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**Submission of the
Western Australian Government**

**Attorney General’s Department Discussion Paper
Improving protections of employees' wages and entitlements:
strengthening penalties for non-compliance**

**Introduction**

1. The Western Australian Government welcomes the opportunity to make a submission regarding the Commonwealth Government’s proposed introduction of criminal sanctions for the most serious forms of exploitative workplace conduct.
2. In February 2019 the Western Australian Government commissioned an Inquiry into Wage Theft in Western Australia (the Inquiry into Wage Theft) to examine whether wage theft was occurring in Western Australia, and to make recommendations for strategies to assist workers and address wage theft. The Inquiry Report was finalised in June 2019.
3. This submission highlights issues identified in the Inquiry Report which are relevant to the Commonwealth Government’s present consideration of criminal sanctions for wage theft at the national level.
4. The Western Australian Government intends to take action to combat wage theft, consistent with the recommendations of the Inquiry into Wage Theft and this submission outlines the proposed Western Australian Government reforms.
5. The Report of the Inquiry into Wage Theft in Western Australia was released by the Western Australian Government on 6 December 2019. The Inquiry Report and the proposed Government response is available at [www.dmirs.wa.gov.au/wagetheft](http://www.dmirs.wa.gov.au/wagetheft).

**Inquiry into Wage Theft in Western Australia**

1. The Inquiry into Wage Theft commenced on 18 February 2019 and was undertaken by Mr Tony Beech, former Chief Commissioner of the Western Australian Industrial Relations Commission (the Inquirer).
2. The Inquiry into Wage Theft had nine Terms of Reference and covered both the State and national industrial relations systems. The Terms of Reference for the Inquiry into Wage Theft are at Attachment A.
3. Western Australia has retained a private sector State industrial relations system that covers those businesses which operate as sole traders, unincorporated partnerships and unincorporated trusts, as well as other employers that are not financial or trading corporations.
4. The Terms of Reference for the Inquiry into Wage Theft defined wage theft as the ‘systematic and deliberate underpayment of wages and entitlements to a worker.’
5. In accordance with the Terms of Reference, the Inquiry considered whether there is evidence of wage theft occurring in Western Australia, the reasons behind it and the impact on workers, businesses and the community. The Inquiry examined whether the current regulatory framework at the State and federal level is effective in combating wage theft, whether new laws should be introduced in Western Australia to address wage theft, and if so, whether wage theft should be a criminal offence. Other strategies that could be implemented by the State Government or stakeholders were also considered.
6. The Inquiry received 78 submissions, including 47 submissions from or on behalf of individual workers. The Inquiry also conducted an online survey to enable workers to provide details of their experiences of wage theft.[[1]](#footnote-1)
7. The Inquiry into Wage Theft found that wage theft is occurring in Western Australia. The forms of systematic and deliberate underpayments identified in the Inquiry Report are:
* unpaid hours;
* non-payment of any wages or allowances for work performed;
* underpayment of wages and entitlements;
* unauthorised or unreasonable deductions; and
* non-payment of superannuation.[[2]](#footnote-2)
1. The hospitality industry, particularly cafes and restaurants, contract cleaning, retail, and horticulture are identified as areas where the likelihood of wage theft is higher.[[3]](#footnote-3) The Inquiry Report also noted that wage theft in Western Australia frequently involves permanent or temporary migrant workers*.*
2. The Inquiry Report makes clear that the impacts of wage theft are significant:

Systematic and deliberate underpayment makes it harder for workers to meet day-to-day living expenses, and can affect the individual’s health, and have consequences for the worker’s family. The unfair cost advantage achieved by underpaying businesses can undermine those businesses which are compliant, and this has consequences for the viability of the compliant business, its employees, and in a wider sense for the economy. As a community, we are the poorer because of businesses which systematically and deliberately underpay their employees.[[4]](#footnote-4)

1. The Report makes 28 recommendations to address wage theft in Western Australia. Broadly, the recommendations include strategies which aim to:
* increase awareness of employment rights and obligations in Western Australia;
* provide a pathway for employees who have been underpaid to obtain information and to seek redress; and
* provide for greater detection of underpayments and enforcement of employment laws.
1. Those aspects of the Inquiry Report that are of particular relevance to the Commonwealth Government’s present deliberations are considered below.

