

6 March 2020

The Committee Secretary
Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Sir/Madam

Inquiry into the unlawful underpayment of employees' remuneration

Thank you for the opportunity to provide a submission to the Senate Economic References Committee Inquiry into the unlawful underpayment of employees' remuneration.

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.

Other than some general observations, the AICD only intends to comment on terms of reference (e) and (f).

General observations

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. Respect for employees is a key part of that. Wage theft should never be regarded as "a cost of doing business".

In this submission we will only focus on entities where there is a functional separation between directors and management. Where directors and managers are the same people, and there is to be liability for a wage underpayment, then that should ordinarily be against an individual in their capacity as a manager rather than as a director.

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 (many of which are complex and overlapping) that applies to their organisation or to evaluate for themselves whether the organisation is complying with every relevant pay agreement.

Instead, boards must 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, board should ensure that senior managers are held to account for unlawful or unethical practices.

(e) whether extension of liability and supply chain measures should be introduced to drive improved compliance with wage and superannuation-related laws

For the reasons set out above, the AICD cautions against the further extension of liability for wage underpayment to directors. The Australian Law Reform Commission is currently reviewing Australia's corporate criminal responsibility regime and the AICD's submission to that Review is available [here](#). Legal advice obtained by the AICD from Allens (available [here](#)) shows that Australia's director liability framework is already complex and, in many regards, uniquely burdensome, compared with other jurisdictions.

Where a director is to be held liable for wage underpayment it should be restricted to cases where a director has intentionally participated in the underpayment with knowledge of its occurrence. Again, this can be distinguished from the example where the director is also the manager of the company. In those cases, if liability is to attach to an individual, it would be in their capacity as a manager.

In this respect, we note that potential accessorial liability for directors already exists for wage underpayment by virtue of s.550 of the Fair Work Act 2009 (**Fair Work Act**). We do not believe there is any need to extend liability beyond this existing provision, which would cover circumstances where a director has intentionally participated in the underpayment with knowledge of its occurrence. We would support more rigorous enforcement of these provisions by the regulator.

(f) the most effective means of recovering unpaid entitlements and deterring wage and superannuation theft, including changes to the existing legal framework that would assist with recovery and deterrence;

We refer to our earlier comments and reiterate that it would not be appropriate to extend accessorial liability beyond that which already exists under the Fair Work Act.

Conclusion

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

Yours faithfully



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