Ai GROUP SUBMISSION

Private Sector Labour Relations Division
Department of Mines, Industry Regulation and Safety

Inquiry into Wage Theft in Western Australia

27 March 2019

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 18 February 2019, the Hon Bill Johnston, Minister for Industrial Relations initiated the current Inquiry into Wage Theft in Western Australia (**the Inquiry**).

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 Western Australian economy, accounting for 83.8% of total employment in the State. The trend unemployment rate in Western Australia was well above the national average in February 2019 at 6.2% (the second highest in the country). This represents a significant increase from the 2.7% trend unemployment rate recorded by the ABS for September 2008. To assist the Western Australian economy to recover from the end of the mining boom, it is essential that State laws encourage business to invest and employ.

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

- The characterisation of underpayments as 'theft' is misleading and inappropriate and improperly intrudes on an area of regulation that is best handled by the civil law system.

- 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 dual coverage of industrial relations legislation by both the Western Australian and Commonwealth Parliaments is already needlessly complex with the State system covering a significant minority of employees who are not engaged by 'constitutional corporations'. The introduction of State laws relating to 'wage theft' would add further complexity by intruding into employment relationships that are already governed by the federal system. 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. An employer may 'deliberately' underpay staff owing to an incorrect interpretation of its obligations. 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 Western Australia.

The Concept of 'Wage Theft'

The Terms of Reference to the Inquiry define wage theft as the systematic and deliberate underpayment of wages and entitlements to a worker.

The characterisation of such behaviours in terms of 'theft' is misleading and constitutes an inappropriate trespass into an area of regulation not traditionally governed by the criminal legal system. 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. To break down this necessary distinction between the civil and criminal legal systems would be a retrograde measure, returning the civil law system to a bygone era where a party could be arrested and imprisoned for failure to pay a debt. In a 1969 report on Supreme Court procedure, the NSW Law Reform Commission made the following comment regarding 'arrest and attachment of the person' for enforcement of an order for the payment of money:

> Imprisonment for debt is the survival of an archaic procedure and we think that it has no place in a modern system.

Ai Group considers the potential exposure of a party to criminal sanction for non-payment of a debt to an employee constitutes a regressive development in the system of workplace relations reversing more than a century of modernisation since the abolition of debtors' prisons in the middle of the nineteenth century.

Criminal penalties already exist under s.378 of the *Criminal Code Compilation Act 1913* (WA) for 'stealing' which incorporates a mental element that the act must be done 'fraudulently'. It is inappropriate to disturb an existing legal framework designed to target fraudulent theft or conversion of property by extending the concept of 'theft', which may be equated with 'stealing', beyond its 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.

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.

Western Australia is the only state which has not referred its powers to regulate private employees of non-constitutional enterprises to the Commonwealth. It has been estimated that between 15% and 30% of employees in Western Australia are covered by the State industrial relations system. Most of those employed in the private sector covered by the State system are engaged by small businesses.

The entitlements of state system employees are governed generally by the *Industrial Relations Act 1979* (WA) (IR Act) and the *Minimum Conditions of Employment Act 1993* (WA). Enforcement of the IR Act is dealt with in 'Part III – Enforcement of Acts, awards, industrial agreements and orders'. The maximum penalty for contravention of an award, agreement or statutory minimum condition is currently $2,000.[1] The Industrial Magistrates Court is also empowered under the IR Act to impose fines of up to $5,000 for breach of certain record keeping requirements or for failure to comply with orders made by the court for the purpose of preventing any further contravention.[2] Any perception that the penalties for non-compliance with the State IR Act are insufficient should be dealt with via adjustment to the quantum of the applicable penalties as opposed to the imposition of criminal liability.

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

[1] *Industrial Relations Act 1979* (WA), s 83(2).

[2] *Industrial Relations Act 1979* (WA), s 83E(1)(a), 83(8), 49F.

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 Industrial Magistrates Courts, Federal Circuit Court or the Federal Court. The Fair Work Commission also has a role in settling disputes about entitlements.

