HOUSING INDUSTRY ASSOCIATION

Submission to the
Victorian Government

Consultation Paper - Wage Theft Bill 2020

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HOUSING INDUSTRY ASSOCIATION

contents

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ABOUT THE HOUSING INDUSTRY ASSOCIATION

The Housing Industry Association (HIA) is Australia's only national industry association representing the interests of the residential building industry, including new home builders, renovators, trade contractors, land developers, related building professionals, and suppliers and manufacturers of building products.

As the voice of the residential building industry, HIA represents a membership of 60,000 across Australia. HIA members are involved in land development, detached home building, home renovations, low & medium-density housing, high-rise apartment buildings and building product manufacturing.

HIA members comprise a diverse mix of companies including residential volume builders, small to medium builders and renovators, residential developers, trade contractors, building product manufacturers and suppliers and allied building professionals that support the industry.

HIA members construct over 85 per cent of the nation's new building stock.

The residential building industry is one of Australia's most dynamic, innovative and efficient service industries and is a key driver of the Australian economy. The residential building industry has a wide reach into manufacturing, supply, and retail sectors.

Contributing over $100 billion per annum and accounting for 5.8 per cent of Gross Domestic Product, the residential building industry employs over one million people, representing tens of thousands of small businesses and over 200,000 sub-contractors reliant on the industry for their livelihood.

HIA exists to service the businesses it represents, lobby for the best possible business environment for the building industry and to encourage a responsible and quality driven, affordable residential building development industry. HIA's mission is to:

"promote policies and provide services which enhance our members' business practices, products and profitability, consistent with the highest standards of professional and commercial conduct."

HIA develops and advocates policy on behalf of members to further advance new home building and renovating, enabling members to provide affordable and appropriate housing to the growing Australian population. New policy is generated through a grassroots process that starts with local and regional committees before progressing to the National Policy Congress by which time it has passed through almost 1,000 sets of hands.

Policy development is supported by an ongoing process of collecting and analysing data, forecasting, and providing industry data and insights for members, the general public and on a contract basis.

The Association operates offices in 22 centres around the nation providing a wide range of advocacy, business support services and products for members, including legal, technical, planning, workplace health and safety and business compliance advice, along with training services, contracts and stationary, industry awards for excellence, and member only discounts on goods and services.

1. INTRODUCTION

On 23 February 2020, the Victorian Government released the *Consultation Paper - Wage Theft Bill 2020* (Consultation Paper).

The Consultation Paper outlines the Governments intention to introduce laws to criminalise wage theft through the *Wage Theft Bill 2020* (Wage Theft Bill), and provides an overview of the proposed design of the offence and enforcement regime. Interested parties have been given the opportunity to provide feedback on the proposals.

HIA takes this opportunity to provide comments in relation to the proposed Wage Theft Bill and Consultation Paper.

HIA opposes the criminalisation of industrial relations matters and the Wage Theft Bill. These matters should remain within the remit of civil laws and penalties.

HIA is also concerned with any attempt by the Government to intervene in employment related matters. The regulation of industrial relations already falls squarely within the realm of the Federal jurisdiction and since 1996, such matters in Victoria have been dealt with through a Commonwealth framework. To alter these current arrangements would cause significant confusion for both employers and employees and may be unconstitutional.

To that end, the interaction of the proposed Wage Theft Bill with Commonwealth and established State legislation is not dealt with in the Consultation Paper. Such matters must be addressed prior to any further moves forward with the proposed reforms.

There are also a range of concerns regarding the proposed offence.

Firstly, and problematically, the Wage Theft Bill is proposed to extend well beyond the remit of 'wages'. Introducing a new concept of 'employee entitlements', which may include Superannuation, and Long Service Leave is confusing and generally ill-advised given that such entitlements are already subject to Commonwealth and State laws.

