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The Hon. Jill Hennessy
Attorney-General
Minister for Workplace Safety
Level 26
121 Exhibition Street
Melbourne, VIC 3000

Dear Attorney-General

Consultation Paper – Wage Theft Bill 2020

Thank you for the opportunity to provide comments on the Victorian Government's proposal to implement the *Wage Theft Bill 2020* (**the Bill**).

The Australian Institute of Company Directors (**AICD**) has a membership of more than 46,000 including directors and senior leaders from business, government and the not-for-profit sectors. The mission of the AICD is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society.

1. Executive Summary

In summary, the AICD's position is as follows:

- the Bill concerns matters that are within the jurisdiction of the Federal government and raises issues around conflict of laws;
- notwithstanding the above, we believe it is appropriate to criminalise deliberate and dishonest wage theft;
- the Bill seeks to attribute liability to directors in contradiction to the COAG Principles on director liability provisions;
- if an offence is to be introduced, a better approach would be to include a provision for accessorial liability such as currently exists under the *Long Service Leave Act 2018*;
- in the alternative, if a director liability provision is introduced it should be a Type 1 provision (as contemplated by the agreed COAG Principles on director liability) and not the Type 3 provision currently proposed; and
- the definition of dishonesty should align with s.9 of the Commonwealth *Corporations Act 2001*.

2. Interaction with Federal legislative and regulatory framework

The AICD is concerned about the interaction of this proposed Bill with national legislation. Since the Howard government introduced the WorkChoices legislation, and the High Court affirmed the Commonwealth's constitutional powers, industrial relations legislation and regulation has almost exclusively been within the jurisdiction of the Commonwealth. The Victorian government has referred a broad range of employment and industrial matters to the Commonwealth by way of the Referral Act.

As well as an individual's ability to bring civil actions under the Federal civil law, there is an existing regulator, the Fair Work Ombudsman, who is able to pursue companies and individuals for underpayment of wages. This includes directors who face accessorial liability for wage underpayment under s.550 of the *Fair Work Act 2009*.

The Fair Work Ombudsman has recently been provided with additional powers and funding from the Federal government to carry out its duties and has, in common with many conduct regulators, outlined a stronger approach to enforcement.[1] Additionally, the Federal Government is examining increased penalties around wage underpayment, including whether underpayment of wages should attract criminal penalties. If this Bill is introduced there is the clear potential for overlap between Federal and State law and regulation in an area largely seen to be within the jurisdiction of the Commonwealth. Indeed, an individual or company could find themselves being pursued for the same activity by both Federal and State authorities, with the possibility of gaol under the State system. Accordingly, the Bill potentially raises constitutional issues around conflict of laws and a question over whether it is within the power of the Victorian government to enact this legislation.

3. Role of directors

The AICD strongly condemns businesses that engage in the deliberate underpayment of wages and rely on the so-called "wage theft" model. As an advocate for good governance, the AICD believes that companies should always comply with the law and directors can play an important role in fostering a culture of compliance. Subject to our concerns about interactions with the Federal system and other State's laws, we believe it is appropriate to criminalise deliberate and dishonest wage theft.

However, as Commissioner Hayne commented in the final report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry: "The task of the board is overall superintendence of the company, not its day-to-day management." The board is not in a position to prevent all instances of corporate misconduct and cannot be made guarantors of all corporate compliance.

This is particularly the case in human resources where matters such as determining the appropriate level of pay is entirely within the remit of management. It is not possible for a board to know the details of every industrial or pay arrangement that applies to their organisation (many of which are complex and overlapping) or to evaluate for themselves whether the organisation is complying with every relevant pay agreement.

Instead, boards play an important and active oversight role. Their first responsibility is to ensure that their business model does not rely on systemic underpayment, including through using labour hire. Secondly, they must constructively challenge management assurances and should seek external verification where there are concerns. Thirdly, boards should ensure that senior managers are held to account for unlawful or unethical practices and encourage strong behaviour, for example by linking variable remuneration to compliance.

[1] See: https://www.fairwork.gov .au/about-us/news-and-media-releases/2019-media-releases/june-2019/20190603-aig-pir-media-release

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4. Attribution of Liability to Directors

We question whether it is appropriate for liability to be attributed to directors in the case where an entity has committed an offence. We note the comment in the consultation paper that:

> *"If the body corporate is liable, criminal liability may also be attributed to corporate decision makers unless the officer is able to demonstrate that they took reasonable precautions and exercised due diligence to prevent the conduct."*

The consultation paper contains no justification for that decision other than the attribution model "will serve as a significant deterrent and is anticipated to lead to behavioural change". However, this seems directly at odds with the Attorney-General and Treasurer's message that opens the consultation paper that the laws are aimed at employers who "deliberately and dishonestly withhold wages".

