HOUSING INDUSTRY ASSOCIATION

Submission to the
Private Sector Labour Relations Division
Department of Mines, Industry Regulations and Safety

Inquiry into Wage Theft in Western Australia

27 March 2019

HOUSING INDUSTRY ASSOCIATION

contents

Housing Industry Association contact:

Cath Hart
Executive Director
Housing Industry Association
22 Parkland Road
Osborne Park
WESTERN AUSTRALIA 6017
Phone: 9492 9200
Email: c.hart@hia.com.au

ABOUT THE HOUSING INDUSTRY ASSOCIATION

The Housing Industry Association (HIA) is Australia's only national industry association representing the interests of the residential building industry, including new home builders, renovators, trade contractors, land developers, related building professionals, and suppliers and manufacturers of building products.

As the voice of the industry, HIA represents some 60,000 members throughout Australia. The residential building industry includes land development, detached home construction, home renovations, low/medium-density housing, high-rise apartment buildings and building product manufacturing.

HIA members comprise a diversity of residential builders, including the Housing 100 volume builders, small to medium builders and renovators, residential developers, trade contractors, major building product manufacturers and suppliers and consultants to the industry. HIA members construct over 85 per cent of the nation's new building stock.

HIA exists to service the businesses it represents, lobby for the best possible business environment for the building industry and to encourage a responsible and quality driven, affordable residential building development industry. HIA's mission is to:

"promote policies and provide services which enhance our members' business practices, products and profitability, consistent with the highest standards of professional and commercial conduct."

The residential building industry is one of Australia's most dynamic, innovative and efficient service industries and is a key driver of the Australian economy. The residential building industry has a wide reach into manufacturing, supply, and retail sectors.

The aggregate residential industry contribution to the Australian economy is over $150 billion per annum, with over one million employees in building and construction, tens of thousands of small businesses, and over 200,000 sub-contractors reliant on the industry for their livelihood.

HIA develops and advocates policy on behalf of members to further advance new home building and renovating, enabling members to provide affordable and appropriate housing to the growing Australian population. New policy is generated through a grassroots process that starts with local and regional committees before progressing to the National Policy Congress by which time it has passed through almost 1,000 sets of hands.

Policy development is supported by an ongoing process of collecting and analysing data, forecasting, and providing industry data and insights for members, the general public and on a contract basis.

The association operates offices in 23 centres around the nation providing a wide range of advocacy, business support including services and products to members, technical and compliance advice, training services, contracts and stationary, industry awards for excellence, and member only discounts on goods and services.

1. INTRODUCTION

On Wednesday 23 January 2019, the McGowan Government announced an inquiry into Wage Theft in Western Australia (**the Inquiry**), to be undertaken by Mr Tony Beech former Chief Commissioner of the Western Australian Industrial Relations Commission.

The Inquiry Terms of Reference (**TOR**) are broad ranging and ask that the Inquiry consider:

1) *Whether there is evidence of wage theft occurring in Western Australia, and the various forms that wage theft may take.*
2) *What are the reasons wage theft is occurring, including whether it has become the business model for some organisations.*
3) *What is the impact of wage theft on workers, businesses which are compliant with employment laws, and the Western Australia community and economy.*
4) *Whether wage theft is more prevalent in particular industries, occupations, forms of employment/engagement or parts of the State.*
5) *Whether the current State and Federal regulatory framework for dealing with wage theft is effective in combating wage theft and supporting affected workers.*
6) *Whether new laws should be introduced in Western Australia to address wage theft and if so, whether wage theft should be a criminal offence.*
7) *Whether there are other strategies that could be implemented by the Western Australia Government, or industry stakeholders to combat wage theft.*
8) *Whether there are strategies and legislative change the Western Australian Government could recommend to the Federal Government to deal with wage theft in the federal jurisdiction.*
9) *Other matters incidental or relevant to the Inquirer's consideration of the preceding terms of reference.*

HIA is unaware of wage theft occurring in the residential building industry.

HIA does not support the deliberate underpayment of wages and other entitlements to employees. In HIA's experience employers in the residential building industry aim to do the right thing by their employees.