Secondly, the proposal to use an objective criminal test of 'dishonesty' to establish the offence is not only out of step with the current approach to such matters under criminal law but gives unfair weight to the views of the 'reasonable person' over that which was in the mind of the individual at the time of committing the alleged offence. When criminal sanctions are involved HIA submit that the subjective intent of the alleged offender must be a consideration.

Finally, the introduction of new offences for, for example, a failure to keep records with significant penalties, clearly steps on existing obligations under the *Fair Work Act 2009* (FW Act). This obvious regulatory overlap can only lead to confusion and uncertainty for both employers and employees.

While HIA does not support employers or businesses deliberately avoiding their wage and superannuation obligations, and intentionally failing to pay employee entitlements, HIA disagrees that any further measures need to be taken to address the underpayment of employee entitlements.

The current Federal penalty, compliance and enforcement frameworks can appropriately respond to instances of underpayment.

2. GENERAL COMMENTS

'Wage theft' has widely been used as an umbrella term to describe all types of underpayment. 'Wage theft' is a term of art, the adoption of which seeks to inappropriately criminalise the underpayment of wages. HIA rejects its use within an industrial context.

In HIA's experience instances of underpayment are generally a result of mistake or error.

For example, recent media articles about instances of the incorrect calculation of overtime[1] and underpayments due to payroll errors[2] by employers were not the result of a deliberate attempt to underpay staff and were remedied once the issues surfaced.

HIA is unaware of deliberate underpayment and exploitation behaviours occurring in the residential building industry. In HIA's experience where underpayments are identified and an employer is made aware and agrees that an underpayment has occurred an employer moves to remedy the situation.

2.1 THE FEDERAL GOVERNMENT IS RESPONDING

The Federal Government is in the process of considering and responding to 'underpayment of wages' and claims of 'wage theft'. There have been numerous separate inquires in response, including:

- The Attorney Generals Industrial Relations Consultation, including the discussion papers on '*Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance'* (Non Compliance Discussion Paper), and *'Improving protections of employees' wages and entitlements: further strengthening the civil compliance and enforcement framework'* (Civil Compliance and Enforcement Discussion Paper); [3]
- The Senate Inquiry into the causes, extent and effects of unlawful non-payment or underpayment of employees' remuneration[4];
- The Senate Inquiry into Corporate Avoidance of the FW Act; and
- The Senate Inquiry into the Superannuation Guarantee.[5]

The Federal Government has also indicated that the drafting of legislation to criminalise certain forms of worker exploitation is underway. The Non Compliance Discussion Paper sought views from interested parties to inform the drafting of these provisions.[6]

Further, the 2019-20 Federal Budget provided greater funding for measures to protect vulnerable workers[7] through a commitment to establish a National Labour Hire Registration Scheme and, the Fair Work Ombudsman (FWO) with additional capacity to conduct investigations and take enforcement action, and focus on educating vulnerable and migrant workers about their workplace rights.

2.2. STATE REGULATION IS NOT THE ANSWER

The Consultation Paper notes '*In recent months, we've seen story after story of Australian workers being ripped off'* and in response states '*It's why, in May 2018 the Andrews Labor Government committed to introducing new laws to make wage theft a crime*'.

[1] http://www.abc.net.au/news/2017-04-04/george-calombaris-apologises-after-restaurant-staff-underpaid/8412852
[2] https://www.theguardian.com/australia-news/2018/jul/17/lush-cosmetics-payroll-error-underpaid-staff-by-2m
[3] Australian Government, Attorney-General's Department, September 2019; and February 2020
[4] Senate Standing Committees on Economics, November 2019
[5] Senate Inquiry into the Superannuation Guarantee, Senate Economics References Committee, 2017
[6] Hon Christian Porter MP, Speech, Committee for Economic Development of Australia's State of the Nation Conference, 19 September 2019
[7] https://www.employment.gov.au/budget-2019-20

HIA is suitably concerned that there appears to be a current trend towards further regulation as the appropriate response to a reported problem or issue.

