



Restaurant  
& Catering

4 March 2020

By Upload: <https://engage.vic.gov.au/wage-theft>

Dear Sir/Madam,

**RESPONSE TO CONSULTATION PAPER TITLED 'WAGE THEFT BILL 2020, VICTORIAN GOVERNMENT, RELEASED FEBRYARY 2020'**

We refer to the above Consultation Paper (the "**Paper**") issued by the Victorian State Government (the "**Government**"). The Department has invited feedback on the proposals raised in the Consultation Paper by Monday, 9 March 2020.

Restaurant & Catering Australia (the "**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 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.

**RESTAURANT & CATERING INDUSTRY ASSOCIATION**

PO Box 121, SURRY HILLS NSW 2010 T: 1300 722 878 F: 1300 722 396 E: [info@restaurantcater.asn.au](mailto:info@restaurantcater.asn.au)  
[www.rca.asn.au](http://www.rca.asn.au)

The R&CA has reviewed the Paper issued by the Government and opposes the proposals 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 be prosecuted.

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.”

As such, it is the R&CA’s view that it is not necessary to establish a separate state body to investigate and prosecute ‘wage theft’ offences. Rather, it is more appropriate, if it is even deemed to be necessary, to extend the powers already provided for by the FWO and continue to develop its current referral arrangement in place with the Australian Federal Police. Introducing a separate state regulatory authority would result only in creating greater confusion for many small business employers (as well as individual employees) and add further complexity to an already complex industrial relations system.

Broadly speaking, introducing criminality into the industrial relations system should be approached with caution, if it is to be approached at all. If employers can 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 Powers of the Inspectorate**

The Paper notes that the powers of the Inspectorate are to include (and are not limited to):

1. "All functions and powers of a wage theft inspector;
2. The power to bring criminal proceedings; and
3. "The power to do **all things necessary or convenient to be done for** or in connection with the performance of its functions, achieving objections, etc." (Emphasis added).

While the R&CA recognises the powers afforded to the Inspectorate are indeed important and necessary, the wide jurisdiction afforded to the Inspectorate should be approached with caution.

The implications of wide discretion to be afforded to Wage Theft Inspectors are best observed by the important findings outlined in the Independent Commission Against Corruption SA's report titled '*Evaluation of the Practices, Policies and Procedures of the Regulatory Arm of SafeWork SA.*' Here, the Commissioner identified that some SafeWork Inspectors avoided issuing statutory notices for workplaces where the outcome could have been achieved by other means. Further, it was noted that there was an "increased risk in respect of conflicts of interest for inspectors" and had the capacity to be influenced, coerced and bribed. As such, the R&CA submits that it is important that the legislation adequately define and provide for an exhaustive list of powers and responsibilities of Wage Theft Inspectors to address potential concerns of Inspector discretion.

## **The Issue of Complicity**

The R&CA notes that the ‘theft of employee entitlements’ offence, as it currently stands, has the capacity to incriminate both the employer and any of its officers. The Paper provides an instance where a payroll officer could be liable even if he/she were acting under the implicit or explicit direction of the company. It is the R&CA’s position that this would strengthen the notion of criminality in the area of industrial relations and therefore would create further areas of concern. For instance, a company director may shift the blame to the payroll officer in an effort to evade liability. If this change were to occur, this would be inconsistent with the current precedent relating to a company director’s duty to exercise a reasonable degree of care and diligence in the context of financial records. As Middleton J observed in *Australian Securities and Investments Commission v Healey* [2011] FCA 717 (“**ASIC v Healey**”) at [166] – [167]:

*“[166] Directors are required to take reasonable steps to place themselves in a position to guide and monitor the management of the company. A director must become familiar with the fundamentals of the business in which the corporation is engaged; a director is under a continuing obligation to keep informed about the activities of the corporation; directorial management requires a general monitoring of corporate affairs and policies, and a director should maintain familiarity with the financial position of the corporation.*

*[167] While directors are required to take reasonable steps to place themselves in a position to guide and monitor the management of the company, they are entitled to rely upon others, at least except where they know, or by the exercise of ordinary care should know, facts that would deny reliance.”*

In these circumstances, it is the R&CA’s submission that the manner in which the proposed provisions would operate is inconsistent with the current case law to the extent that they apply to director responsibilities. While *ASIC v Healey* relates specifically to director’s duties in the context of approving company financials, it is the R&CA’s submission that introducing the ‘theft of employee entitlements’ offence would create a ‘loophole’ for company directors to shift responsibility to other officers within the organisation in order to evade liability.

For the abovementioned reasons that the R&CA opposes the *Wage Theft Bill 2020* (Vic).

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](mailto: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