Where such conduct does occur it is an industrial matter and there are appropriate existing mechanisms in place to ensure employees are paid what they are owed.

Such a view was echoed in the Interim Report for WA IR System Review (**Interim Report**) which formed the view that wage theft is a matter of Criminal law and is therefore best dealt with through the involvement of the Attorney General.[1]

In responding to this Inquiry there are four key matters HIA would highlight.

1. Criminalising the underpayment of wages is inappropriate

Criminalising matters of an industrial nature is inappropriate. There is currently no jurisdictions in Australia where 'wages theft' is a criminal offence.[2]

Circumstances in which an employer fails to provide their employees with the full wage or salary to which they are entitled is an underpayment. The use of the term 'theft' seeks to inappropriately attach criminal intent to an employment related matter. HIA opposes such an approach.

[1] Ministerial Review of the State Industrial Relations System Interim Report, March 2018, pg 457
[2] Ibid, pg 457

2. The jurisdiction of the Western Australian legislature is limited

The jurisdiction of WA to legislate on this matter is limited to the *Industrial Relations Act 1979* (WA) (**WA IR Act**), which is confined to state system employers (i.e. sole traders, partnerships and state government employees). All other employers and employees in WA, are covered by the national industrial relations framework, are captured by the Commonwealth *Fair Work Act 2009* (**FW Act**).

3. There is a framework of existing powers to respond appropriately to the underpayment of wages

Both the state and national frameworks, have existing powers to respond appropriately to the underpayment of wages. The current provisions of the FW Act including the role of the Fair Work Ombudsman (**FWO**), and WA IR Act including the roles of the WA Industrial Relations Commission (**WAIRC**) and Department of Mines, Industry Regulation and Safety (**DMIRS**), are appropriate to respond to instances of underpayment.

4. The current workplace relations framework is complex

The current complexity of the workplace relations framework, including the complexity in determining rates of pay is directly relevant to the incidence of the underpayment of wages.

HIA elaborates on these matters below.

2. WHAT IS WAGE THEFT?

'Wage theft' is a term of art, the adoption of which seeks to inappropriately criminalise the underpayment of wages.

The term appears to be primarily American-based but has come to be used more commonly in Australia after cases like that of 7-Eleven where systemic and deliberate underpayments of vulnerable workers was found. Of note, in that case, existing mechanisms were used to uncover and remedy this conduct.

HIA rejects its use within an industrial context.

As highlighted in a Departmental Brief by the Office of Industrial Relations (**OIR**) for the 2018 Inquiry into Wage Theft Queensland (**QLD Wage Theft Inquiry**), *"there has been a long-standing principle that criminal law has no place in an industrial context"*.[3]

Such a major departure from traditional civil remedy provisions relating to underpayment issues would require significant justification, which HIA submits is currently not available.

The offence of theft (whether that occurs in the workplace or in a non-industrial context) is a matter of criminal law. Prosecutions for theft and other criminal offences should only be instituted by public prosecutors and should take place before a proper criminal court with a criminal onus of proof and normal rights of appeal.

Public policy, including workplace relations legislation should be focused on the actions of employers and employees in the workplace, including the fundamental duty to pay an employee what they are owed for the labour provided.

[3] Briefing Paper - Departmental brief by the Office of Industrial Relations, June 2018, pg 27

3. THE CAUSES OF UNDERPAYMENT

3.1 MISTAKE OR ERROR

In HIA's experience underpayments are generally a result of mistake or error.

For example, recent media articles about instances of the incorrect calculation of overtime[4] and underpayments due to payroll errors[5] by employers were not the result of a deliberate attempt to underpay staff and were remedied once the issues surfaced.

In HIA's experience where underpayments are identified and an employer is made aware and agrees that an underpayment has occurred an employer moves to remedy the situation.

Both the Fair Work Ombudsman (**FWO**) and Department of Mines, Industry Regulation and Safety (**DMIRS**) perform educative roles (further detail below), with the objectives of ensuring compliance, and in the case of underpayment ensuring an employee is paid correctly, favouring neither party.

