

**INQUIRY INTO TAX ADMINISTRATION AMENDMENT
(COMBATING WAGE THEFT) BILL 2021**

Organisation: Unions NSW

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Unions NSW Submission

Inquiry into the Tax Administration Amendment (Combatting Wage Theft) Bill 2021

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Unions NSW
Trades Hall
Level 3, 4-10 Goulburn
Street
Sydney
T: 02 9881 5999
F: 02 9261 3505



Introduction

1. Unions NSW is the peak body for trade unions and union members in New South Wales with 48 affiliated trade unions and Trades and Labour Councils, representing approximately 600,000 workers across New South Wales. Affiliated trade unions cover the spectrum of the workforce in both the public and private sectors.
2. Unions NSW welcomes the opportunity to make a submission in relation to the Inquiry into the Tax Administration Amendment (Combatting Wage Theft) Bill 2021 (**the Bill**).
3. Unions NSW and its affiliated unions have a proud history of engaging in the parliamentary process to protect and represent the interests of union members. Unions NSW frequently makes submissions to inquiries involving industrial relations and other issues which may impact members. Wage Theft is one such issue, and one with which this organisation has a deep and ongoing engagement.
4. This submission will explore the merits and flaws of the proposed bill while also suggesting further avenues available to the NSW State Government to combat wage theft.
5. While Unions NSW believes the bill is an innovative way to harness the state government's tax power to assist the Federal Government in combatting wage theft, the claim that criminalisation of wage theft is a purely national issue ignores the ability of State Government to implement further meaningful change to truly live up to its commitment "to support workers and put employers who do the wrong thing".¹
6. The Minister rightly points out that the Bill will "not stop wage theft, nor will it criminalise" it. While the measures introduced are welcome, they fall short of harnessing the full force of state government power to effect meaningful change to combat wage theft. This bill is a starting point, but it is not enough.
7. As will be explored throughout this submission, it is not reasonable to suggest that further action is unavailable to State Government, and that the bulk of measures to combat wage theft must lie with Federal Government.

¹ New South Wales, *Parliamentary Debates*, Legislative Council, 6 May 2021, 62 (Damien Tudhope, Minister for Finance and Small Business) (n 1).

Recommendations

In respect of this inquiry, Unions NSW makes the following recommendations:

- (1) State Government to increase the number of inspectors at Revenue NSW to allow for effective implementation of the proposed measures contained in the Bill.
- (2) State Government to ensure all relevant staff are educated on the proposed reforms and are trained in their enforcement and application.
- (3) State Government to consider altering discretionary provisions to create a positive legal duty to share information with other agencies on taxpayers found to have engaged in wage theft, irrespective of whether they have avoided their payroll tax liability.
- (4) State Government to introduce legislation to criminalise wage theft.
- (5) State Government to create a dedicated inspectorate or agency to investigate wage theft and provide education and training to employers, employees and the public.

Wage Theft

8. Reasons provided for Wage Theft frequently cited by employers include the complexities of the Modern Award system² and a general ignorance around obligations. This fabled ignorance has been perpetuated by former federal Workplace Minister Craig Laundy, among others, who claim educating employers is the solution and the majority of Wage Theft is not deliberate, but the unfortunate result of “genuine administration mistakes”³. Only a year ago, Federal Attorney-General Christian Porter claimed that the “vast majority” of underpayments are “not deliberate”⁴.
9. However, noting business owners manage to navigate commercial leases, complex business sale and structure contracts, means to legally reduce taxation obligations and comply with a range of schemes relating to such issues as safety and food hygiene, depending on their industry, Unions NSW considers these arguments to be nonsense. There is a plethora of resources available to employers, produced and distributed by the Fair Work Ombudsman (**Ombudsman**) and Australian Taxation Office (**ATO**) which aid employers to correctly pay workers their entitlements. In addition, many employers are members of employer peak bodies who are available to provide accurate and timely advice on employers’ responsibilities regarding their employees.
10. By contrast, those companies and employers engaging in Wage Theft practices seem to have adopted such practices as a business model⁵. The general opportunity to exploit workers in Australia, coupled with the lack of enforcement of industrial laws and/or consequences for breaking these laws, makes the undercutting of workers to save money an attractive and easy prospect.
11. In the experience of Unions NSW, Wage Theft is predominately caused by the enormous opportunity that exists for employers to take advantage of their workers in order to cut costs with very little chance of being caught. Unions NSW understands the Ombudsman has approximately 177 inspectors conducting workplace investigations under the current system of

² The AFR View ‘Award complexity is the real wage stealer’, *The Australian Financial Review* (online), 31 October 2019 <<https://www.afr.com/politics/federal/award-complexity-is-the-real-wage-stealer-20191031-p53670>>.

³ Anna Patty and Noel Towell, ‘Pressure mounts on federal Labor to pledge to criminalise wage theft’, *The Sydney Morning Herald* (online), 25 May 2018 <<https://www.smh.com.au/business/workplace/pressure-mounts-on-federal-labor-to-pledge-to-criminalise-wage-theft-20180525-p4zhjj.html>>.

⁴ Dana McCauley, ‘Employers could be forced to name and shame themselves over wage theft’, *The Sydney Morning Herald* (online), 18 February 2020 <<https://www.smh.com.au/politics/federal/employers-could-be-forced-to-name-and-shame-themselves-over-wage-theft-20200217-p541iz.html>>.

