements may be derived from the FW Act, an enterprise agreement, an individual flexibility arrangement, an underpinning modern award and an employment contract. To this may be added any number of policies and separate State/Territory legislation governing work health and safety, long service leave and workers' compensation. Even employers with well-developed and highly resourced payroll departments are capable of making errors. As the current 4 yearly review of modern awards has demonstrated, it is very possible for industrial organisations and even members of the Fair Work Commission to interpret modern award clauses differently. In recognition of some elements of this complexity, the Federal Government has established a working party which is currently meeting to discuss potential simplification of modern awards.

Ai Group urges the Committee to ensure that the offence provisions in the Wage Theft Bill are fair and only apply to dishonest, deliberate, serious and systematic conduct. It is unconscionable for employers to incur criminal liability for inadvertently underpaying an employee where the employer was unaware the amount paid was insufficient to meet their legal obligations.

Elements of criminal responsibility are dealt with in Chapter 5 of Part 1 of the *Criminal Code*. Section 22 of the Code relevantly provides:

> ***22 Ignorance of the law—bona fide claim of right***
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> ***(1)*** *Ignorance of the law does not afford any excuse for an act or omission which would otherwise constitute an offence, unless knowledge of the law by the offender is expressly declared to be an element of the offence.*
>
> ***(2)*** *But a person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by the person with respect to any property in the exercise of an honest claim of right and without intention to defraud.*

Even if the protections afforded to an employer under s. 22(2) avoid liability emerging in most cases where employers are not genuinely culpable for underpayment, Ai Group considers knowledge of the relevant laws which underpin an underpayment application to be an essential element in any proposed criminal offence targeting such conduct. If the proposed criminal offence is to exclude those who make an error but intended to pay their employees correctly, proposed s. 391(6A) should be amended to clarify that actual knowledge that an employer was not paying an

employee their correct entitlements is an element that must be satisfied for the criminal liability to be attributed to a person or corporation.

Accessorial liability

The importance of an explicit reference to the required knowledge of the essential elements of the offence is particularly acute in considering the accessorial liabilities already present in Chapter 2 of Part 1 of the *Criminal Code*. Section 7(1) of the *Code* lists categories of persons who are deemed to have taken part in committing an offence and who may be charged with actually committing it. These are:

> *(a) every person who actually does the act or makes the omission which constitutes the offence;*
>
> *(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;*
>
> *(c) every person who aids another person in committing the offence;*
>
> *(d) any person who counsels or procures any other person to commit the offence.*

Significantly, pursuant to s. 7(3) of the Code, a conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.

Conclusion

Ai Group oppose the introduction of criminal penalties for underpayment of employees' entitlements. The numerous inquiries and policy positions taken by the State and Federal Governments nevertheless suggest a national response would be preferable to the emergence of individual state regimes.

Constitutional considerations also demonstrate that the Wage Theft Bill would merely add confusion and encourage litigation to test the validity of the laws. The Bill should be withdrawn.

ABOUT THE AUSTRALIAN INDUSTRY GROUP

The Australian Industry Group (Ai Group®) is a peak employer organisation representing traditional, innovative and emerging industry sectors. We are a truly national organisation which has been supporting businesses across Australia for more than 140 years.

Ai Group is genuinely representative of Australian industry. Together with partner organisations we represent the interests of more than 60,000 businesses employing more than 1 million staff. Our members are small and large businesses in sectors including manufacturing, construction, engineering, transport & logistics, labour hire, mining services, the defence industry, civil airlines and ICT.

Our vision is for thriving industries and a prosperous community. We offer our membership strong advocacy and an effective voice at all levels of government underpinned by our respected position of policy leadership and political non-partisanship.

With more than 250 staff and networks of relationships that extend beyond borders (domestic and international) we have the resources and the expertise to meet the changing needs of our membership. We provide the practical information, advice and assistance you need to run your business. Our deep experience of industrial relations and workplace law positions Ai Group as Australia's leading industrial advocate.

We listen and we support our members in facing their challenges by remaining at the cutting edge of policy debate and legislative change. We provide solution-driven advice to address business opportunities and risks.

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