**The proposed addition of criminal sanctions to the current enforcement framework**

1. The Inquiry into Wage Theft examined whether the current regulatory framework at the State and federal level is effective in combating wage theft, whether new laws should be introduced in Western Australia to address wage theft, and if so, whether wage theft should be a criminal offence.
2. With regard to the criminalisation of wage theft, the Inquiry Report notes there was strong opposition to criminalising wage theft in some submissions to the Inquiry from employer groups, and that submissions from a range of unions and community organisations supported the criminalisation of wage theft.[[5]](#footnote-5)
3. In considering the possible criminalisation of wage theft, the Inquiry Report identifies two fundamental issues to be addressed, namely:
* to try and reduce or prevent systematic and deliberate underpayment of wages and entitlements from occurring; and
* to ensure that a worker receives the wages and entitlements which should have been paid to them.[[6]](#footnote-6)
1. In the Inquirer’s view, “If making wage theft a criminal offence may assist to address those issues, it deserves to be considered.”[[7]](#footnote-7)
2. While accepting that criminalisation raises some complex issues, the Inquirer observes that widespread wage theft is occurring under current laws and reasons that “arguably, those laws are not effective in deterring wage theft.”[[8]](#footnote-8)
3. The Inquiry Report notes that the evidence considered by the Inquiry demonstrates that:

… some employers do not regard the law requiring them to pay their workers the minimum wages, penalty rates and other entitlements, including superannuation contributions, as applying to them. Those employers who know the law does apply to them, but who still systematically and deliberately underpay, apparently consider the risk of being caught and brought to account is small enough to disregard the law. Yet it is deliberate law-breaking. In the cases and examples shown, the employer deliberately takes labour for which they have an obligation to pay, without paying for it in accordance with the law.[[9]](#footnote-9)

1. The Inquiry Report argues that the harmful effects of such practices are of such significance that stronger measures are required. To this end, it is observed that:

A criminal offence is more serious and weighty than a civil offence. Making the most serious systematic and deliberate underpayment of wages and entitlements a criminal offence sends a message that it is treated more seriously. I consider it can play a role in more effectively trying to reduce or prevent systematic and deliberate underpayment of wages and entitlements from occurring, which is one of the two fundamental issues I refer to above.[[10]](#footnote-10)

1. The Inquirer concluded with regard to criminalisation that “I do not accept that unintentional underpayment of wages and entitlements as such should attract a criminal sanction.”[[11]](#footnote-11) However the Inquiry Report recommends that “in principle, a criminal sanction should be considered by the State Government for the most serious cases of systematic and deliberate underpayment of wages and entitlements in Western Australia.” [[12]](#footnote-12) Recommendation 21 of the Inquiry Report states:

I recommend that in principle, a criminal sanction should be considered by the State Government for the most serious cases of systematic and deliberate underpayment of wages and entitlements in Western Australia.

The State Government’s consideration should include:

* the commitment of the Commonwealth Government to consider the circumstances and vehicle in which criminal penalties will be applied for the most serious forms of deliberate exploitation of workers;
* the constitutional issues arising from the application of a State law criminalising the most serious cases of systematic and deliberate underpayment of wages and entitlements in Western Australia to employment covered by the Commonwealth *Fair Work Act 2009*;
* the desirability of an employee being able to pursue, in a timely manner, a civil claim of underpayment of wages and entitlements without it being delayed by a criminal proceeding; and
* the need to devote sufficient funding and resources to receive and investigate complaints, and adequately and properly enforce the proposed law.[[13]](#footnote-13)

**Possible impact on civil proceedings**

1. The recommendation of the Inquiry into Wage Theft that the Western Australian Government consider criminal sanctions for wage theft expressly states that this consideration should include “the desirability of an employee being able to pursue, in a timely manner, a civil claim of underpayment of wages and entitlements without it being delayed by a criminal proceeding.”[[14]](#footnote-14)
2. The Inquiry Report details the Inquirer’s concerns that recovery of wages and entitlements could be delayed if a civil case to recover an underpayment was adjourned pending the outcome of any associated criminal proceedings. The Inquirer notes that:

Criminal offences are required to be proved beyond reasonable doubt, which is a higher standard of proof than in a civil case where the standard is proof on the balance of probabilities. The time and resources needed to bring a criminal case can be more onerous than in a civil case, and the hearing of the criminal case may mean a considerable delay to the civil case. An underpaid employee may wait for some time, perhaps measured in years rather than months, before being able to pursue their lawful wages and entitlements.[[15]](#footnote-15)