The AICD recently commissioned advice from Allens[2] into the existing director liability environment in Australia. That advice found Australia's director liability environment is unique - and in many regards, uniquely burdensome - as compared with other jurisdictions. Australia regulates a relatively broad range of subject matter through the imposition of director liability. Our country imposes criminal liability (with harsh penalties) on directors relatively liberally, particularly in relation to dishonest or reckless contraventions of their corporate governance obligations.

The offences outlined in the Bill mean that conduct that was previously dealt with as a civil matter will now be treated as criminal behaviour. The Bill envisages very serious consequences for individuals such as incarceration. Where this occurs, it is incumbent on the legislature to ensure that proper protections are put in place for potential accused individuals, including the presumption of innocence, as well as clear defences so that innocent people are not convicted.

COAG principles on director liability

The AICD's starting point for consideration of criminal liability for directors are the matters outlined in the *Personal Liability for Corporate Fault: Guidelines for applying the COAG principles*[3] (**COAG Principles Guidelines**) agreed at the Council of Australian Governments meeting on 25 July 2012. These were drafted to assist governments in the interpretation of the Principles to determine whether a director's' liability provision was justified.

The Victorian government was one of the Australian governments that agreed to apply those Guidelines. They were applied by the Victorian government to all criminal liability provisions for directors in the *Statute Law Amendment (Directors' Liability) Act 2013*.

In particular, we draw your attention to Principle 4 of the COAG Principles which states:

> *The imposition of personal criminal liability on a director for the misconduct of a corporation should be confined to situations where:*

[2] Available at: https://aicd.companydirectors.com.au/-/media/cd2/resources/advocacy/policy/pdf/2020/aicd--advice-for-publication-including-organagrams.ashx
[3] Available at: https://webarchive.nla.gov.au/awa/20151020034724/https://www.coag.gov.au/node/434

1) *there are compelling public policy reasons for doing so (for example, in terms of the potential for significant public harm that might be caused by the particular corporate offending);*

2) *liability of the corporation is not likely on its own to sufficiently promote compliance; and*

3) *it is reasonable in all the circumstances for the director to be liable having regard to factors including:*

   i. *the obligation on the corporation, and in turn the director, is clear;*
   ii. *the director has the capacity to influence the conduct of the corporation in relation to the offending; and*
   iii. *there are steps that a reasonable director might take to ensure a corporation's compliance with the legislative obligation.*

Guideline 4(a) of the COAG Principles - The seriousness of the harm that the Underlying Offence is seeking to avoid.

Guideline 4(a) says that a provision will only be justified where there is a "compelling public policy reasons for doing so" with the "potential for significant public harm".[4] Examples provided include serious breaches of workplace health and safety obligations, damage to the environment or public health, insolvent trading and morally reprehensible conduct such as breaching child protection or animal welfare provisions. The Guidelines state that: "Unless such serious consequences flow, then a Directors' Liability provision is unlikely to be justified."

Without wishing to downplay the seriousness of the wage theft offences outlined in the consultation paper, they do not fall into the category of significant public harm that is said to justify directors' liability provisions in the first place. At a minimum, the consultation paper does not engage with these issues at all.

Guideline 4(d) of the COAG Principles - the extent to which Directors can directly control the relevant corporate conduct

Guideline 4(d)[5] provides the following assistance in interpreting Principle 4:

> *It cannot always be assumed that directors are responsible for running the day to day operations of the business. Therefore it would generally not be reasonable to impose a Directors' Liability Provision for offences which concern day to day business operations…*
>
> and
>
> *A Directors' Liability Provision for an offence concerning day to day business operations would need to be demonstrated to be clearly justified.*

The employment and engagement of staff, the correct payment of wages in accordance with legal minimum and the keeping of employee entitlement records are all matters that fall into

[4] Ibid p.7.
[5] Ibid p.8.

the category of "day to day business operations". These are matters for which we do not believe it is reasonable to impose a Directors' Liability provision. As the Guidance itself notes, this can be distinguished from when the directors are hands on and are "knowingly concerned" in the offence in which case "the usual rules regarding accessorial liability would generally be adequate" (see below for comments on accessorial liability).

