

15 May 2023

Department of Employment and Workplace Relations
Australian Government

Via email: WRSubmissions@dewr.gov.au



Chamber of Commerce
and Industry WA

T: (08) 9365 7555

E: membership@cciwa.com

W: www.cciwa.com

To whom it may concern

CCIWA submission to *criminalising wage underpayments and reforming civil penalties in the Fair Work Act 2009*

Introduction

CCIWA is the peak body advancing trade and commerce in WA. We want the best for communities across the State. Our members are of all sizes and come from all industries and regions, from small early childhood education and care providers in regional towns, to medium sized manufacturers in the Perth metropolitan area.

At the outset, we wish to convey that the consultation surrounding these reforms is improved as compared to the rushed *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*. That said, the four-week turnaround time for this consultation paper, alongside the other significant and transformative reforms currently underway, is inadequate given the complexity and impact these reforms present.

Despite the short-time frame, we have engaged with the WA business community on this matter. We have also been working closely with the Australian Chamber of Commerce and Industry, and support its submission in full.

As we understand it, the Federal Government is considering criminalising wage underpayment, recklessness-based wage underpayment and record-keeping misconduct. The government is also seeking to increase penalties to increase deterrence.

As outlined in the consultation paper, these reforms are in response to recommendation 5 and 6 of the Migrant Worker Taskforce, which was established by the Liberal-National Coalition Government in part due to the revelation of significant wage exploitation in certain industry sectors:

- a. **Recommendation 5:** It is recommended that the general level of penalties for breaches of wage exploitation related provisions in the Fair Work Act 2009 (FW Act) be increased to be more in line with those applicable in other business laws, especially consumer laws.
- b. **Recommendation 6:** It is recommended that for the most serious forms of exploitative conduct, such as where that conduct is clear, deliberate and systemic, criminal sanctions be introduced in the most appropriate legislative vehicle.

Wage ‘theft’ as distinct from wage ‘underpayment’

At the outset, it is necessary to address the differences between wage ‘theft’ and wage ‘underpayment’. The intention of the Department and those keen on developing this legislation is to criminalise all forms of wage ‘underpayment’, not specifically wage ‘theft’, which captures the most serious and intentional cases.

As such, we strongly recommend the Department be guided directly by recommendation 6 of the Migrant Worker Taskforce and focus their legislative intervention on conduct that is ‘clear, deliberate and systemic’.

We suggest that if the policy intent goes beyond this narrow scope, this will give rise to a range of unintended consequences, particularly for small and family-run businesses.

Criminalising wage ‘theft’ as the most serious case

We suggest a new criminal offence should only apply to deliberate behaviour that incorporates the elements of ordinary theft offences, where there is evidence of a deliberate intention to permanently deprive employees of their wages in a dishonest way.

We, therefore, do not support criminalising ‘recklessness-based wage underpayments’, which are due to accidental mistakes and non-deliberate behaviour. The complexity of the system of Awards in Australia (at both Federal and State tiers of government) is the principal driver of cases of underpayment and non-payment of wages, which the government suggests “continues to feature across a range of Australian workplaces, from small business to large corporations”.

We, then, also suggest that any changes to the structure of penalties in Australia should also only be guided by these principles. This would ensure that employers who make accidental mistakes when remunerating their employees are not subject to penalties.

Addressing the Award system complexity

The focus of the Department and those intent on developing this legislation should be on addressing the problem of Award system complexity and supporting businesses to better understand their workplace obligations. This is a major omission of the Department’s consultation paper, and would go a long way in addressing the issue of underpayment, failures in keeping appropriate records and other workplace obligation issues.

Given the Award system complexity disproportionately impacts those with limited resources and know-how, we suggest small and family-run businesses would also likely be most impacted by any new criminal penalties.



Concluding remarks

We are concerned about the government's broad agenda to criminalise wage 'underpayments' which can arise from the complexity of the Award system, not just the most serious cases.

For the government to address the issue of underpayments in Australia, we strongly recommend the Department address the problem of Award system complexity and how it can provide better support to businesses, particularly small and family-run businesses, to understand their workplace obligations.

For these reasons, we suggest a new criminal offence should only apply to deliberate and intentional behaviour that incorporates the elements of ordinary theft offences. Penalties should also only be aligned with this offence category.

Yours sincerely,

Chris Rodwell

CEO CCIWA