

Consultation Paper

Wage Theft Bill 2020

Victorian Government

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Ministers' message

“When it comes to really deliberate wage theft, most employers know that the Fair Work Ombudsman only takes a small number of cases – and will therefore take the risk that the FWO won't follow up. Employers know that if they don't have the records, the FWO will not have the required evidence.”

- Melbourne Wage Theft Forum Attendee

In recent months, we've seen story after story of Australian workers being ripped off. And as the words above illustrate, a system that far too often fails to respond.

It's why, in May 2018, the Andrews Labor Government committed to introducing new laws to make wage theft a crime.

This consultation paper represents the next step in that reform, detailing the scope and breadth of our proposed legislation.

These new laws – to be introduced shortly and the first of their kind in the nation – will ensure employers who deliberately and dishonestly withhold wages, or other employee entitlements, face the consequences.

These laws are not aimed at administrative errors and genuine mistakes. They are aimed at criminalising behaviour that is dishonest and intended to deprive people of their entitlements.

Importantly, these laws will also apply to bosses who attempt to deny workers their wages by falsifying employment records or by failing to keep employment records at all.

For individuals and corporate decision makers who commit these offences, it means fines of up to \$198,264 and up to 10 years in jail.

And reflecting the seriousness – and pervasiveness – of this crime, companies will also face fines of up to \$991,320.

To ensure these new laws are effectively enforced, offences will be investigated and prosecuted by Wage Inspectorate Victoria, with a dedicated criminal law enforcement arm.

As a Government, we're also committed to improving the process for employees to recover the money they are owed by their employers through the courts.

For civil claims of up to \$50,000, court filing fees will be lowered, court processes will be simplified, and claims will be heard even sooner.

In developing these laws, we have heard from employer representatives, unions and victims of wage theft.

In each and every instance, the importance of these reforms has been reaffirmed:

Not only ensuring those who steal from their workers face the consequences – but ensuring workers are afforded that most fundamental right: a fair day's wage for a fair day's work.

The Hon. Jill Hennessy MP
Attorney-General
Minister for Workplace Safety

Tim Pallas MP
Treasurer
Minister for Industrial Relations
Minister for Economic Development

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Wage Theft Bill 2020

The Government intends to introduce laws into the Victorian Parliament to criminalise wage theft in Victoria. This public consultation paper provides an overview of the proposed design of the offence and enforcement regime.

Work is also underway to deliver on the commitment to make it faster, cheaper and easier for workers to get money they are owed by their employer through the courts. Further information will be made available in the future regarding the implementation of this commitment.

Feedback on these proposals is invited by Monday 9 March 2020.

Purpose

The Government intends that the purpose of the Bill will be to create three wage theft offences and establish the Wage Inspectorate Victoria.

Scope

Retrospectivity

The wage theft offences will not apply retrospectively.

Employment

The Government intends that offences will only apply to an employment relationship. 'Employment' will not be defined so that the common law approach applies, whereby the courts consider each case against a list of factors indicative of an employment relationship.¹

This approach will ensure that the new offence will capture a broader range of cases including those involving sham contracting and employment relationships disguised as internships or vocational training.

Liability

The Government intends that offences will apply to all organisations that have capacity to employ including government departments, corporations, partnerships and unincorporated associations.

Corporate liability

The Government intends that the Bill will pierce the corporate veil using an attribution model of liability and will permit the conduct engaged in by an officer or the directors of a body corporate to be attributed to the body corporate where it is appropriate to do so.

'Officers' will be defined similarly to the *Corporations Act 2001* (Cth) definition, to enable prosecution of directors and secretaries of companies. This will also enable prosecution of persons who make decisions affecting the whole or a substantial part of the business and/or a corporation's financial standing.

The Bill will stipulate that the conduct of an associate or agent of the employer can be attributed to an 'officer', director or employer when the conduct of that associate or agent is explicitly or implicitly authorised and within the actual or apparent scope of their employment.

¹ *Hollis v Vabu Pty Ltd* 207 CLR 21

The Bill will provide that implicit authorisation can be established by the existence of a corporate culture within the body corporate that directs, encourages, tolerates or leads to the relevant conduct being carried on.

If the body corporate is liable, criminal liability may also be attributed to corporate decision makers unless the officer is able to demonstrate that they took reasonable precautions and exercised due diligence to prevent the conduct.