Guideline 4(f) - The extent to which similar offences in the same jurisdiction and other jurisdictions are subject to a Directors' Liability Provision

We note that the guidelines suggest that if other jurisdictions do not impose directors' liability provisions then this suggests that the provision will not be justified.[6] COAG aimed to achieve national consistency by introducing the COAG Principles. No other jurisdiction currently criminalises wage theft, nor attempts to impose attributed criminal liability on directors, which further suggest these provisions are not justified.

5. Accessorial Liability

As already stated, the AICD deplores the dishonest theft of employee wages. We wish to see companies and directors who deliberately live off this exploitation punished, as their actions harm not only their workforce but those companies that do the right thing.

We agree that directors and other officers should be held liable for an offence where there is accessorial liability; that is, where the officer either authorised or permitted the commission of the offence by the body corporate or was knowingly concerned in any way (whether by act or omission) in the commission of the offence by the body corporate. We note that a number of Acts already contain accessorial liability provisions.[7]

The *Long Service Leave Act 2018*, in particular, contains offences that are very similar to those proposed by the Bill. Section 20 of the Act makes it an offence not to pay long service leave entitlements, s.37 relates to the keeping of records and s.38 relates to the production of false or misleading documents. Section 43 of the Acts provides for accessorial liability for officers. There is no provision for attributed or deemed liability for officers or directors.

This would lead to the anomalous situation that, were the Bill to be introduced in the form contemplated by the consultation paper, and were underpayment of both wages and long service leave to occur, a director could have liability attributed to them for a company's failure to pay wages but not failure to pay long service leave.

We submit that the appropriate position is to insert an accessorial liability provision into the Bill in the terms set out in s.43 of the *Long Service Leave Act 2018*. This would align the Bill to a similar provision and capture directors and officers knowingly concerned in offences. It would also reflect the principles and guidelines of the COAG agreement to which the Victorian government is a party.

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[6] Ibid p.8.

[7] Anzac Day Act 1958; Child Wellbeing and Safety Act 2005; Electoral Act 2002; Family Violence Protection Act 2008; Independent Broad-Based Anti-Corruption Commission Act 2011; Inquiries Act 2014; Long Service Benefits Portability Act 2018; Long Service Leave Act 2018; Shop Trading Reform Act 1996; Victorian Inspectorate Act 2011.

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6. Reasonable Measures Defence

We note that the consultation paper states: "in circumstances where the officer may not have been directly involved in the offence, a reasonable measures defence, will be included in the Bill." We understand that this would be an additional defence available to an officer, including a director, when seeking to attribute conduct by an entity to its officer/s.

The elements of this defence are not discussed at length in the consultation paper, including where the evidential and legal burden of proof would lie. However, based on the extract of the consultation paper quoted earlier in this submission, it appears that conduct will be attributed to the officer "unless the officer is able to demonstrate that they took reasonable precautions and exercised due diligence to prevent the conduct".

The COAG Principles established that there are three types of director liability provisions that should apply when seeking to go beyond normal accessorial liability. These were also incorporated by the Victorian Government into legislation in the *Statute Law Amendment (Directors' Liability) Act 2013*. These are:

	Evidential Onus	**Legal Onus**
Type 1	Prosecution	Prosecution (beyond reasonable doubt)
Type 2	Defence (prima facie evidence)	Prosecution (beyond reasonable doubt)
Type 3	Defence	Defence (balance of probabilities)

On the basis of the statements contained in the consultation paper, it appears the Victorian Government is contemplating a Type 3 provision.

7. Why a Type 1 provision is more appropriate

In the alternative to our argument on accessorial liability, the AICD submits that the most appropriate construction of a director liability provision would be a "Type 1" provision where the evidential onus rests with the prosecution and the legal onus is on the prosecution to prove beyond reasonable doubt. This would be consistent with the Minister's stated aim of combatting deliberate and dishonest wage theft. The COAG Guidelines state:

> *Type 1 should be the default position for directors' liability provisions. The imposition of Type 2 or Type 3 liability must be supported by rigorous and transparent analysis and assessment and clearly warrant the conclusion that such liability is justified from a public policy perspective.*[8]

The Guidelines were referred to by the then Attorney-General in the second reading speech introducing the *Statute Law Amendment (Directors' Liability) Act 2013*:

> *The COAG guidelines provide that as a general rule, where personal criminal liability is to be imposed on directors or officers, a directors' accessorial liability provision or a type 1 directors' liability provision is preferred as the prosecution should bear the burden of establishing the case against the accused. The use of a type 2 provision or a type 3 provision should be confined to circumstances where there are sound public policy reasons for using these provisions and where the relevant offences are central*

[8] Ibid p.17.