The Consultation Paper notes that the State Government is relying on recent 'stories' to back an election commitment made years prior, in 2018. This statement suggests there is insufficient evidence, and lack of research and data available to support the need for further regulatory change to address 'wage theft' at a state level.

There is also a failure to assess and consider the impact that further changes may have. Any efforts to legislate at a state level against 'wage theft' or 'underpayment of wages' are not only an unnecessary duplication of efforts and costs already expended at a Federal level, but also have the real potential of being Constitutionally unsound, leading to inadequate outcomes for all parties.

The provisions of the FW Act, particularly section 26(1) and 30, excludes state or territory industrial laws as they would otherwise apply in relation to a national system employee, or national system employer. Under section 109 of the Australian Constitution '*when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid*.'

Chapter 4 of the FW Act, deals with the compliance and enforcement provisions which apply to national system employees and employers. Victoria by way of the *Fair Work (Commonwealth Powers) Act 2009* (Vic), has referred most of its industrial relations powers to the Commonwealth following on from the original referral in 1996 in the *Commonwealth Powers (Industrial Relations) Act 1996*.

How the proposed Wage Theft Bill is constitutionally sound is therefore unclear, and not adequately addressed in the Consultation Paper.

Any attempt to establish state based legislation will create further layers of uncertainty for employers and employees regarding industrial relations related matters. Employers and employees will be understandably confused as to who is the appropriate regulator for employment related matters, and will undoubtedly utilise valuable Government resources in determining their appropriate course of action.

Overall, the notion that the current penalty, compliance and enforcement frameworks do not respond appropriately, and further regulation is therefore required at a state level is flawed, the FW Act and FWO have the capacity to and are already responding to instances of underpayment.

3. CURRENT COMPLIANCE FRAMEWORK

Under the FW Act the underpayment of wages is a civil offence and penalties can be imposed for being found to have carried out such actions.

Recent amendments to the FW Act through the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Protecting Vulnerable Workers Act) have significantly increased penalties for the underpayment of wages where the actions are deliberate and systemic.[8]

The Protecting Vulnerable Workers Act introduced:

- increased penalties for record-keeping and payslip failures;
- a significantly higher scale of penalties for serious contraventions of workplace laws;
- prohibitions on 'cashback' from employees or prospective employees;

[8] Fair Work Amendment (Protection of Vulnerable Workers) Act 2017

- a reverse onus of proof to disprove wage claim;
- strengthened FWO powers to collect evidence;
- new penalties for giving the FWO false or misleading information, or hindering or obstructing investigations; and
- new franchisor and holding company responsibilities for workplace laws.

Although HIA understands that this legislation was largely driven to address the apparent systemic underpayment of workers by some employers operating under franchising business models, much of the new legislation applies to all businesses. The increases in civil penalties apply to all employers, including small business, even though there had been no demonstrated case made that such blanket increases were necessary.

The effect of the Protecting Vulnerable Workers Act is yet to be fully realised. It was only recently, on in August 2019, the FWO finalised their first case under the protecting vulnerable workers provisions.[9]

In this case, A & K Property Services Pty Ltd was the first test of new reverse onus of proof provisions set out in section 557C of the FW Act requiring employers to disprove underpayment claims if they have not kept adequate records.

The employees, South Korean nationals on visa arrangements, were employed by small business A & K Property Services Pty Ltd sushi stores in Queensland. A & K Property Services Pty Ltd had underpaid workers almost $27,000 over three months, and failed to pay leave entitlements, keep accurate records, and pay slips, and were found to have acted recklessly, but not deliberately in this case.

A & K Property Services Pty Ltd was ordered to pay $108,000 in pecuniary penalties, and the three directors required to pay penalties totaling $24,750 for failing to pay leave entitlements, and record-keeping and pay slip breaches.

