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Business SA submission to Select Committee Inquiry into Wage Theft

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Introduction

Business SA supports and encourages lawful workplaces practices by all parties, and does not support any deliberate underpayment of wages, entitlements or breaches of employment laws. It should be made clear that it is only a very small minority of business owners that underpay their employees and those that do, the majority is due to administrational errors or misunderstanding of the complex Australian employment system. From Business SA's experience the vast majority of businesses work very hard to ensure their employees are correctly paid and our workplace advice line receives over 13,000 calls a year from businesses seeking clarity on these matters.

The characterisation of all underpayments as 'theft' is misleading, inappropriate, and brands every mistake as a criminal act. The existing regulatory system already provides a framework for the regulation and enforcement of workplace laws, including payment of wages. The current regulatory system governing workplace relations in Australia is federally based and State and Territory legislation designed to circumvent the Commonwealth system would add to an already overly complex system.

The State Government, when considering any potential changes to the business landscape, must be careful not to demonise businesses and discourage people from becoming businesses owners and undertake start-ups for fear of making a mistake could make them a criminal. Exposure to criminal penalties, including imprisonment, for underpayments will discourage investment and employment in South Australia.

The South Australian economy is transitioning and there has been an emphasis on supporting start-up businesses. Business owners often take considerable risk when establishing or buying a business. Such risk takers are essential to the South Australian economy and should not be discouraged by increasing the number of laws.

1. What is wage theft?

The terms of reference for the inquiry do not provide a definition of wage theft which may, without clear parameters result in submissions addressing different criteria. A definition of wage theft is important as it is a modern, colloquial term and not a legal definition.

The importance for a clear definition is demonstrated by the difference in definitions between the terms of reference for the recent Queensland Parliament inquiry and the Australian Unions website. The Queensland inquiry defined wage theft as "when an employer fails to provide their employees with the full wage or salary to which they are entitled".[1] This definition does not allow for the accidental underpayment or misinterpretation of wage entitlements.

The Australian Unions website states: "Wage theft, through employers deliberately underpaying workers and refusing to pay mandatory superannuation, is affecting thousands of workers every year. It is employers stealing money from workers pockets."[2]

It is Business SA's view that a clear definition is important to any discussion as there is a clear difference between intentional and unintentional underpayment of wages. An unintentional underpayment occurs when there is insufficient understanding, or the system is too complex to understand.

When some 7-Eleven franchisors took their employees to the ATM and demanded cash back – that is intentional. Theft may be the correct label for extreme and exceptional behaviours, but it is simplistic and inaccurate to assume all non-compliance with our complex and overlapping rules on wages and conditions is theft.

The term wage theft does not acknowledge that underpayment can be more than wages. Underpayment may also include superannuation, allowances, overtime and penalty rates. Therefore, for the purposes of this submission, Business SA has used the term "intentional underpayment of employee entitlements" or "intentional underpayment".

Intentional underpayment can take many forms. The most obvious is the intentional underpayment of wages when compared to the relevant industrial instrument such as a modern award, enterprise agreement or the minimum wage. This includes the underpayment of allowances, penalty rates and overtime. Unintentional underpayment may include intricate schemes employed by organisations to underpay staff. Such schemes were brought to the attention of the authorities and media in the 2015 7-eleven wages scandal.

The abovementioned ATM cash-back scheme emerged as an insidious practice whereby workers were paid the correct wages in their bank accounts but away from CCTV cameras were forced to give back half their pay in cash to dodgy franchisees. If they refused, they risked losing their jobs.

1 A fair day's pay for a fair day's work? Exposing the true cost of wage theft in Queensland Report No. 9, 56th Parliament Education, Employment and Small Business Committee November 2018. p4
2 https://www.australianunions.org.au/wage_theft_factsheet

The following practices are considered intentional underpayment of wages:

- Underpayment of wages, allowances and penalties when compared to the relevant industrial instrument;
- Employees required to train unpaid on the promise they will be hired;
- Business owners logging their own names on the books, when it is the employee who is working;
- Underpayment of superannuation;
- Sham contracting;
- Cash back schemes.

2. The prevalence of wage theft

There are a number of reports on the prevalence of intentional underpayment of wages. The difficultly with the reports is the varying definition of intentional underpayment with a number of reports categorising unintentional underpayment as wage theft and resulting in inconsistent data. Although there is an unacceptable number of employers who intentionally underpay wages, Business SA urges caution in assuming that the worst cases of willful and deliberate wrongdoing employers are reflective of employer behaviours generally.