1. The Inquirer notes that such delays have been observed in the United Kingdom and emphasises:

This is a significant issue given the submissions to the Inquiry, which I accept, that most underpaid workers want simply to have the underpayment rectified, and that punishing the employer is not the worker’s objective.[[16]](#footnote-16)

**Enforcement considerations**

1. The recommendation of the Inquiry into Wage Theft regarding criminal sanctions for wage theft in Western Australia explicitly refers to “the need to devote sufficient funding and resources to receive and investigate complaints, and adequately and properly enforce the proposed law.”[[17]](#footnote-17)
2. The importance of adequate resourcing for education and enforcement is a major theme of the Inquiry into Wage Theft. Noting that employee underpayments can occur for a variety of reasons, the Inquiry Report states:

Except in a case of serious systematic and deliberate underpayment of wages and entitlements, the significant resources which would be required to successfully prosecute a criminal charge would, in my view, be better devoted to making the current civil framework operate more effectively.[[18]](#footnote-18)

1. Elsewhere in the Inquiry Report, the Inquirer concludes that “one of the reasons, perhaps the most significant single reason, why wage theft is occurring is the lack of detection of non-compliance and of enforcement”[[19]](#footnote-19) and describes Industrial Inspectors as “the single most important factor in the effective regulatory response to wage theft.”[[20]](#footnote-20) In the view of the Inquirer, “a visit from an Industrial Inspector or a Fair Work Inspector is the only current practical means for detecting [wage theft]”.[[21]](#footnote-21)
2. The Inquiry Report notes that one common theme among submissions to the Inquiry into Wage Theft from both employer and employee organisations was that the Fair Work Ombudsman (FWO) should be given increased funding and resources for its work in Western Australia.[[22]](#footnote-22) The Inquirer expresses agreement with those submissions. The Inquirer states:

In my opinion, a visit from a Fair Work Inspector is one of the most effective ways to counter wage theft; it is entirely consistent with my opinion that the number of Fair Work Inspectors in WA should be increased … This does not reflect upon the work the FWO already undertakes in WA; it recognises the size of the State and the inherent difficulties in having inspectors visit businesses throughout the State.[[23]](#footnote-23)

1. Recommendation 26(1) of the Inquiry into Wage Theft is that the Western Australian Government recommend to the Commonwealth Government that “there be greater funding for the Fair Work Ombudsman’s presence in Western Australia.”[[24]](#footnote-24)
2. The Western Australian Government supports the view of the Inquiry into Wage Theft with regard to the importance of FWO Inspectors in detecting wage theft. The Western Australia Government is concerned about the limited number of FWO Inspectors operational in the field in Western Australia.
3. At the April 2019 Senate Estimates hearing, FWO officials indicated that there were only 12 designated FWO Inspectors in Western Australia, and that this includes the staff of the dispute resolution and early intervention team based in Perth.[[25]](#footnote-25)
4. A substantial increase in the number of FWO Inspectors available to undertake pro‑active inspections of workplaces in industries where wage theft is likely to be prevalent, and to take enforcement action in response to employee complaints, is considered by the Western Australian Government as essential to improve detection and enforcement of wage theft in Western Australia.

**Proposed response to the Inquiry into Wage Theft recommendations**

1. The Western Australian Government intends to take action to combat wage theft through a range of strategies consistent with the recommendations of the Inquiry into Wage Theft.
2. Proposed reforms include:
* Giving further and immediate consideration to whether wage theft should be criminalised in Western Australia, which will include ongoing consultation with the Commonwealth Government.
* Establishing a wage theft website at [www.wagetheft.wa.gov.au](http://www.wagetheft.wa.gov.au) which provides information for Western Australian workers on how to seek assistance with resolving an underpayment issue or report wage theft anonymously.
* Supporting legislative change to enhance the level of cooperation and information sharing between the Department of Mines, Industry Regulation and Safety (DMIRS) and the Fair Work Ombudsman.
* Seeking to engage with the Commonwealth Government on a range of issues to address wage theft, including federal measures to facilitate cooperation between State and federal industrial inspectors and greater funding for the Fair Work Ombudsman’s presence in Western Australia.
* Committing in principle to a labour hire licensing scheme in Western Australia and consulting with the Commonwealth Government on its proposed national labour hire scheme.
* Supporting amendments to State industrial laws which include providing broader powers for industrial inspectors and prohibiting:
	+ - employers unreasonably requiring employees to spend, or “pay back” to the employer, their wages
		- employers discriminating against employees because they have inquired or complained about their employment conditions
		- employment being advertised at less than the applicable minimum wage for the position
		- sham contracting arrangements
* Commitment to bolstering the Industrial Magistrates Court’s processes and powers to combat wage theft and seeking funding from the Commonwealth for the Industrial Magistrates Court, as most matters dealt with by the Industrial Magistrates Court arise from the national system and the Commonwealth does not currently contribute to its funding.
* Commitment in principle to strengthening procurement processes, particularly in high risk industries such as cleaning and security.
* Recognising the need for an appropriate number of industrial inspectors and an expansion of State compliance and education services and supporting the need to develop effective information and education initiatives to combat wage theft.