Problematically a misplaced assumption has developed that if underpayments as a result of mistake or error genuinely occur, so would overpayments by mistake or error:

> *"genuinely innocent errors would be expected to include some proportion of overpaid employees. The absence of any evidence that widespread overpayments cast a certain amount of doubt over claims of inadvertent underpayments".*[6]

Such incorrect conclusions should be rejected. Why would an employee report an overpayment? If an employer is overpaying their employee it is likely they are either unaware and therefore would not take action to remedy or that these payments are made as a result of a deal struck between them.

Additionally, the ability at law to 'remedy' an overpayment i.e. to reduce an employee's wage is fraught with uncertainty for employers.

One key risk for employers is that generally a reduction in an employee's remuneration may be seen as a breach of contract and while parties can agree to do so, it would be unusual for an employee to genuinely agree to such an arrangement. A reduction in pay could also be seem as a constructive dismissal and lead to the risk of an unfair dismissal claim.

This was the outcome for the employer in the case of *Owens v Allied Express Transport Pty Ltd*[7].

In that case, the employer and employee agreed that the employee would work in a less difficult role as the employee was pregnant. However, when the employer informed the employee that there would be a significant reduction in salary for the new role, the employee refused to agree, and regarded herself as having been dismissed. This was found to constitute a termination of employment at the initiative of the employer opening the employer to an unfair dismissal claim.

Equally problematic is the situation in which an employer is accidentally overpaying an award covered employee. In such situation the FWO advises that *"if the repayment can't be agreed an employer should get legal advice."*[8]

[4] http://www.abc.net.au/news/2017-04-04/george-calombaris-apologises-after-restaurant-staff-underpaid/8412852
[5] https://www.theguardian.com/australia-news/2018/jul/17/lush-cosmetics-payroll-error-underpaid-staff-by-2m
[6] Briefing Paper - Departmental brief by the Office of Industrial Relations, June 2018, pg 25
[7] [2011] FWA 1058
[8] https://www.fairwork.gov.au/pay/deducting-pay-and-overpayments

3.2 COMPLEXITY OF THE CURRENT WORKPLACE RELATIONS FRAMEWORK

To say that the WA workplace relations framework is complex is an understatement.

Employers in WA are required to contend with two regulatory frameworks, determining the appropriate jurisdiction largely on the structure of their business[9].

Likelihood for error in determining appropriate jurisdiction in significant, particularly for small business who do not have the appropriate human resource expertise to assist in navigating a complex legislative framework.

Employers in the WA residential building industry must consider and comply with the safety net as set out by:

- For federal system employers:
    - The National Employment Standards (**NES**) under the FW Act;
    - The Building and Construction General Onsite Award 2010 (**Onsite Award**)[10];
    - Individual Flexibility Agreements or Enterprise Agreements; and
    - *Long Service Leave Act 1958 (*WA) (**LSL Act**);

- For state system employers:
    - WA IR Act;
    - Minimum Conditions of Employment Act 1993 (WA) (**MCE Act**);
    - General Order of the WA Industrial Relations Commission (**WAIRC**);
    - Termination, Change and Redundancy General Order (**TCR General Order**);
    - LSL Act;
    - *Building Trades (Construction) Award 1987* (**WA Building Award**)[11]; and
    - Employer and Employee Agreements, and industrial agreements.

While employers must seek to understand how these different instruments interact, the complexities do not end there. Interpreting and applying state and federal modern awards also presents a number of challenges.

Federal Workplace Relations System

Most national system employers in the residential building industry are covered by the Onsite Award.

The Onsite Awards presents a set of complicated and complex provisions, running at over 100 pages, which is not reflective of flexible and modern work practices and are incredibly difficult for small businesses to understand and apply.