As noted by the presiding Federal Circuit Court Judge Michael Jarrett, these penalties act as a significant deterrent:

> *"I accept that these matters all demand a penalty in the present case that recognises the need to deter others in this industry who might be tempted to treat their workers and their obligations to comply with workplace laws in the same way as the respondents in this case."*

It is clear the consequences for a failure to comply workplace relations obligations under the FW Act are significant. Failure to pay employees wages and entitlements correctly can result in a penalty of up to $12,600 per contravention for an individual, and up to $63,000 per contravention for a company. In addition, serious contraventions of prescribed workplace laws attract higher penalties of up to $126,000 for individuals, and up to $630,000 for companies.

Role of the Fair Work Ombudsman

In 2019, the FWO announced a new 'firm but fair approach to non-compliance' with the FWO issuing an updated Compliance and Enforcement Policy, and committing to the increased use of compliance notices.[10]

The FWO consequently reported in 2018-19 their 'intelligence-led approach' to education and compliance activities resulted in recoveries of over $40 million for nearly 18,000 workers, as compared to recoveries of almost $30 million for nearly 13,400 workers in 2017-18.

[9] Fair Work Ombudsman v A & K Property Services Pty Ltd & Ors [2019] FCCA 2259 (16 August 2019)
[10] Address by the Fair Work Ombudsman, 2019 Annual National Policy-Influence-Reform Conference

The FWO also in recent times have taken a more transparent and proactive approach. A range of high profile cases that have highlighted systemic breaches of workplace relations laws have, in HIA's view established the FWO as visibly and proactively undertaking the role of identifying and recovering underpayments.

As noted in the FWO 2018-19 Annual Report, the FWO has seen an increase in self-reporting of underpayments, with the Fair Work Ombudsman Sandra Parker noting *"I welcome self-disclosures, as they suggest our compliance and enforcement activities are creating the desired deterrence effect."*[11]

The Ombudsman has also expressed in relation to self-disclosures "*we expect non-compliant employers as a minimum to enter into a court enforceable undertaking (EU) and immediately pay back money plus interest owed to workers*."

In 2018-19, the FWO entered into 17 Enforceable Undertakings (EU's), as compared to 7 EU's in 2017-18. EU's require employers to admit liability, express contrition, and agree to remedy breaches as well as secure ongoing compliance. EU's draw significant public attention, through the FWO website publication, and often attracts media attention which can portray the business, and business owners negatively, threatening the future viability of the business.

It is the clear the FWO is moving towards a stricter and more proactive approach in compliance and enforcement. With further time, appropriate analysis will be able to be taken to determine how these measures have influenced and changed behaviours in employment.

4. CRIMINALISATION OF INDUSTRIAL MATTERS IS NOT APPROPRIATE

HIA maintains the view that criminalising matters of an industrial nature is inappropriate. These matters should remain within the remit of civil laws and penalties.

Circumstances in which an employer fails to provide their employees with the full wage or salary to which they are entitled is an underpayment. Further, the use of the term 'wage theft' seeks to inappropriately attach criminal intent to an employment related matter.

HIA opposes such an approach.

As noted above, the FWO has initiative a 'firm but fair approach to non-compliance' which has seen an increase in self-disclosures of instances of underpayments.

In HIAs view the criminalisation of employment related matters, will likely result in less self-disclosure of underpayments to the FWO, due to the risk of criminal sanctions, undermining the efforts of the FWO remedying workplace breaches, and ensuring compliant workplaces into the future. The criminalisation may possibly also decrease employee reporting due to the serious personal consequences for employers and likely end of the business and therefore employment.

4.1 THE CURRENT WORKPLACE RELATIONS FRAMEWORK IS COMPLEX

The current complexity of the workplace relations framework, including, for example, the difficulty in determining rates of pay is directly relevant to the incidence of non-compliance with workplace laws.

In HIA's experience employers are attempting to comply, however in doing so are navigating through a myriad of complex regulatory instruments that includes legislation, regulations and modern awards.

