Australian Institute of Company Directors

18 Jamison Street,
Sydney NSW 2000

t: 1300 739 119

e: contact@aicd.com.au
aicd.com.au

ABN 11 008 484 197

Friday 12 May 2023

Department of Employment and Workplace Relations
GPO Box 9828
CANBERRA ACT 2601

Via email: WRSubmissions@dewr.gov.au

Dear Department,

Criminalising wage theft consultation

Thank you for the opportunity to make a submission to the Department of Employment and Workplace Relations' (DEWR)consultation on criminalising wage theft (**Consultation**).

The Australian Institute of Company Directors (AICD)'s mission is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society. The AICD's membership of more than 50,000 includes directors and governance leaders of not-for-profits, large and small businesses and the public sector.

Our submission is informed by our engagement with members as well as other stakeholders including industry groups and legal advisers.

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", and we support enforcement that reinforces that.

In our view, due to the serious consequences of a conviction, criminalisation should only apply to the most egregious conduct. This was recognised by the Report of the Migrant Workers' Taskforce (on which this Consultation and reform is based) in which it was noted that in respect of imposing criminal penalties "… *careful design will be required to ensure these are an effective addition to regulators existing powers. For example, these powers should be aimed at dealing with* ***exploitation that is clear, deliberate and systemic***" [emphasis added].

Executive summary

Given workplace relations regulation is a complex area and primarily falls within the responsibility of management teams, we only provide input on Questions 1, 3 and 8 of the Consultation Paper. We also make some overarching comments. In summary, our key points are as follows:

1. The imposition of a criminal penalty should only apply to the most serious cases which demonstrate deliberate, exploitative and systematic wage theft. In the event that the Government elects to legislate a "recklessness" offence, we consider it important that the legal test of "recklessness" align with its long-standing legal definition. We are concerned that the phrasing of the proposed test of "recklessness" as set out in the Question 1 of the Consultation

Paper is too broad and may capture non-deliberate conduct such as taking a particular interpretation of an Award or Workplace instrument.

2. We do not support the creation of "deemed liability" for directors on the basis of a "failure to prevent" wage underpayment as we consider this is at odds with the Council of Australian Governments (COAG) principles for assessment of directors' liability provisions (**COAG Principles**). It also fails to recognise that, under the Corporations Act, directors are already subject to a statutory duty to act with care and diligence, meaning they can be personally liable when a corporation breaches a legal obligation (such as adherence to workplace relations laws).

3. Given the existence of two state wage theft criminalisation Acts (Victoria and Queensland), it is critical that any federal Act "cover the field" to avoid duplication and confusion.

4. The simplification of the Industrial Relations system should be a priority reform area, as we consider that this is the cause of the bulk of wage underpayment. As such, we support calls by the Business Council of Australia and the Australian Industry Group to incentivise employers to proactively self-identify and rectify instances of wage underpayments.

Criminalising wage underpayments by employers (Questions 1 and 3)

It is important that deliberate acts by corporations and their officers that lead to systemic underpayment and exploitation of employees are subject to effective regulatory sanctions. Where corporations deliberately adopt a business model that intentionally and systemically underpays employees or categories of employees, it is appropriate that criminal penalties apply to such conduct. Liability should focus on employers engaging in conduct that is clear, deliberate and systemic.

We note that Options 2 and 3 under Question 1 propose legislating a "recklessness" fault element, as opposed to intention. In the event that this approach is adopted by Government, it is critical that the legal test of recklessness applied aligns with the long-standing legal definition, and that the framing of offences is consistent with the Attorney General's Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers. In the AICD's view, the framing of the proposed "recklessness" offence as set out in Option 2 is inconsistent with this approach.

We are concerned that the proposed phrasing of "recklessness", namely attaching liability where the employer "*appreciates the existence of a risk that an amount is incorrect and proceeds to paying that incorrect amount*" will encompass unintentional underpayments based on a genuinely held (but ultimately incorrect) view as to the interpretation of an Award or workplace instrument.

Australia's Industrial Relations system is extremely complex, with over 120 awards and 1500 instruments subject to competing interpretations and applications. Awards can have numerous clauses that specify minimum pay rates, safety net entitlements, and leave loading which vary based on employment status and work type.

For instance, some Awards have over 10 distinct regulations that impact overtime accrual calculations. Awards and workplace instruments are therefore subject to varying interpretations. When interpretating ambiguous or complex Awards or Workplace instruments, there is therefore often a risk, if not a substantial risk, of coming to an incorrect view as to the amount owed to employees. It would be an unjust outcome if criminal liability attached to such situations.

We note that one of the solutions being considered is the introduction of a defence where companies can demonstrate they took reasonable steps to mitigate the substantial risk of underpayment (see Question 3 of the Consultation Paper). Whilst this would provide some protection, it would only come into play *after* a company is already prosecuted for a criminal offence. Prosecution brings significant

reputational damage which may be irreparable, even if the organisation is ultimately able to mount a successful defence.