Notably, Fair Work Commission (**FWC**) president Iain Ross has observed that the Award system, and language used within those awards, can be "tortuous".[12]

The FWC has also engaged in a plain language redrafting exercise of all Modern Awards, specifically research done by Sweeny Research found that small businesses view Modern Awards as:

- *"Convoluted... Too long and unwieldy, suggesting a time intensive and difficult process.*
- *Complex... The language was difficult to understand, with 'legalese' and jargon.*
- *Ambiguous... Information provided was not clear, requiring too much interpretation.*

[9] http://www.commerce.wa.gov.au/labour-relations/guide-who-wa-state-system
[10] The Onsite Award is one of several Awards that may apply
[11] The Building Award is one of several Awards that may apply
[12] http://www.abc.net.au/news/2018-06-06/iain-ross-industrial-award-system-language-set-to-become-simpler/9833026

- *Of questionable relevance... Difficult to identify which award was most relevant when employees' roles varied and did not clearly fit into a single industry.*
- *Not for them... Written for the benefit of "bureaucrats and lawyers", with no consideration of end-user needs or capability."*[13]

In addition, issues of potential overlap between the coverage of modern awards, difficultly determining rates of pay and redundancy provisions at odds with the commonly accepted notion of 'redundancy' provide fertile ground for inadvertent underpayment of wages.

Cross coverage issues - paying under the incorrect award

Confusion as to the appropriate award coverage can cause payment errors.

During award modernisation the Australian Industrial Relations Commission was directed to *"create modern awards primarily along industry lines, but may also create modern awards along operational lines as it considers appropriate."*[14]

This was a significant shift in approach and in contrast to pre-reform awards rather than being clearly bound to an award, as a respondent (or within a class of respondents), employers are now required to determine the appropriate award coverage:

> *"Rather than using a concept of parties being 'bound' to awards…adopt two new key concepts which better reflect the new modern workplace relations system. These are:*
> - *That an instrument covers an employer and employee or organisation; (that is they fall within the scope of the instrument); and*
> - *The instrument applies to the employer and employee (that is, the instrument that actually regulates rights and obligations)"*[15]

This approach has caused uncertainty for employers operating across industries who engage employees across a variety of trades and who may be covered by more than one modern award, for example for those businesses carrying out both on and off-site work, determining the appropriate award to derive employment conditions from can be extremely difficult.

To that end, there are similarities between the occupations and classifications contained within the *Timber Industry Award 2010* (**Timber Award**), the Onsite Award and the *Joinery and Building Trades Award 2010* (**Joinery Award**).

There are classifications that provide coverage for the following occupations in the Joinery, Timber and Onsite Award:
- Joiner
- Machinist
- Carver
- Special class trade

In light of this, disagreements can arise in relation to the most appropriate award coverage. Unsurprisingly, each award contains different employment conditions, including different rates of pay resulting in potential underpayments by virtue of a change in award coverage.

[13] Citizen Co-design with Small Business Owners (13 August 2014) Pg.6
[14] Award Modernisation Request 28 March 2008
[15] [2008] AIRCFB1000 at paragraph 12

Rates of Pay

The calculation of a rate of pay under the Onsite Award is a complex matter.

The minimum rate of pay as prescribed by the award is rarely the actual rate of pay an employee is entitled to, in fact at a minimum there are at least 12 variables that influence the actual amount an employee is paid.

Under the Onsite Award an employee's rate of pay depends on whether the employee is:

- Engaged as a daily hire, weekly hire, or casual employee; and
- Which of the following are applicable (some of which are compulsory):
  - clause 19.1—Minimum wages;
  - clause 21.1—Special allowance;
  - clause 21.2—Industry allowance;
  - clauses 20.1—Tool and employee protection allowance;
  - clause 21.3—Underground allowance;
  - clause 21.11—Air-conditioning industry and refrigeration industry allowances;
  - clause 21.12—Electrician's licence allowance; and
  - clause 21.13—In charge of plant allowance.

An employer must determine if each allowance is applicable in order for it to form a part of the employee's actual minimum rate of pay.

Further, some allowances are payable for 'all purposes' of the award, and will be payable when for example, an employee works overtime, but some are not. Finally, the Onsite Award contains a range of other skill, expense and disability allowances that, depending on the circumstances, an employer will be required to pay, potentially changing an employee's rate of pay on a daily basis.

Redundancy pay in the residential building industry

The Onsite Award provides that a redundancy exists if employment ceases for any reason other than misconduct or refusal of duty, this includes if an employee resigns.

This is at odds with the definition of redundancy under the NES which occurs when employment ends because the employer has determined that the employee's job no longer exists, is not needed or if the employer becomes insolvent or bankrupt.