[11] Fair Work Ombudsman 2018-19 Annual Report, pg 2

The average small business builder/principal contractor spends significant hours each week attending to paperwork and compliance arising from regulatory requirements that span national, state and local obligations. The compliance obligations not only include workplace relations requirements but also include GST, PAYG, payroll tax compliance, state based training regulations that apply to apprentice employees, workplace health and safety management, occupational licensing laws, planning regulations and state-based residential construction laws and requirements.

In HIA's experience, most employer non-compliance relates to the misinterpretation of the relevant Modern Award and FW Act obligations, due to the complex nature of the workplace relations system.

5. WAGE THEFT BILL

Notwithstanding HIAs strong opposition to the Wage Theft Bill, HIA provides the following comments in relation to the content of the Consultation Paper.

While HIA notes the detail of the proposed scope and breath of the legislation will be in the drafting of the Wage Theft Bill, in many cases the content of the Consultation Paper raises further questions and issues which require examination and consideration in the drafting process. These are outlined below.

5.1 SCOPE

Retrospectivity

Whilst HIA notes that the proposed offences would not be retrospective, it would also be appropriate to delay the commencement of the proposed offences to allow employers time to ensure that they are not at risk of prosecution.

While the stated intent of government is not to prosecute employers who make honest mistakes the blunt reality is that many employers will be distressed by the introduction of the offences and need assistance to ensure they are ready, and appropriately educated about the proposed reforms. A rushed introduction is unlikely to increase the effectiveness of the proposed offences however allowing employers more time to review their payroll arrangements will ensure better compliance.

Employment

While HIA does not support the proposed offences it agrees that if introduced the offences should only apply to alleged underpayments of employees.

It is concerning that the proposed offences would apply to employment relationships as defined using the common law approach. While the common law approach is familiar to many lawyers and industrial relations practitioners it is rarely well understood by employers; and especially small business employers. The common law test is often subjective, uncertain and for practical purposes unreliable, applying the common law to a specific case can be difficult and many businesses are left uncertain about the appropriate status of their workers. This is a constant source of confusion, uncertainty and risk for those operating in the residential building industry.

Since being an employer would be a critical element of the offences it is essential that businesses are able to clearly identify their potential criminal liability. If the common law approach is to be taken it will be critical to have a defence for businesses who honestly and reasonably believe that a worker is a contractor and not an employee.

It is HIA's view that the appropriate test is the current "results" test set out in Division 84 of *the Income Tax Assessment Act 1997*, which is a part of the Alienation of Personal Services Income (APSI) rules which allows tax payers to self-assess against the test of "independence".

APSI has two main elements. Firstly, the 'results test' which individuals can self-assess against. The results test is based on the traditional criteria used to distinguish independent contractors from employees, namely, working to produce a result; providing their own plant, equipment and tools of trade; and being liable to rectify defective work.

Under the second element, if the results test is not satisfied, tax payers are able to move to other tests including the '80/20 rule', that the business employs its own workers and the unrelated clients test. A binding personal services business determination from the ATO is also available.

This approach provides the necessary level of certainty given the criminality of the offence and associated penalties proposed.

Liability

It is understood that all employers, including governments and charities, will be subject to the proposed offences. The impact of these laws on charities and similar entities may however have a major impact on the availability of officers to serve on the boards and committees of management of these entities.

Corporate Liability

The corporate and officer liability aspects of the proposed offences are likely to significantly discourage those in business from becoming directors. The attribution of criminal responsibility to officers for the conduct of associates or agents, such as payroll officers or payroll service providers, is a major concern.

The concept of a "corporate culture that directs, encourages, tolerates or leads" to relevant conduct seems very broad and may capture poor management practices as opposed to intentional misconduct. As a general observation it is worth noting that organisational cultural change is rarely successful if forced. This is especially so when the change is imposed by external factors.

Complicity

Section 323 of the *Crimes Act 1958* (Crimes Act) defines when a person can be complicit in the commission of an offence. This goes beyond 'third parties who 'intentionally assist" in the offending' and would capture those who encourage or direct the commission of the offence.

