



Restaurant
& Catering

29 July 2020

By E-mail: eesbc@parliament.qld.gov.au

Dear Sir/Madam,

RE: RESPONSE TO DISCUSSION PAPER TITLED ‘CRIMINAL CODE AND OTHER LEGISLATION (WAGE THEFT) AMENDMENT BILL 2020

We refer to the above Discussion Paper (the “**Paper**”) issued by the Education, Employment and Small Business Committee of the Queensland Government (the “**Government**”). The Government has invited feedback on the recommendations raised in the Paper by Thursday, 30 July 2020.

Restaurant & Catering Australia (“**R&CA**”) is pleased to provide a submission in this matter. R&CA is the national industry association representing the interests of more than 47,000 restaurants, cafés and catering businesses across Australia. The café, restaurant and catering sector is vitally important to the national economy, generating over \$37 billion in retail turnover each year as well as employing 450,000 people. Over 92 per cent of businesses in the café, restaurant and catering sector are small businesses, employing 19 people or less.

R&CA delivers tangible outcomes to small businesses within the hospitality industry by influencing the policy decisions and regulations that impact the sector’s operating environment. R&CA is committed to ensuring the industry is recognised as one of

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excellence, professionalism, profitability and sustainability. This includes advocating the broader social and economic contribution of the sector to industry and government stakeholders, as well as highlighting the value of the restaurant experience to the public.

The R&CA has reviewed the Paper issued by the Government and opposes the recommendations for the following reasons.

Criminalisation of 'Wage Theft'

The R&CA does not support or condone the conduct of employers who deliberately and intentionally underpay their employees. However, creating further offences is unnecessary and would add greater complexity to the already complex industrial relations system. At present, the criminalisation of wage theft has already been included in legislation at both the federal and state levels (see: *Crimes Act 1958* (Vic) s 74; *Crimes Act 1900* (NSW) s 125; *Criminal Code 1995* (Cth) s 12.2). These provisions provide clear, systematic and deliberate examples of 'wage theft' which, in the R&CA's view, should, of course, be prosecuted.

Broadly speaking, introducing criminality into the industrial relations system should be approached with caution, if it is to be approached at all. The introduction of wage theft offences into the Criminal Code supports the notion that *all* wage theft is criminal, regardless of intention, while failing to consider other systemic factors contributing to unintentional underpayments, such as the complexities in the Award system. For instance, the *Restaurant Industry Award 2020* does not specify a minimum spread of hours for a 'split shift' despite stating a maximum spread of hours. Further, the *Hospitality Industry (General) Award 2020* has approximately 600 different rates of pay. More often than not, the Award system is so complex enough that a small business operator, or a high school student, require the training of a legal practitioner, or be in a position to afford one, in order to interpret the Award. This is particularly problematic for small business operators who are Award-reliant.

On the other hand, if employers are to be investigated and prosecuted for underpayment claims, then so should employees who deliberately and intentionally defraud employers by taking falsified sick leave claims together with overpayment claims. The Australian Payroll Association recently reported that 27 out of 39 audits on clients' pay processes in the last 18 months had uncovered overpayments, with some errors estimated to cost employers millions of dollars. To further aggravate this issue, it has been approximated that only 52 percent of employees in Australia were genuinely ill when taking a legitimate sick day. Again, while noting that the R&CA does not condone or support intentional and deliberate instances of underpayment of wages, the R&CA submits that employees who knowingly receive an overpayment as a result of an oversight and/or an administrative error, and the employee does not make a disclosure, that employee should also be criminalised and prosecuted.

The Fair Work Ombudsman as the Enforcement Regulator

The Fair Work Ombudsman (the “**FWO**”) remains the “single point of contact for reliable and timely information about Australia’s workplace relations system.” The FWO has already in place inspectors who are “empowered to investigate and enforce compliance with Australia’s workplace laws and industrial instruments” and include the performance of the following duties:

1. “Assessing complaints or suspected breaches of workplaces laws, awards and registered agreements and some Fair Work Commission orders;” and
2. “Litigating, in some circumstances, to enforce workplace laws and deter people from doing wrong in the community.”

Introducing and extending not one, but potentially three state regulatory authorities (i.e., an industrial division within the Queensland Magistrates Court, the Queensland Industrial Relations Commission or Industrial Court), would not only create greater confusion for many small business employers (as well as individual employees) as to jurisdiction, but add further complexity to an already complex industrial relations system. So much is true as reflected in the recent Fair Work Commission decision of *Shalini Mahendran v Not for Profit Organisation*

Social Housing – Community and Justice [2020] FWC 3522 (3 July 2020). Here, a state government employee had incorrectly filed an unfair dismissal application, convinced that the federal tribunal was the correct jurisdiction in which to contest her dismissal.

For the abovementioned reasons that the R&CA opposes the *Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020*. We thank the Government for considering our submission. If you wish to discuss R&CA's views further, do not hesitate to contact Victor Song (Senior Adviser – Industrial Relations and Policy) by email on victors@restaurantcater.asn.au

We thank you again for the opportunity to make this submission.

Regards

A handwritten signature in black ink, appearing to be 'Wes Lambert', written in a cursive style.

Wes Lambert CPA FGIA MAICD
Chief Executive Officer
Restaurant and Catering Australia