It is regrettable that when people commit acts of wrongdoing, the community may form a negative view about of the cohort or group with which the person is associated. Employers are not immune from this. When cases of willful and deliberate wrongdoing by employers emerge in the public arena this has the potential to create negative perceptions about employers generally. However, the Fair Work Ombudsman (FWO) has stated:

> *"In our experience, most employers want to do the right thing. There are a range of reasons why an employer may not be compliant with workplace laws, including the complexity of the system, or an oversight or misunderstanding of the legislation."* [3]

From Business SA's experience, the exploitation of workers generally occurs in industries and occupations that engage workers who are blue-collar, migrant, young, transient and vulnerable.

Business SA urges the Inquiry to acknowledge, as the FWO has, that most employers endeavour to do the right thing and to be mindful of the crucial role that private sector employers play in creating wealth, prosperity and opportunities for social and economic participation for Australians.

3 Fair Work Ombudsman, Annual Report 2014-2015, pp 42-43

3. What are the current regulatory frameworks?

Employers are faced with a significant number of laws that govern employment. In addition to legislation, many workplaces are also governed by multiple complex modern awards that are difficult to interpret.

The following laws apply to the majority of workplaces in Australia:

- Fair Work Act & Regulations 2009;
- Fair Work Amendment (Protecting Vulnerable Workers) Act 2017;
- Long Service Leave Act;
- Independent Contractors Act 2006;
- Superannuation Guarantee Act 1992;
- Modern Slavery Act 2018;
- 122 Modern Awards.

Clauses in Modern Awards are often complex or vague. Employers, the vast majority of which are not legally trained, are expected to interpret these complex documents. For example, the definition of a casual worker is vague in most awards. A typical casual definition is:

"A casual is one who is engaged and paid as such."[4]

This definition is clearly too simplistic and, as the Workpac decision[5] has shown, may lead to serious implications for misclassifying an employee as a casual. In *Workpac v Skene*, Skene was employed under his employment contract as a casual employee on a seven day on, seven day off continuous roster arrangement. After being dismissed, Skene challenged his classification as a casual and argued an entitlement to annual leave. The matter was, on appeal heard by the Full Bench of the Federal Court, where the Court considered the question of where Federal Parliament intended the words 'casual employees' in the NES to be used their in their ordinary, legal sense, or the specialised non-legal sense which the employer contended was common to federal industrial instruments.

The Full Court after much deliberation, found there was not a uniformly understood specialised meaning of 'casual employee' that can be used in industrial instruments. How can an employer possibly be expected to understand and correctly interpret industrial instruments that the Federal Circuit Court has difficulty with? And when businesses think they understand the Awards, along come new award provisions, minimum shift rulings, or other entitlements, that require interpretation and application to their business.

Despite the complexity of the system, there are already considerable disincentives for employers to underpay employees under the *Fair Work Act 2009*. The FWO administers the compliance of *the Fair Work Act 2009* and related legislation. If there is a systematic pattern of deliberate misconduct, individuals can be fined $126,000 and corporations $630,000.[6]

4 *Clerks Private Sector Award,* clause 12.1
5 *WorkPac Pty Ltd v Skene* [2018] FCAFC 131
6 Fair Work Amendment *(Protecting Vulnerable Workers) Act 2017 (Cth)*

The FWO's 2016-17 annual report said requests for assistance were resolved in an average of 15 days and most disputes were resolved in seven days and an audit of companies previously found to be in breach of workplace laws found the majority had subsequently become compliant.[7]

4. Options for ensuring wage theft is eradicated

In recent years the Commonwealth government has significantly increased the role of the FWO. The FWO has received an additional $20 million in funding to deal with vulnerable workers and plays a key role in the enforcement of compliance with the *Fair Work Act 2009*.

The FWO currently has approximately 185 Fair Work Inspectors who conduct investigations, inquiries, audits and pursue enforcement outcomes on behalf of the FWO. There are also approximately 40 lawyers who support these investigators by providing advice, assessing briefs of evidence and litigating matters in the courts. The FWO is now a well over $100 million organisation[8] employing over 800 people Australia-wide.[9] They have the systems in place and are well-known to employee and employers as the main government resource for industrial relations. The creation of additional departments or laws at a state level will only serve to confuse employers and employees on where to seek advice.

In comparison to international jurisdictions, Australia's FWO represents world best practice in workplace relations enforcement. Despite this, there is clear and increasing community concern that underpayments are too frequent and widespread. The FWO should address this concern by developing a culture of compliance in Australian workplaces. This will deliver more consistently on the community's expectations that exploitation of workers will not be tolerated and will be met with serious consequences.

Business SA, along with our national body, the Australian Chamber of Commerce and Industry (ACCI) have recommended that funding of the FWO be boosted in order to fund an additional 50 workplace inspectors across Australia. This should include a pilot program to hire inspectors fluent in key languages other than English, to work with migrant workers and communities, and ensure that migrant workers in particular are better protected from underpayments, and more confident to query pay and conditions.