A broader concept of complicity also applies it the third party intentionally assists, encourages or directs the commission of another offence. It is not clear however what other offence would be committed to trigger the broader concept of complicity for the proposed new offences. Is this intended to be a reference to the existing Commonwealth offences?

5.2 KEY CONCEPTS

The proposed offences are not intended to be strict liability offences. The proposal however to introduce a new definition of dishonesty for the purpose of these offences is troubling and may make the distinction between the proposed offences and strict liability offences minor.

Dishonesty

Using an objective standard and the idea of a reasonable person creates uncertainty. The proposed offences introduce the idea that a person can be guilty of a criminal offence for not meeting society's expectations about how they manage the payroll of their employees. In other words, it might be a criminal offence to have poor skills at managing a business when you employ people.

The existing common law meaning of dishonesty, with a subjective approach, would be a fairer meaning to use for the offences.

Entitlements

The concept of 'employee entitlements' is much broader than the realm of entitlements under existing industrial relation laws. The use of this term as outlined in the Consultation Paper will extend into superannuation, long service leave, which have existing legislation and enforcement options available to employees.

Further the proposed concept of 'employee entitlements' has the potential to extend to claims relating to items under contractual dispute.

HIA rejects the use of this term, and recommends that the proposed laws are confined to wages and related entitlements, as suggested by the title of the bill.

Employee entitlement record

HIA notes the reference to employee entitlement record relates to '*any record of an employee entitlement* required to be kept at law.'

Employee record keeping and payslip requirements are set out within section 535 and 536 of the FW Act, and the *Fair Work Regulations 2009*. Employers are required to make and keep accurate and complete records for all of their employees (for example- time worked and wages paid), as well as issue pay slips to each employee.

The FWO have a range of enforcement remedies available should employers be found to contravene the requirements of the FW Act. These include the FWO:

- Issuing infringements (maximum fines of $1260 per contravention for an individual, and $6300 for a corporation);
- Initiating court action for serious, wilful or repetitive behaviours (maximum penalties to be imposed by a court are $12,600 per contravention for an individual, and $63,00 per contravention for a corporation); and
- Initiating court action, and the court finding the contraventions are 'serious contraventions' where occurring knowingly or part of systematic patterns of conduct (maximum penalties of $126,000 per contravention for an individual, and $630,000 per contravention for a corporation).

Again HIA is concerned how the proposed Wage Theft Bill will interact with Commonwealth based legislation, in enforcement, and whether the proposed legislation is sound.

5.3 THE OFFENCES

Theft of employee entitlements

The Consultation Paper states that '*the new 'theft of employee entitlements' offence is the primary offence. It will criminalise the conduct of an employer who 'dishonestly' withholds entitlement such as wages, from an employee*.'

The proposed new definition of dishonesty being, '*dishonest to the standards of a reasonable person'*, has the potential to capture employers who make mistakes. A mistake is not worthy of criminal prosecution.

'*The standards of a reasonable person'* are primarily subjective, and can differ from person to person, making such a mechanism manifestly inadequate, where criminal sanctions are a very real risk. There also seems to be no reference to quantum of the alleged underpayment. So even minor underpayments could result in a charge for the new offence. Such outcomes would be inappropriate and should be avoided.

Falsification of an employee record

The falsification of employee records offence would presumably be most likely to be relevant to recording of information such as working hours and times of work. It is assumed that the proposed new meaning of dishonesty would apply to this offence.

There also needs to be clarity about what is meant by the definition of 'falsify', as it is noted within the Consultation Paper that the definition will not capture people who '*rectify payroll errors in an appropriate and honest manner'*. Does this mean that corrective payments can prevent a charge?

Failure to keep employee entitlements offence

While some businesses, small businesses in particular, may be guilty of poor document management due to misinterpreting or misunderstanding employee entitlement records, many do not do so for the purposes of gaining a financial advantage or preventing a financial advantage from being exposed. Recent events have shown that the commercial consequences of underpayment of wages can result in the insolvency of successful businesses.