⁵ Migrant Workers Taskforce, Commonwealth of Australia, *Report of the Migrant Workers’ Taskforce* (2019) 37.

auditing⁶. This equates to roughly to one inspector for every 72,000 employed people in Australia⁷ and is blatantly not enough to competently and adequately protect the rights of workers. Presently, the chance of an employer getting caught underpaying staff is attractively low.

12. At the state level, the proposed bill makes no provision for extra Revenue NSW inspectors and officer to be able to enforce the policy and effectively combat wage theft. Unions NSW questions how, without an increase in enforcement capacity, the government will be able to ensure “the workers of New South Wales... are paid what they are entitled to”.⁸

Recommendation: State Government to increase the number of inspectors at Revenue NSW to allow for effective implementation of the proposed measures contained in the Bill.

⁶ David Marin-Guzman, ‘Employer groups should police underpayments: unions’, *The Australian Financial Review* (online), 5 March 2020 <<https://www.afr.com/work-and-careers/workplace/employer-groups-should-police-underpayments-unions-20200305-p54748>>.

⁷ Australian Government, *Industry Information* (3 February 2020) Labour Market Information Portal <<http://lmip.gov.au/default.aspx?LMIP/GainInsights/IndustryInformation>>.

⁸ n 1.

Naming Provisions

13. Amendments to disclosure provisions in s 82 to allow a tax officer to disclose information to the Fair Work Ombudsman (**FWO**) to assist in the performance of functions under the *Fair Work Act 2009* (Cth) (**FWA**), and to the Secretary of Department of Premier and Cabinet for the purposes of investigating breaches of the Long Service Leave Act 1995 (NSW) are welcome reforms.
14. However, their effectiveness will be determined by internal cultural and policy changes within Revenue NSW itself. Revenue NSW must ensure that tax officers are empowered and educated on circumstances in which disclosure is appropriate. This will ensure provisions are given life and do not remain a stale discretionary option that is rarely utilised.
15. Further, as mentioned in paragraph 10, the reforms are meaningless if the NSW Government fails to hire tax officers and revenue inspectors needed to enforce the proposed reforms.
16. In the alternative, provisions mandating disclosure would ensure that relevant information is passed on, creating a positive duty on tax officers to disclose, demonstrating that government is serious about the fight against wage theft, rather than what currently appears to be a cosmetic discretionary fix.

Recommendation: State Government to ensure all relevant staff are educated on the proposed reforms and are trained in their enforcement and application.

Recommendation: State Government to consider altering discretionary provisions to create a positive legal duty to share information with other agencies on taxpayers found to have engaged in wage theft, whether or not they have avoided their payroll tax liability.

Disclosures to FWO and Industrial Relations NSW

17. The proposed insertion of s 83A, which allows for disclosure to be made to the FWO in respect of an investigation in relation to an employer *after* the investigation has been finalised negates the potential effectiveness of the provision.
18. Further, reliance on ministerial guidelines to provide a framework for the exercise of discretion in disclosure by officers and the Chief Commissioner overlooks the need for legislated clarity on measures introduced to increase compliance with minimum wages. Already workers and their unions have little faith in the ability of government to ensure that employers comply with minimum wages and not engage in wage theft, relying on ministerial guidelines will not go far enough to alleviate these concerns and clear precise regulation should be included in the legislative framework.

Increasing Penalties

19. While Unions NSW acknowledges that the current penalties for taxation offences relevant to instances of wage theft are inadequate and the proposed penalty increases are long overdue, the government's claim that criminalisation of wage theft is not within the jurisdictional gambit of New South Wales is simply untrue.⁹
20. Queensland and Victoria have introduced state-based laws criminalising wage theft, which include jail time for the worst offences.¹⁰¹¹ Victoria has also introduced a Wage Inspectorate which will oversee wage theft investigations, promote compliance through education and has numerous other powers that aim to facilitate cooperation with other enforcement agencies including the FWO, demonstrating a genuine commitment to combatting wage theft. Unions NSW called on the NSW state government to implement similar reforms to ensure that no worker in NSW is the victim of wage theft.
21. The Minister's claims that criminalisation requires a national framework is further undermined by the abandonment of such plans by the Federal Government's industrial relations reforms despite having bipartisan support. Calls for a national framework for criminalisation and the negation of any role to be played by state government is further evidence that the intention to combat wage theft is cosmetic. Also there is considerable precedent in other areas of criminal law for the state to legislate. An extensive array of criminal laws exist at the state level with the

⁹ n 1.

¹⁰ 'Queensland criminalises wage theft', *Workplace Express*, 9 September 2020 <https://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=59330>.

¹¹ 'Victoria's new wage theft laws "a waste of money": Porter', *Workplace Express*, 17 June 2020 <https://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=59039>.

purpose of criminalising theft in other areas and there is no reason why wage theft should not also be included as one of these.

Recommendation: State Government to introduce legislation to criminalise wage theft.

Recommendation: State Government to create a dedicated inspectorate or agency to investigate wage theft and provide education and training.

Conclusion

22. Unions NSW believes that the Tax Administration Amendment (Combatting Wage Theft) Bill 2021 demonstrates an innovative approach to combatting wage theft. Employers dodging payroll tax through wage theft is indeed a serious issue that should be addressed.
23. However, the Bill falls short of harnessing the full ability of state government to effectively combat wage theft.
24. While the Bill is a starting point, if State Government is serious about wage theft it must introduce comprehensive measures, such as criminalisation, to tackle it head on rather than assigning the bulk of the responsibility to Federal Government.