Businesses do not claim a moral right to put themselves above the law due to the complexity of the system and while the laws are complex, Business SA does not claim this as an argument for breaking them. It is however an issue that must be addressed. The complexity of our laws is an argument for providing employers with greater assistance with compliance through education and to advocate for changing the laws to make them simpler. While the rules are as they are, it's only fair that everyone plays by them, but adequate help is necessary.

It is important to focus on vulnerable workers and in 15 September 2017, the Fair Work Amendment *(Protecting Vulnerable Workers) Act 2017*[10] came into effect. Among other things, this Act enforces the following:

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7 https://ministers.jobs.gov.au/cash/turnbull-government-delivers-stronger-protections-vulnerable-workers
8 https://www.fairwork.gov.au/annual-reports/annual-report-2017-18/05-financial-statements
9 https://www.fairwork.gov.au/annual-reports/annual-report-2017-18/04-management-and-accountability/workforce-demographics
10 *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017(Cth)*

- Tenfold increases for serious contraventions;
- Underpaying employers can now lose their houses and risk personal bankruptcy;
- Cash backs are prohibited;
- Record-keeping and pay slips obligations increased and now subject to a reverse onus of proof;
- New liabilities for franchisors and holiday companies.

These penalties show the punishment and disincentives component of the system have already been ramped up. It is now time for further efforts focused on publicity, education and on increasing the awareness for employees, the parents of young workers, migrants and working visa-holders; as well as support networks.

More employers need to get it right and more employees need to ask, question and check. But as long as the system remains complex and difficult to navigate for both parties, this will be difficult to achieve.

It is our view that the State government should lobby the Commonwealth government for additional Fair Work Inspectors located in South Australia to respond more proactively and strategically to the breadth of this serious problem in our state, and to non-compliance in particular industries, locations, sectors or involving particular cohorts of workers. More inspectors will simply put more boots on the ground, more employees will be prompted to check and raise concerns, and more employers will be prompted to check they are getting it right.

The South Australian government, should assist the Federal Government by promoting the FWO to ensure more employees and parents know where to go to check pay, ask questions, and call out problems. We do not see ads in our newspapers, street press, social media, radio or TV encouraging employees to ensure pay and conditions are right through the FWO – and this is something that happens in other systems internationally. Increased awareness and education is the first step in a cultural change in Australia.

It is Business SA's view that creating criminal penalties is simply not going to work. There are already significant penalties of up to $630,000 and these apply to corporations of all sizes. A potential criminal penalty or additional state laws are not going to offer any greater threat or disincentive than the status quo.

There is no justification for any state to replicate what the Commonwealth already governs. A state government's concern about underpayment of wages is not a justification to ignore the realities of federalism.

Certainly, rates of underpayment in certain circumstances have been appallingly high. Last year's report on the chronic underpayment of migrant workers found that 30 per cent of international students and backpackers earned $12 an hour (about half the minimum wage) or less.[11]

But these statistics and stories are prior to the commencement of the Protecting Vulnerable Workers amendment passing, which greatly increased the financial penalties for serious contraventions of the Fair Work Act 2009.[12] It is important that the new laws and the FWO are provided with adequate time to implement and see results. A second layer of State laws should not be implemented when new laws that address the issue have recently been enacted.

[11] https://www.mwji.org/highlights/2017/11/14/report-released-wage-theft-in-australia-findings-of-the-national-temporary-migrant-work-survey

[12] *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017*

In the recent Federal Budget, the Government announced additional funding to assist the Fair Work Ombudsman with $1.4 million over four years from 2018-19 (and $0.4 million per year ongoing) to expand the Fair Work Commission's (FWC) Workplace Advice Service clinics from 1 January 2019. In addition, the federal Government will provide $26.8 million over four years from 2019-20 (and $6.2 million per year ongoing), including $1.0 million over four years in capital funding, to establish a National Labour Hire Registration Scheme (the Scheme) to protect vulnerable workers, including migrant workers.[13]

The Scheme will make it mandatory for labour hire operators in higher-risk sectors, such as horticulture, cleaning, meat processing and security sectors, to register with the Australian Government as a labour hire operator. The measure also includes $10.8 million over four years from 2019-20 to enhance the Fair Work Ombudsman's capacity to conduct investigations into underpayment and related issues and deliver information and education activities. This will raise vulnerable workers' awareness of their rights and of the Government help available to them and will also raise employers' awareness of their responsibilities under the workplace laws.[14]

As previously mentioned, Australia's industrial relations system is unduly complex. The first step to reducing underpayments is to simplify the system, not make it more complex. The *Fair Work Act 2009* is similar to a phone book with 700 sections, plus rules and regulations. In addition, employers must interpret and apply at least one of the 122 complex modern awards. For example, the award covering the hospitality industry has 39 clauses plus 11 schedules, across 96 pages.[15] Even the FWO's simplified pay guide for this award is 86 pages long.[16]

An unduly complex system is no excuse for not obeying the law, but a simpler, more consistent system would make it easier for working people to know their rights and reduce underpayments attributable to error.