> *to the regulatory objectives of the particular act. The COAG principles are clear that directors' liability provisions should not apply as 'blanket' provisions in any act.*[9]

Many Type 1 provisions exist already under Victorian legislation and could form the basis of the director liability provision in the Bill.[10]

8. Why a Type 2 or Type 3 provision is inappropriate

A Type 2 or 3 provision would be particularly inappropriate for these offences as on the face of it, a director liability provision is not justified by reference to the COAG principles. These were offences that were traditionally resolved in the civil jurisdiction and are only now being subject to the criminal law. To further reverse the onus of proof would be unjust and unfair to accused individuals.

We note that there was extensive justification provided by the Attorney General over the human rights issues raised by Type 3 provisions in those Acts when the then Attorney General introduced the *Statute Law Amendment (Directors' Liability) Act*.[11] In the Second Reading Speech, the then Attorney General stated that Type 2 and Type 3 provisions should be restricted to offences that are "sufficiently grave to warrant holding directors and officers to account for corporate offending".[12] As a result the Type 2 and 3 offences that remain in legislation are limited to those involving a serious risk to public health and safety and that risk the integrity of the state taxation system.

If, as it appears, the Bill contains a Type 3 provision, it would indicate that the Victorian Government regards wage theft offences as of greater gravity than the Type 1 provisions that exist for offences such as:

- by dishonesty or undue influence, either inducing another person to make a request for access to voluntary assisted dying or inducing them to self-administer a voluntary assisted dying substance;[13]
- failing to make weekly payments to a worker covered by workers compensation;[14]
- designing, manufacturing or supplying unsafe marine safety equipment;[15]
- the breach of the duty by operator of a bus to ensure the safety of the bus service.[16]

In summary, to impose a Type 3 provision would not only be inconsistent with the COAG Principles it would be inconsistent with how the Victorian Government has treated offences which appear to be of equal if not greater gravity under existing legislation.

9. Failure to keep employee entitlements offence

We are note the reference to "express or implicit authorisation" and "existence of a corporate culture" in the consultation paper when dealing with this offence. This was also the subject of advice from Allens.[17] Australia is unique among similar countries in utilising director

[9] Victorian Parliamentary Debates, Legislative Assembly,12 December 2012, page 5497.
[10] See for example s.26B *Unclaimed Money Act 2008*.
[11] See note 9 (supra) pages 5494 – 5495.
[12] Ibid page 5497.
[13] ss. 53C, 85, 86, Voluntary Assisted Dying Act 2017.
[14] ss. 179, 601, Workplace Injury Rehabilitation and Compensation Act 2013.
[15] ss 27, 285, Marine Safety Act 2010
[16] ss. 15, 69, Bus Safety Act 2009.
[17] See note 2

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authorisation or permission and corporate culture as general bases for attributing criminal responsibility to a corporation. Consideration of this offence may mean that a regulator, prosecutor or court may have cause to consider directors' conduct, even if there is no suggestion that the director breached a law. This may expose directors to further liability, including stepping-stone liability. Again, this seems to run counter to the Minister's message that this Act seeks to only address dishonest and deliberate conduct.

10. Dishonesty

We support the proposal that the accused will need to have acted "dishonestly" as an element of the proposed wage theft offence. We note from the consultation paper that "dishonesty" is intended to be applied in accordance with an objective standard. The consultation paper states: "'Dishonesty' for the purposes of the new wage theft offence will mean dishonest to the standards of a reasonable person*."* This is a slightly different construction of dishonesty to the High Court's *Peters* test[18] that says the question whether actions are to be characterised as dishonest is to be determined by application of the standards of ordinary, decent people. A similar construction appears in the newly amended s.9 of the Commonwealth government *Corporations Act 2001* which defines "dishonest" as "dishonest according to the standards of ordinary people".

We suggest that, if an objective standard is to be incorporated, that the definition appearing in s.9 of the *Corporations Act 2001* be used. This will enable greater consistency and should mean the test to be applied will be better understood by courts and regulators.

11. Next steps

We hope our comments will be of assistance. If you would like to discuss any aspect of this submission further, please contact Christian Gergis, Head of Policy, at cgergis@aicd.com.au or David McElrea, Senior Policy Adviser, at dmcelrea@aicd.com.au.

Yours sincerely

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Head of Policy

[18] *Peters v The Queen* (1998) 192 CLR 493.