Further, small businesses are exempt from paying redundancy under the NES, however under the Onsite Award they are not.

The NES reflects the ordinary and commonly accepted meaning of 'genuine redundancy' as devised by the then Australian Conciliation and Arbitration Commission in the 1984 Termination, Change and Redundancy Case (**the TCR Case**).

In the TCR case it was made clear that the right to redundancy referred to situations caused at the initiative of the employer, whether directly as a result of technological change or company restructuring or indirectly because of insolvency or liquidation. This was again confirmed in the 2004 Redundancy Case in which it was stated that the intended operation of severance pay was primarily directed at ameliorating the 'inconvenience and hardship' of sudden job loss and compensation for non-transferable credits.

However, the construction industry through the Onsite Award has its own (and much broader) definition.

This means that an employer is obliged to pay severance whether the employee is terminated by the employer, resigns, retires, loses a required qualification, becomes totally incapacitated for work, dies or is retrenched (just to name a few scenarios).

This is a significant complexity faced specifically by the residential building industry within the current workplace relations framework that could result in an unintentional underpayment.

State Workplace Relations System

Whilst many of HIA's WA members are covered by the FW Act, some 30% of HIA's WA membership operates solely within the state industrial relations jurisdiction. More broadly, given that the state system covers unincorporated entities i.e. sole traders and partnership it is likely that most of those businesses are small businesses. Small business acutely feel the weight of the complexity of the state system.

Those employers and employees are required navigate through numerous instruments to determine the appropriate terms and conditions of employment, which potentially can lead to unintentional underpayment.

Review of the WA industrial relations system have also highlighted the need to simplify and streamline the system. For example, in 2009 the Amendola Review recommended combining the patchwork of different industrial relations laws and instruments including the WA IR Act, MCE Act, the *Employment Dispute Resolution Act 2008* (WA) and associated Orders into one Act.[16] More recently, the now defunct *Draft Labour Relations Legislation Amendment and Repeal Bill 2012* proposed a number of changes that looked to modernise, streamline and harmonise WA industrial relations laws and in 2017 the Government announced a further review of the state industrial relations system. While we await the final report from that inquiry the Interim Report, released in 2018 made a number of recommendation aimed making the system simpler and more efficient.

State Awards

Most state system employers in the WA residential building industry are covered by the WA Building Award. Of note the WA Building Award has not been substantially reviewed in some time.

Rates of Pay

The calculation of rates of pay under the WA Building Award as it relates to the residential building industry is also a complex matter.

Similar to the federal Onsite Award, the minimum rate of pay prescribed by the WA Building Award is rarely the actual rate of pay an employee is entitled to, in fact at a minimum there are at least 11 variables that influence the actual amount an employee is paid.

Under the WA Building Award an employee's rate of pay depends on whether the employee is:

- Engaged as a weekly hire or casual employee; and
- Which of the following are applicable (some of which are compulsory):
- clause 1(B)(2) - Minimum Adult Award Wage;
- clause 8(3)- Industry Allowance;
- clause 8(5)—Special Allowance;
- clause 8(6) – Tool Allowance;
- clause 8(7) - Location allowance
- clause 8(8)- Underground allowance;

[16] Review of Western Australian Industrial Relations System Final Report pg 23

- clause 8(9)- Plumbing Trade allowance;
- clause 8(10)- Leading Hands allowance;
- clause 9- Special Rates and Provisions;
- clause 20 - Meal Allowance;
- clause 12A- Fares and Travelling Allowance.

It is also noted that an internal analysis of Wageline data[17] demonstrated that the WA Building Award was considered amongst the top ten awards for which complaints from employees were received. The correlation between the number of calls received (14% of calls), accessing of award summaries (top 6 most accessed), and complaints in relation to the WA Building Award, in HIAs view demonstrates the complexities faced by employers in understanding the overly archaic nature of the WA state system awards.

Undoubtedly the simplification of the State Awards would assist in ensuring a greater level of compliance overall but specifically in relation to the correct payment of wages.