[13] Press release of 7 March 2019 issued by the Minister for Jobs and Industrial Relations.
[14] Press release of 7 March 2019 issued by the Minister for Jobs and Industrial Relations.
[15] Hospitality Industry (General) Award 2010
[16] https://www.fairwork.gov.au/ArticleDocuments/872/hospitality-industry-general-award-ma000009-pay-guide.docx.aspx

5. Should wage theft be criminalised in South Australia?

In recent times there has been an increase in the call for wage theft to be criminalised. It is Business SA's view that this is not appropriate. The calls for criminalising deliberate underpayment are inspired by the same breaches that led to the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* amendment, which recently came into effect. The *Protecting Vulnerable Workers* amendment addresses serious contraventions, which are repeated and systematic offences, the same as the types of offences the States are looking to criminalise.

The State Government must also be cautious when considering the criminalisation of wage theft as there may be constitutional hurdles. Serious concerns have been raised in Victoria on the constitutional legality of criminalising wage theft. Professor John Howe has raised concerns that *s 26(1) of the Fair Work Act 2009* (Cth) prevents industrial laws being introduced for the *"establishment or enforcement of terms and conditions of employment*" and that it is likely that enforcement includes criminal laws.[17] Further, *s 30 of the Fair Work Act 2009* (Cth) excludes state law from applying in other cases if there is an inconsistency with federal law.[18]

Under the Australian Constitution, federal laws take priority over state laws where there is an inconsistency and where the law already "covers the field". It is arguable that the *Fair Work Act 2009* already deals with the enforcement of proper payment of wages to employees.

The constitutional issues must be carefully considered, otherwise any State criminal laws implemented in this field risk the prospect of being challenged and held invalid by the High Court.

When considering if criminal laws are appropriate it should be recognised that relatively few criminal prosecutions may be successful because they can be costly and require a high standard of proof and evidence. Criminal charges may be hard to prove if the underpayment was not carried out by the employer, for instance there is an issue with outsourced payroll. Criminal proceedings are also difficult for the victims who may be required to appear as witnesses.

A criminal case will not result in the rectification of the underpayment to the employee. Civil matters relating to back-pay will be put on hold until the criminal matter is heard and determined. This will result in workers waiting long periods for back-pay and may have a devastating effect for underpaid employees, who are already out of pocket and need the money for basic necessities.

With criminal prosecutions, where does the responsibility lay? In a large and complex enterprise, where responsibilities for compliance may be shared, who would be tried? The line manager, the HR manager, the payroll officer, the CEO or someone on the board?

Introducing a criminal penalty may disadvantage the employees who have been underpaid. The main objective in any underpayment of wages, no matter the intent of the parties, must be getting the money back to the employee. While an employee may be pleased to see an employer criminally charged, these

17 Professor Howe is Director of the University of Melbourne School of Government and was previously co-director of the Centre for Employment and Labour Relations Law at the Law School: https://www.smh.com.au/business/workplace/criminalisation-of-wage-theft-likely-to-backfire-say-experts-20181212-p50lto.html

18 https://pursuit.unimelb.edu.au/articles/can-victorian-labor-really-make-wage-theft-a-crime

charges do not help pay for housing, food, schooling for children or any other of life's basics. Recovery of the underpayment cannot be commenced in the civil jurisdiction until the criminal matter has been settled and this may take a significant amount of time. If wage theft is criminalised and there are a limited number of successful prosecutions, it is unlikely that the criminal sanctions will have a deterrent effect sufficient to bring about the changes to business and employer behaviour as hoped by supporters of a criminalisation model and will only serve to undermine the Federal regulators. By criminalising wage theft, the State Government runs the risk of entering into a complex area of law and further adding to the complexity with matters best dealt with elsewhere.

6. Conclusion

It is Business SA's view that there is no justification for the replication of Commonwealth laws or to implement laws that further what the Commonwealth already governs. A state government's concern about underpayment of wages is not a justification to ignore the realities of federalism. When considering whether appropriate changes need to be made, the Government must be careful not to demonise businesses and discourage people from becoming business owners.

Instead of setting up a system in South Australia that detracts from the millions spent federally, the state government should implement changes that complement the increase in federal inspector numbers and penalties. This should be done with education, increased awareness of core employment rights and information on where employees can go to have the rights enforced for them. The state government can play a long-term role in the cultural change of Australia's employment landscape by assisting with the education of vulnerable workers.

The State government should also lobby the Federal government for a system that is better understood across our community – and a system better able to be grasped and applied by lay people – employers or employees rather than a system that relies on lawyers and an adversarial system.