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Committee Secretary
Senate Education and Employment Committees
PO Box 6100
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Canberra ACT 2600

Via email: eec.sen@aph.gov.au

Dear Committee Secretary

Senate Education and Employment Committee Inquiry: *Fair Work Legislation Amendment (Closing Loopholes) Bill* 2023

Thank you for the opportunity to make a submission to the Senate Education and Employment Committee on its inquiry into the *Fair Work Legislation Amendment (Closing Loopholes) Bill* 2023 (**Inquiry**).

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.

The Fair *Work Legislation Amendment (Closing Loopholes) Bill 2023* (**the Bill**) proposes wide ranging changes to a number of key Industrial Relations matters. Our submission focuses specifically on the wage theft proposals only, and is informed by engagement with members as well as other stakeholders, including industry groups and legal advisers.

Executive Summary

The AICD strongly condemns businesses that engage in the intentional 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.

It is important to make a clear distinction between a business model which systematically and deliberately underpays employees, and unintended wage underpayment caused by navigating a complex Industrial Relations system. This challenge is illustrated by the broad range of organisations, ranging from government departments, universities, charities and large listed companies, which have been reported to have underpaid staff over recent times.

Given this regulatory complexity, and the serious consequences of conviction, we strongly submit that criminalisation should only occur for the most egregious and intentional conduct. We are pleased to see that the Government has taken such an approach.

While we consider criminalising intentional wage theft is a positive step to eliminate abhorrent employment practices, we are concerned about the practical and legal impact of some of the proposals set out in the Bill, namely:

1. Design elements of the proposed Cooperation Agreement regime;
2. The lowering of the civil liability threshold for a "serious contravention" (which includes wage underpayment[1]) from a "systematic patten of conduct" to recklessness;
3. Ambiguity in the drafting of the wage theft offence; and
4. Interaction with existing state wage theft legislation.

Overall, while we support the penalisation of intentional wage theft, we are concerned that the Bill focuses solely on punishment and deterrence, rather than on addressing the root causes of unintentional wage underpayment and supporting timely rectification.

1. The Cooperation Agreement framework fails to incentivise and support voluntary self-disclosure for unintentional underpayment

We understand that the majority of wage underpayments are unintentional and are a result of human or technological error arising out of the complex Industrial Relations system. The most recent 2021-2022 Fair Work Ombudsman (FWO) Annual Report showed that 68% of the total $279 million in underpaid wages was recovered from large organisations following self-disclosure.[2]

Notwithstanding the high incidence of self-reporting by large Australian corporations, anecdotal feedback from members is that the current self-reporting system, and subsequent engagement with the FWO, can be challenging and ultimately lead to delayed wage repayment. This can make corporations, particularly smaller corporations lacking the resources of their larger counterparts, reluctant to self-report, and instead choose to simply rectify any underpayments, once identified, without engaging with regulators.

In our view, the Cooperation Agreement framework proposed in the Bill will not address existing problems, and may disincentive self-reporting given the heightened liability and penalties proposed.

Our key observations are as follows:

- *Firstl*y, the proposed immunity from criminal prosecution is too narrow. As drafted, it only prevents the FWO from referring a matter to the Department of Public Prosecutions (DPP) or Australian Federal Police (AFP). It does not prevent a party other than the FWO from referring the matter to the DPP or AFP for prosecution, or the DPP commencing a prosecution of their own volition. This means that there is still a significant criminal liability risk to organisations that self-report, undermining the policy rationale for the proposed mechanism.
- *Secondly*, given that most cases of wage underpayment involve *unintentional* underpayment, excluding *civil* liability form the scope of Cooperation Agreements means they are likely to be of limited practical application. The relationship between the proposed Cooperation Agreement framework and the existing self-reporting mechanisms, including enforceable undertakings, also remains unclear. We suggest that the FWO clearly set out the relationship between Cooperation Agreements and Enforceable Undertakings in the compliance and enforcement policy proposed in paragraph 223 of the Bill. Ultimately, the incentives for self-reporting must be sufficiently compelling so as to persuade companies to come forward.
- *Thirdly*, we consider that the Voluntary Small Business Wage Compliance Code, which will only apply to businesses with fewer than 15 employees, is extremely narrow. By way of comparison, the definition of a 'small proprietary company' under s45A of the Corporations Act refers to companies with less than 50 employees. If the Government's intention is to incentivise small

[1] S 323(1) and 557A(1)(example) of the FWA.
[2] See the FWO Annual Report 2021-2022 at page 11.

businesses to self-report and to simplify the rectification process, we recommend that the code be expanded to cover a much broader cohort.