Proposed Penalties

A proposed maximum penalty of 10 years imprisonment for the offences is a severe punishment and is disproportionate to the gravity of the offence.

The proposed maximum fines for most employers will be academic as the imposition of such fines would probably follow other enforcement activity and funds would not be available for payment of these fines.

It is also likely that many businesses would have to cease trading if a principal was imprisoned even for a relatively short time. For example, in the residential building industry if an imprisoned director was the only registered building practitioner the company would lose its registration and right to build unless a different registered building practitioner could be convinced to become a director of the company. Other industries may have similar issues.

5.4 DEFENCES

The due diligence defence and reasonable measures may mitigate some of the harshness of the proposed new laws.

These defences however seem to be limited to the theft of employee entitlements offence. There is also no reference in the Consultation Paper to the operation of other defences that may be applicable in relation to record keeping offences. A possible example would be the defence of honest and reasonable mistake of fact.

The harshness of the penalties and the apparent broad nature of the proposed offences makes it essential that defences that would be available for other serious criminal offences are available.

5.5 ENFORCEMENT

The Consultation Paper states that the Government intends to establish a statutory body corporate, the Wage Inspectorate Victoria (the Inspectorate) under the proposed Wage Theft Bill. The Inspectorate would have responsibility for investigating and prosecuting the new wage theft offences. This is presumably the already established Wages Inspectorate Victoria responsible for the enforcement of child employment, long service leave and independent contractors' legislation in Victoria.

The involvement of the Inspectorate will undoubtedly lead to confusion between the roles, responsibility and jurisdictions of the FWO and the Inspectorate, as the FWO will continue to carry out their enforcement function.

Many concerns and questions remain unanswered from the Enforcement model set out in the Consultation Paper, including:

- In the case where an employee may make a complaint to the FWO in relation to an underpayment of wages claim, it would be unclear how the role of the Inspectorate would interact with the FWO?
- How and when would the Inspectorate intervene in a matter?
- Will or can dual matters occur concurrently between the two authorities?
- How and will the Inspectorate rely upon information gathered and used by the FWO?
- Can the Inspectorate overturn, or re-consider decisions made by the FWO?
- Will the FWO co-operate with the Inspectorate?
- Will employees and employers be unfairly delayed in proceedings where both the FWO and Inspectorate are involved?

The proposed establishment of the Inspectorate presents many unanswered questions, and many concerns relating to due process, procedure, fairness, privacy, and information sharing. The insufficient coordination of response in offences, and enforcement, is likely to lead to unsatisfactory outcomes for all parties involved.

5.6 Enforcement Model

Should the proposed offences be introduced and the Inspectorate given the proposed role, HIA has numerous comments and concerns about the proposed model as set out within the Consultation Paper.

While the Consultation Paper states that the *'inspectorate may also have functions to provide information and assistance to persons seeking to recover unpaid entitlements through new streamlined court processes'*, it is unclear to HIA what the new streamlined court processes might entail, therefore it is difficult to comment on the proposed enforcement model.

Appointment of wage theft inspectors

HIA objects to the use of the term 'wage theft inspectors.'

The notion of a 'wage theft inspector' suggests that the inspector's powers are confined to matters relating to wages. Rather, the Consultation Paper notes that the remit of the Wage Theft Bill will extend to 'employee entitlements', and well beyond the understood term of 'wages.'

Further, HIA is concerned as to what criteria will be used in appointing 'wage theft inspectors'. What will be the inspector's knowledge and expertise? This needs to be clearly defined and outlined.

Powers of the inspectorate and inspectors powers

The powers of the Inspectorate and inspectors outlined in the Consultation Paper are very broad in nature, and it is difficult to comment on the proposed powers without the detailed drafting.