Redundancy pay in the residential building industry

The entitlement to redundancy payments depends on the applicable WA award and the interplay with the TCR General Order which covers termination of employment, introduction of changes or redundancy. The TCR General will generally apply except in the event of an inconsistency with an award, order or agreement which provides more favourable conditions. As such, an employees entitlement is determined once it has been identified whether the appropriate award contains more favourable conditions, and if so, an employer must then apply the award provisions.

Under TCR General Order employers:

- are generally not required to make severance payments to certain employees such as apprentices, trainees, casual employee, fixed term employees, where employment is terminated as a consequence of serious misconduct, and where an employee has less than 1 year's service. However some WA awards have specific severance pay provisions that may override these exemption provisions;[18]
- with less than 15 employees are exempt from paying severance pay 'subject to an order of the Commission in a particular redundancy case' which is ambiguous and uncertain. Similarly, in the event an award contains specific severance pay requirements, then this will override the exemption provisions contained in the TCR General Order.[19]

This effectively means that in some circumstances, where it is not clear whether the State award or TCR General Order is applicable, an underpayment could result inadvertently.

Relevantly, the TCR General Order took effect on 1 August 2005 and has not been amended or updated since this date.

[17] Ministerial Review of the State Industrial Relations System- Interim Report, March 2018, pg 440
[18] Clause 4.9
[19] Clause 4.10

4. EXISTING RESPONSE TO UNDERPAYMENT

In HIA's view the current regulatory framework for responding to the underpayment of wages is appropriate.

4.2 CURRENT LEGAL FRAMEWORK

Fair Work Act

Under the FW Act the underpayment of wages is a civil offence and penalties can be imposed for being found to have carried out such actions. Recent amendments to the FW Act have significantly increased penalties for the underpayment of wages where the actions are deliberate and systemic.[20]

Under the FW Act there are a range of options for employees to recover unpaid wages.

Firstly, the FWO offers free services to employers and employees to assist with compliance with workplace laws. The FWO also assist to mediate disputes. In 2017–18, the FWO resolved 27 074 workplace disputes through their dispute resolution services, most within an average of seven days.[21]

Further the FWO assisted over 800 people to pursue their small claims (less than $20,000) directly before the courts in 2017–18. The courts awarded more than $1 224 145 in unpaid entitlements.[22]

Secondly, where questions about entitlements arise, the FWC has power to hear disputes about the NES, Awards and enterprise agreements.[23]

The FWC annual report for 2016-2017 indicates that there were a total of 1940 applications for the FWC to deal with disputes.[24]

Finally, matters that remain unresolved can be heard by the Federal Court. The court also maintains a specific small claims list.

Sham Contracting

In previous inquiries of this nature, sham contracting has been identified a form of 'wage theft'.[25] HIA disagrees with this characterisation. Sham contracting is a stand-alone offence and should not be conflated with notions of 'wage theft'.

The concept of sham contracting is found in the "sham arrangement" provisions of the FW Act (ss.357-359), which is where an employer attempts to deliberately disguise an employment relationship as an independent contracting relationship.

These provisions prohibit an employer from:

- Representing to an individual that the contract of employment under which the individual is (or would be) employed by the employer is in fact a contract for services under which the individual performs (or would perform) work as an independent contractor (FW Act s.357(1)).
- Dismissing, or threatening to dismiss, an employee who performs particular work for the employer in order to engage them as an independent contractor to perform the same or substantially the same, work (FW Act s.358).

[20] *Fair Work Amendment (Protection of Vulnerable Workers) Act 2017*
[21] https://www.fairwork.gov.au/annual-reports/annual-report-2017-18/02-fwo-performance-report/assisted-dispute-resolution-services
[22] ibid
[23] Part 6-2 of the *Fair Work Act 2009*
[24] Fair Work Commission, 'Access to Justice' Annual Report 2016-2017, pg 68
[25] Terms of Reference, Inquiry into Wage Theft in Queensland https://www.parliament.qld.gov.au/work-of-committees/committees/EESBC/inquiries/past-inquiries/Wagetheft

- Making a statement to an employee or former employee that it knows is false in order to persuade or influence the individual to enter into a contract for services under which the individual will perform the same, or substantially the same, work as an independent contractor (s.359).