2. Lowering the bar to 'recklessness' for civil liability is inappropriate

The Government is proposing to reduce the bar for a 'serious contravention,' which includes wage underpayment, from a "systematic patten of conduct" to "recklessness." The proposed test for recklessness would impose liability where the person or corporation is aware of a *substantial risk* that underpayment would occur and proceeds to take that risk notwithstanding that it is unjustifiable to take the risk.

While the AICD is not opposed in principle on penalising reckless conduct, we consider that the current articulation of recklessness, which replicates the Criminal Code, is inappropriate in the wage underpayment context. We consider there are two main issues with this approach.

Firstly, because of the complexity of the Industrial Relation system (comprised of just over 120 Awards and a multitude of enterprise agreements/ industrial instruments), there is often a substantial risk of an organisation coming to an honest, though ultimately incorrect, view as to the amount payable. 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.[3] The ambiguity of such workplace instruments means their application is often unclear, even with the benefit of expert advice.

Although undertaking regular audits of wage entitlements can be a prudent compliance step and help reduce underpayment risks, such exercises are expensive, time consuming and offer no guarantees that calculations will not be disputed or proved ultimately incorrect.

Accordingly, there is a real prospect that organisations will be alleged to have breached the recklessness test, triggering civil liability, if they have not taken steps such as regularly reviewing the accuracy of their pay system. While such a risk could arise for any organisation, it is particularly acute for smaller businesses and charities which often operate under significant financial and other resource constraints.

One potential solution that may reduce uncertainties in the interpretation of workplace instruments, is to adopt a mechanism similar to the ATO's private ruling regime (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). Such a mechanism would help address a key root cause of wage underpayment - being the complexity of the industrial relations system.

Secondly, we do not consider it is sound policy to take the Criminal Code definition of recklessness, which ordinarily attracts a 'beyond all reasonable doubt' burden of proof, and transplant it into a civil workplace context, where it would attract the significantly lower 'on the balance of probabilities' burden of proof.

Given the above issues, we recommend that the Government maintain the current test of "systematic pattern of conduct." Should it decide to proceed with a recklessness liability threshold, we would urge clarity on what constitutes a substantial risk of underpayment, and the mitigation steps that are expected by regulators.

[3] PwC (2020) Navigating Australia's industrial relations.

3. The federal wage theft offence under the Fair Work Act should "cover the field"

We note that are already laws in Queensland and Victoria dealing with wage criminalisation, with the latter currently under constitutional challenge.

To reduce confusion, it is critical that the proposed federal wage theft offence "covers the field" on this issue so as to reduce regulatory complexity and prevent employers from being held potentially liable under both state and federal wage theft laws.

4. Additional clarification of the wage theft offence

More broadly, we consider that the drafting of the 'fault element' of the wage theft criminal offence should be tightened so as to make abundantly clear that the offence applies to intentional conduct only. In our view, the current drafting of s 327A(3), which splits the fault elements into absolute liability and intention, is confusing. Furthermore, it is not clear whether the defence of mistake of fact under section 9.2 of the Criminal Code is available for breaches of s 327A(1)(a) and (b)(to which strict liability applies).

Finally, given the offence will, in most cases, be committed by a corporation, we suggest that the Bill or supporting guidance sets out more clearly how the principles of attribution of corporate criminal responsibility, set out in Part 2.5 of the Criminal Code, will apply in the wage theft context. This should include discussion of the level of involvement that would trigger individual accessorial liability.

5. Next steps

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

Yours sincerely,

Christian Gergis
Head of Policy