HIA understands the Consultation Paper is attempting to outline that additional powers allowed in the Crimes Act for those with legal authority in Victoria (often called authorised officers) will not apply to the inspectors, as the Wage Theft Bill will establish its own clear powers for inspectors to investigate and enforce. However, it is understood from the Consultation Paper that the rights in the Crimes Act in respect of investigations – such as the rights when interviewed while in custody, will apply.

HIA therefore is concerned that the rights of inspectors as outlined for the Inspectorate, appear to have a significant cross over of powers ordinarily reserved for those under the Crimes Act. This will need to be clarified if this proposal continues.

Any powers conferred on an inspector must be proportionate and recognise that the majority of employers are small businesses with limited experience, skills and resources to respond to enforcement activity. Many small businesses also operate from a home and there is potential that family members who are not involved in the business will have to respond to enforcement activity. Also it is likely that employers will be confused about the role of the Inspectorate as opposed to better known agencies such as the FWO and allowance will need to be made for confusion and uncertainty about the Inspectorate as it is likely to remain a government agency with low public visibility.

HIA submits in all cases, including circumstances whereby inspectors are entering premises, and requiring documentation to be provided, that an inspector identity card must be provided. Further there should be a mechanism through which a person involved in Inspectorate processes, has the capability to check whether the inspector is an authorised person. This will be especially important as many people responding to inspector activity are unlikely to be unaware of the existence of the Inspectorate and not unreasonably reluctant to provide financial and similar records to an inspector.

It would appear that the inspectors will need not only a very clear understanding of the law in which they are operating, but also a very clear understanding of the Workplace Relations system, and extensive knowledge and understanding of which evidence, information and documents will be needed in relation to matters being investigated. It would also seem that these inspectors must have an intimate working knowledge of compliance and enforcement in relation to criminal matters, and therefore should be suitably legally qualified to undertake the proposed enforcement process.

These wage theft inspectors would also need to be free from the perception of bias and ideally have no history of representing either employer or employee associations.

Power to require production of documents and answer questions

The broad requirement to require 'a person' to produce documents and answer questions, is unreasonable. This would suggest any person with little knowledge or understanding of the business in relation to workplace relations matters could offend the proposed legislation. The power to require the production of documents and answer questions should be confined to those who are in control of the business.

There needs to be safeguards in place that enable a person who is required to answer questions adequate time to gather information to respond to questions put to them by the Inspector.

Further, in the interests of natural justice, persons involved within the investigative process should have a legal right to be legally represented due to the potential initiation of criminal proceedings.

Power to accept undertakings

HIA is concerned with how the proposed powers of the Inspectorate to accept undertakings will interact with the provisions of the FW Act. The FWO has powers to enter into EU's as part of the compliance and enforcement framework, and do so under the provisions of the FW Act. Should the Inspectorate be given similar powers, it would appear that it is proposed that the Inspectorate will enter into undertakings involving the provisions of the FW Act. It is questionable as to whether such provisions are sound, and can actually be administered in the manner proposed.

Criminal prosecution of the wage theft offences

HIA also submits that valid consideration needs to be applied to costs versus benefits in the initiation of criminal proceedings.

As noted above there appears to be no threshold proposed in relation to the quantum of the alleged underpayment when initiating enforcement processes.

Further, valid consideration needs to be applied when initiating proceedings as to whether the employee's likelihood of recovery of the alleged underpayment will be impeded by the commencement of proceedings. Small businesses in many cases will be unable to carry costs in defending legal proceedings of a criminal nature, and in many cases will have no option other than to stop operating, resulting in potential job losses and limiting potential recovery action for employees. The possible impact of state prosecutions placing employees into insolvency may also impact on existing schemes to ensure funds are available to affected employees.

Referrals to other regulators

As noted throughout this submission, HIA is concerned about the potential cross over of regulator responsibilities in terms of compliance and enforcements activities through the commencement of the proposed Wage Theft Bill.

Should the Wage Theft Bill be introduced in the form suggested in the Compliance Paper, a coordinated approach with the FWO is an absolute necessity to ensure a consistent and workable compliance and enforcement framework.