Our view is that the better solution is to ensure that no liability attaches to underpayment of wages where the employer's genuinely held view that their payment amount was correct was made on the basis of "reasonable grounds." Legislation could then set out the factors relevant to determining whether an employer had "reasonable grounds", such as external legal or workplace relations advice.

The AICD also recommends that the Government provide more definitive guidance to corporations so as to reduce the risk of unintentional underpayment. The ATO's private ruling mechanism (which sees the ATO providing binding advice on how a tax law applies to a person or organisation in relation to a specific scheme or circumstance) may be a useful precedent.

Extending criminal liability for wage underpayment to directors (Question 8)

The AICD does not support the introduction of a deemed liability criminal offence, based on a failure to prevent model. As is the case under the Criminal Code,[1] accessorial liability for directors and officers should only apply in circumstances where there is intention or knowledge.

The introduction of a deemed liability offence is not consistent with the COAG Principles and the application guidelines adopted at the COAG meeting on 25 July 2012 (**Guidelines**). Under the Guidelines, the default position is that there should be no criminal liability for a corporation's conduct attached to directors. The Guidelines allow for a departure from this default position only where:

1. there are compelling public policy reasons for doing so in terms of the potential for significant public harm that might be caused by the particular corporate offending. Examples provided by the Guidelines 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 consider that the degree of control directors have over a corporation's conduct is a factor relevant to determining the existence of compelling public policy reasons. The Guidelines go on to say that "it would generally not be reasonable to impose a Directors' Liability Provision for offences which concern day to day business operations";

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:

    a. the obligation on the corporation, and in turn the director, is clear;

    b. the director has the capacity to influence the conduct of the corporation in relation to the offending; and

    c. there are steps that a reasonable director might take to ensure a corporation's compliance with the legislative obligation.

We do not consider that the Guidelines justify the imposition of deemed liability to directors for wage underpayment in circumstances where:

- Australia's industrial relations system is complex and ever-changing. Directors, particularly those in large organisations, do not have direct visibility over the appropriate level of pay, which sits

[1] Division 11.

entirely within the remit of management, especially human resources teams. It is not the role of the director (and neither is it possible) 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. This is particularly the case in circumstances where the Government is proposing that "wages" also include leave and superannuation, cash-back arrangements and "deductions which benefit the employer directly or indirectly and are unreasonable in the circumstances." Rather, what is reasonable is that directors appropriately probe management on compliance with relevant workplace laws, including seeking external assurance where possible;

- No evidence has been put forward that criminalising directors, as opposed to the corporation, would have an additional deterrent effect;
- It is our members' experience that the only steps open to reasonable directors to ensure there is no wage underpayment, is to undertake a full audit of all workplace instruments that may apply within their organisation. Such audits are time-consuming and expensive, and generally require the appointment of a third party expert. Even where a third party expert is appointed, there is no guarantee that this expert would arrive at the "correct" interpretation of a workplace instrument, such that underpayment may still occur. This is an unintended consequence of the complexity of the Australian workplace relations system;
- To the extent that the Government seeks to target reckless or negligent director conduct, civil provisions are already available, including the "stepping stone" doctrine by which ASIC could argue that a breach of the Fair Work Act gives rise to director breach of 1801(1) of the Corporations Act (obligation to act with care and diligence). This can lead to a range of monetary and non-monetary penalties, including director disqualification.

On the basis of the above, director liability should not extend beyond accessorial liability.

Overarching observations

Federal Act must "cover the field"

Member feedback is that the industrial relations framework in Australia is extremely complex and difficult to navigate. There are already two state laws (one of which is under constitutional challenge) dealing with wage criminalisation. To reduce confusion, it is critical that any federal wage criminalisation system "covers the field" on this issue, preventing state-based laws from being developed in an inconsistent and piecemeal fashion.

Focus on simplification and rectification

Deliberate wage theft should be subject to effective, clear and impactful penalties. However, given the complexity of Australia's industrial relations system, as noted above, the majority of underpayment cases are likely to be driven by differing or incorrect interpretations of workplace instrument application and administrative errors.

We are concerned that the reform proposal set out in the Consultation Paper focuses solely on punishment and deterrence through criminalisation, rather than on addressing the root causes of wage underpayment and supporting timely rectification.

As such, we support calls by the Business Council of Australia[2] and the Australian Industry Group to create a system where employers are incentivised to proactively self-identify and rectify instances of wage underpayment.

Next steps

We hope our submission will be of assistance to you. If you would like to discuss these matters further, please contact Christian Gergis, Head of Policy at cgergis@aicd.com.au or Anna Gudkov, Senior Policy Adviser at agudkov@aicd.com.au.

Yours sincerely,

Louise Petschler GAICD
General Manager, Education & Policy Leadership

[2] See https://www.bca.com.au/submission_on_workplace_relations_changes_proposed_for_the_second_half_2023