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 2017-2018 reported that 'the average time taken to resolve requests for assistance has been reduced to 14 days, as compared with 15 days in 2016-2017 and 19 days in 2015–16. Over the 2017-2018 reporting period, the FWO resolved 27,074 disputes through its dispute resolution service, in an average of 7 days, an increase on 25,332 in the previous reporting period. Over 96% of requests for assistance involving a dispute received by the FWO in 2017-2018 were finalised through education and dispute resolution services.

The existing regulatory regime will not be improved by State Government legislation directed at addressing underpayments. The addition of yet another layer of complexity through the introduction of 'wage theft' laws applicable to employees covered by both the Commonwealth and State systems would cause even greater confusion considering the availability of existing provisions in the FW Act and the IR Act which deal with underpayment.

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'[3] the FW Act endeavours to establish as the main legislation governing the employment relationship.

In Western Australia, it is incumbent on employers covered by the Federal System 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. For private employers covered by the State system, the number and complexity of State awards has been highlighted as a major problem in the Interim Report for the recent Ministerial Review of the State Industrial Relations System.[4] The Interim Report stated that coverage is difficult to discern and noted that industry and occupational coverage of national modern awards is less complex than State awards.[5] 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). In January 2019, the ABC apologised after admitting that it had

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

[4] Government of Western Australia, *Ministerial Review of the State Industrial Relations System* (Interim Report) March 2018, [1272].

[5] Ibid, [1208] [1272].

underpaid up to 2,500 casual staff who had received a "flat rate" including an underpayment of $19,000 with respect to one employee.

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.

It is necessary to take into account how wide the net may be cast in any prosecution relating to criminal offences concerning underpayment. The 2017 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[6] 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.[7] 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.'

Numerous practical difficulties with the criminalisation of underpayment have the potential to cause detriment to employees by placing various procedural barriers between an underpaid worker and their receipt of appropriate compensation. Proceedings initiated in a relevant court for recovery of unpaid entitlements under an industrial instrument or safety net contractual entitlement are likely to be made subject to a stay application where existing criminal proceedings are on foot. Compared with civil proceedings, the prosecution of a party for committing a criminal offence is complex and time consuming. The 2017 Annual Review of the Western Australian District Court revealed a significant 31.3% increase in the total number of matters committed in the Court's

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

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

criminal jurisdiction for trial and sentencing over the previous five years and a 91.1% increase in the total number of matters on hand over the same period.[8]. The District Court has reported an average trial length of 4.09 days, constituting a 6% increase on the 3.84 days recorded for 2016.[9] The 2017 Report recorded an increase in the median delay to criminal trial from 2013, with the 12 month moving average recorded as 35 weeks in December 2017.[10] The median delay for sentencing in 2017 was 26 weeks, 4 more than in December 2016 and 7 more than in December 2015.[11] It is notable that of matters pending in the Federal Court's original jurisdiction at 30 June 2018 (excluding native title matters), those arising from the Court's Fair Work jurisdiction were the second most common.[12] Introducing criminal penalties for underpayment would significantly tax the court system's already stretched resources and likely force employees to wait considerable lengths of time to initiate civil proceedings where these are subject to a stay pending the outcome of an application for a criminal penalty regarding the same subject matter. Considering the significantly higher burden of proof for criminal proceedings whereby a contravention is subject to proof 'beyond reasonable doubt', it is arguable whether the number of convictions would justify both the burden on the court system, delay for recovery and injustice experienced by employers.

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.

Ai Group strongly opposes criminal offences for underpayment of wages or entitlements. The longstanding regulation of such matters through the civil law system should not be disturbed.

Conclusion

The necessity to provide fairness to employers whilst ensuring adequate protections are in place for 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

[8] District Court of Western Australia, *Annual Review* 2017, p 1.
[9] District Court of Western Australia, *Annual Review* 2017, p 7.
[10] District Court of Western Australia, *Annual Review* 2017, p 8.
[11] District Court of Western Australia, *Annual Review* 2017, p 9; District Court of Western Australia, *Annual Review* 2016, p 8.
[12] Federal Court of Australia, *Annual Report 2017 – 2018,* p 29.

that are being considered by this Inquiry. The current regulatory system would not be improved by amendments to Western Australian 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.

Ai Group would be happy to meet with the Committee to discuss the issues referred to in this submission.

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