Under FW Act subsection 357(2) a defence is available to an employer if at the time they made the representation they did not know, and were not reckless as to, the true nature of the relationship i.e. whether contract was a contract of employment.

Failure to comply with the sham arrangement provisions attracts potential penalties of up to $51,000 per breach for corporate entities and up to $10,200 per breach for involved individuals.

Sham contracting should not be confused with legitimate contracting arrangements or circumstances where an employee has been misclassified as a contractor, i.e. there is no intent to enter into a sham.

HIA considers that the current provisions provide sound and effective protections measures against sham contracting. Where convicted of sham contracting significant penalties apply.

In recent years, significant penalties have been levied against a number of companies found to be in breach of the law.[26]

WA IR Act

Similarly for WA state system employees there are a range of options to respond to underpayment of wages. Penalties can be imposed under the WA IR Act for contravention of award, agreement or statutory minimum condition.

Section 83 of the WA IR Act provides specific rights of enforcement of industrial instruments. Where a person contravenes or fails to comply with a provision of an instrument (award, industrial agreement, employer- employee agreement, specified order made by the WAIRC), the following parties may make application for enforcement of an instrument under the section:

- the Registrar or a Deputy Registrar;
- an industrial inspector;
- an organisation or association named as a party to an award or industrial agreement;
- an employer bound by an award, industrial agreement or order;
- any person on his or her own behalf who is a party to the instrument or to whom it applies; and
- a representative acting on behalf of an employee under an employer-employee agreement.

On the hearing such an application the WA industrial magistrate's court may, by order:

- issue a caution;
- impose such penalty as the industrial magistrate's court thinks just but not exceeding $2 000 in the case of an employer, organisation or association, and $500 in any other case; or
- dismiss the application.

If a contravention or failure to comply with a provision of an instrument is proved the industrial magistrate's court may, in addition to imposing a penalty under that subsection, make an order against the person for the purpose of preventing any further contravention or failure to comply with the provision. A person is required to comply with such order, or can face a penalty of $5000 and a daily penalty of $500.

[26] See for instance http://www.fairwork.gov.au/about-us/news-and-media-releases/2013-media-releases/july-2013/20130729-happy-cabby-penalty and http://www.fairwork.gov.au/about-us/news-and-media-releases/2015-media-releases/march-2015/20150302-global-penalty.

In Western Australia the Department of Mines, Industry Regulation and Safety (**DMIRS**) has authority under the WA IR Act to investigate alleged underpayments of WA Award pay rates, and leave entitlements and minimum pay rates and leave entitlements under the MCE Act.[27]

In the 2017-2018 annual report for DMIRS the Private Sector Labour Relations division found that of the 363 employers inspected, 104 separate breaches of awards, agreements or legislation were identified and three prosecutions were undertaken, with one penalty imposed.[28]

Employees seeking enforcements of pay rates above the award or minimum rates, or contractual entitlements not provided by an award or WA legislation, are able to make a 'Denial of Contractual Benefits Claim' to the WAIRC under section 29 of the WA IR Act.[29]

In 2017-2018 there were 75 Denial of Contractual Benefits Claims made to the WAIRC, with 73 of the Applications finalised. Of the 73 finalised applications, 14 were arbitrated claims in which an order was issued, and 59 were settled or withdrawn without arbitration.[30]

Fair Work Ombudsman

Under the FW Act, the FWO is empowered to promote:

> *"…harmonious, productive and cooperative workplace relations"* and *"compliance with this Act and fair work instruments" including by providing education, assistance and advice to employees, employers, outworkers, outworker entities and organisations and producing best practice guides to workplace relations or workplace practices;*
>
> - *to monitor compliance with this Act and fair work instruments;*
> - *to inquire into, and investigate, any act or practice that may be contrary to this Act, a fair work instrument or a safety net contractual entitlement;*
> - *to commence proceedings in a court, or to make applications to the FWC, to enforce this Act, fair work instruments and safety net contractual entitlements;*
> - *to refer matters to relevant authorities;*
> - *to represent employees or outworkers who are, or may become, a party to proceedings in a court, or a party to a matter before the FWC, under this Act or a fair work instrument, if the Fair Work Ombudsman considers that representing the employees or outworkers will promote compliance with this Act or the fair work instrument."*

Recently the FWO has taken a more transparent and proactive approach. A range of high profile cases that have highlighted systemic breaches of workplace relations laws have, in HIA's view established the FWO as the 'cop on the beat'.