**Conclusion**

1. The Western Australian Government is committed to a fair safety net of wages and entitlements for all workers and, as the national industrial relations system covers the majority of private sector workers in Western Australia, strongly supports the Commonwealth Government taking clear action on the critical issue the wage theft.
2. The Western Australian Government thanks the Commonwealth for the opportunity to provide input into the development of its proposals to improve protections of employees’ wages and entitlements in the national industrial relations system.



**Inquiry into Wage Theft in Western Australia
Terms of Reference**

The Western Australian Government is committed to ensuring there is a fair safety net of wages and entitlements for all workers and workers are not denied their legal pay and entitlements through employers engaging in wage theft. Wage theft is the systematic and deliberate underpayment of wages and entitlements to a worker.

The Inquiry into Wage Theft in Western Australia is to consider and make recommendations to Government on the following terms of reference:

1. Whether there is evidence of wage theft occurring in Western Australia, and the various forms wage theft may take.
2. What are the reasons wage theft is occurring, including whether it has become the business model for some organisations.
3. What is the impact of wage theft on workers, businesses which are compliant with employment laws, and the Western Australian community and economy.
4. Whether wage theft is more prevalent in particular industries, occupations, forms of employment/engagement or parts of the State.
5. Whether the current State and federal regulatory framework for dealing with wage theft is effective in combating wage theft and supporting affected workers.
6. Whether new laws should be introduced in Western Australia to address wage theft, and if so, whether wage theft should be a criminal offence.
7. Whether there are other strategies that could be implemented by the Western Australian Government, or industry stakeholders to combat wage theft.
8. Whether there are strategies and legislative change the Western Australian Government could recommend to the Federal Government to deal with wage theft in the federal jurisdiction.
9. Other matters incidental or relevant to the Inquirer’s consideration of the preceding terms of reference.
1. The non-confidential submissions to the Inquiry are available at: [www.dmirs.wa.gov.au/wagetheftinquiry](http://www.dmirs.wa.gov.au/wagetheftinquiry) [↑](#footnote-ref-1)
2. Report of the Inquiry into Wage Theft in Western Australia, p.7. [↑](#footnote-ref-2)
3. Ibid, p.7. [↑](#footnote-ref-3)
4. Ibid, p.7. [↑](#footnote-ref-4)
5. Ibid, pp.144-45. [↑](#footnote-ref-5)
6. Ibid, p.143. [↑](#footnote-ref-6)
7. Ibid, p.143. [↑](#footnote-ref-7)
8. Ibid, p.147. [↑](#footnote-ref-8)
9. Ibid, p.148. [↑](#footnote-ref-9)
10. Ibid, p.149. [↑](#footnote-ref-10)
11. Ibid, p.12. [↑](#footnote-ref-11)
12. Ibid, p.150. [↑](#footnote-ref-12)
13. Ibid, p.150. [↑](#footnote-ref-13)
14. Ibid, Recommendation 21, p.150. [↑](#footnote-ref-14)
15. Ibid, p.145. [↑](#footnote-ref-15)
16. Ibid, p.146. [↑](#footnote-ref-16)
17. Ibid, Recommendation 21, p.150. [↑](#footnote-ref-17)
18. Ibid, p.149. [↑](#footnote-ref-18)
19. Ibid, p.69. [↑](#footnote-ref-19)
20. Ibid, p.114. [↑](#footnote-ref-20)
21. Ibid, p.69. [↑](#footnote-ref-21)
22. Ibid, p.119. [↑](#footnote-ref-22)
23. Ibid, p.164. [↑](#footnote-ref-23)
24. Ibid, Recommendation 26(1), p.167. [↑](#footnote-ref-24)
25. Senate Education and Employment Legislation Committee Estimates 10 April 2019, pp.94-95. [↑](#footnote-ref-25)