However, the FWO can always improve their performance in relation to their key deliverables of advice, and assistance and would consider that an examination of the role of the FWO in order to provide further dispute resolution processes or mediation outside court processes a worthwhile exercise.

For the residential building industry the introduction of measures tailored for small business, including a dedicated small business InfoLine and the release of a range of guides and resources specifically for small business are certainly steps in the right direction. These resources will assist employers comply

[27] https://www.commerce.wa.gov.au/labour-relations/making-complaint-about-underpayment-wages-or-entitlements
[28] WA Department of Mines, Industry, Regulation and Safety, Annual Report 2017-2018, pg 73
[29] https://www.commerce.wa.gov.au/labour-relations/making-complaint-about-underpayment-wages-or-entitlements
[30] WA Industrial Relations Commission, Annual Report 2017-2018, pg 16-17

with the workplace relations obligations. According to their 2017-18 annual report the Small Business Helpline took 98 641.[31]

Wages queries are the most common matter dealt with by the FWO. During 2017-18 the FWO Pay and Conditions Tool generated 6% more visits and generated 10% more calculations a month, providing an average of 480 000 calculations per month..[32]

Department of Mines, Industry Regulation and Safety

In Western Australia, DMIRS is the 'central authority' responsible for conducting labour inspections for workplace safety, and wages and conditions of employment.[33]

According to the DMIRS 2017-2018 Annual Report:

> *"the amount of proactive compliance inspections undertaken has increased and there has been a focus on resolving complaints at the conciliation stage. This has significantly reduced the number of complaints proceeding to the formal investigation stage, assisted in increasing the number of conciliations/investigations finalised and enabled staffing resources to be directed towards proactive compliance inspections*."[34]

In recent years, DMIRS has also increased their compliance activities. In 2017-2018 DMIRS Private Sector Labour Division conducted 554 conciliations, investigations and prosecutions in 2017–18, as compared to 252 in 2016–17.

The DMIRS remit also includes their Wageline service as part of the Private Sector Labour Relations Division, which provides information relating to 'pay rates, leave entitlements and other employment arrangements for employers and employees in the WA state industrial relations system.'[35]

In 2017–18 the number of 16, 245 private sector enquiries were answered by Wageline, and 37, 822 electronic information units (Newsletter emails) were delivered by Wageline to the private sector.

An internal analysis of Wageline data for 2016-2017 demonstrated 14% of state system calls concerned those employed under the Building Award, and the Building Award was amongst one of the most accessed award summaries.[36]

Industry/occupation divisions

In the past HIA has suggested that there would be significant value in the FWO Infoline having industry/occupational divisions for the handling of queries, given the specific complexities in the residential building industry. Such an approach could also be mirrored in the WA state system.

This approach would enable callers to access practitioners who are well versed in their respective industry and occupational award issues and complexities and would assist in the provision of quick, consistent and reliable advice and aid in preventing the underpayment of wages.

[31] Annual Report at pg.15
[32] FWO and ROC Annual Report 2017-18 at pg. 14
[33] WA Department of Mines, Industry, Regulation and Safety, Annual Report 2017-2018, pg 73
[34] WA Department of Mines, Industry, Regulation and Safety, Annual Report 2017-2018, pg 118
[35] http://www.commerce.wa.gov.au/labour-relations/contact-wageline
[36] Ministerial Review of the State Industrial Relations System- Interim Report, March 2018, pg 440

5. CONCLUSION

HIA considers that:

- The concept of “wages theft” has been greatly exaggerated by implying that all underpayment of wages is “theft”;
- The complexity of the current workplace relations framework and in particular the Modern Awards applicable to the residential building industry, and complex ‘patchwork’ of outdated industrial instruments in the WA state system, are a major contributor to underpayment that in no way should be construed as theft; and
- The existing regulatory remedies for underpayment are very adequate.