This attribution model and the consideration of a corporate culture will serve as a significant deterrent and is anticipated to lead to behavioural change.

Complicity

The Government intends that *Part II, Division 1, (1)* of the *Crimes Act 1958* (Vic) will apply to the wage theft offences.

This will enable prosecution of third parties that are complicit in the offending including third parties who ‘intentionally assist’ in the offending. This may include:

- head franchisors who ‘encourage’ franchisees to engage in wage theft to assist their business viability; and
- businesses involved in supply chain contracting, who intentionally contract at a price for services that they know will involve the commission of the wage theft offence.

The Bill will exclude persons who are not officers acting under the direction of an employer from being captured by the complicity provisions.

Jurisdiction

The Government intends that the Bill will provide that the offences apply to employers regardless of whether the services are performed in more than one Australian jurisdiction or partly outside Australia.

The nexus between Victoria and the services performed will enable this when:

- the employee or employer is based in Victoria; or
- the entitlements are paid or attributable within Victoria; or
- the services are mainly performed in Victoria.

Key Concepts

The offences will be crafted to ensure those who dishonestly engage in underpayment of employee entitlements and authorise such conduct will be held responsible.

The Government intends that the offences will not be strict liability offences. Rather, the offences will be directed at addressing criminal conduct and will therefore require that the specified mental element and conduct be proven beyond reasonable doubt.

The Bill will create new specialised definitions that will enable the particulars of this kind of offending to be captured by the criminal law when an employer is acting dishonestly.

Dishonesty

Each offence will require consideration of whether the accused acted ‘dishonestly’. A new and distinct definition of ‘dishonesty’ will be a central feature of the Bill.

This specialised term will depart from the common law meaning of ‘dishonesty’ as is typically applied to the general theft offence in Victoria.² The general approach to theft requires consideration of whether the accused acted without a belief in a legal right to obtain the property acquired. The dishonesty of the accused is determined by **subjective** consideration of their state of mind. More specifically, the court will consider whether the accused believed that they had a legal right to take the property and deprive the other person of it.

The existing formulation is insufficient for determining culpability for wage theft as it does not allow proper consideration of the surrounding circumstances, including whether the belief of the accused was reasonable or an expression of wilful blindness.

‘Dishonesty’ for the purposes of the new wage theft offence will mean dishonest to the standards of a reasonable person.

An employee’s consent to the withholding of an entitlement will be irrelevant to determining the accused’s dishonesty.

This new definition will therefore import an **objective** standard tailored to the very specific conduct the wage theft laws intend to deter.

Specifically, these laws will not tolerate widespread and disingenuous claims that the deliberate withholding of entitlements amounted to a “mere mistake” where there is substantial evidence indicating that the employer in question did know—or should have known—what the correct legal entitlements payable were.

Entitlements

‘Employee entitlement’ will be specially defined to include any amount payable by an employer to an employee in accordance with the relevant laws, contracts or agreements.

This may include wages, allowances, gratuities, superannuation and other accruals such as leave.

Employee entitlement record

The Wage Theft Bill 2020 will contain two record keeping offences that recognise the fact that wage theft is both concealed and propagated by fraudulent record keeping.

In concert with the definition of ‘entitlement’ an ‘employee entitlement record’ will include any record of an employee entitlement required to be kept at law.

The offences

Theft of employee entitlements

The Government intends that the new ‘theft of employee entitlements’ offence is the primary offence. It will criminalise the conduct of an employer who ‘dishonestly’ withholds entitlements, such as wages, from an employee.

The offence is not intended to capture employers that make genuine mistakes. However, it will capture those that fail to undertake reasonable action when they suspect or are alerted to a mistake in respect of the payment or attribution of employee entitlements.

² *Crimes Act 1958* (Vic), section 72

Importantly, the offence will stipulate a conduct element that can be attributed to employers and officers. For example, where a payroll officer is acting under the implicit or explicit direction of the company, their conduct can be attributed to the company for the purposes of the offence.

Penalty: Individuals who commit this offence will face fines of up to \$198,264 and up to 10 years in jail. Companies will face fines of up to \$991,320.

Falsification of an employee record

It is common for employers engaging in wage theft to falsify employee entitlement records as a means of either carrying out their wage theft or covering up their wage theft.

The Government intends that the falsification offence will include producing, making or copying a record that is misleading, false or deceptive. It will also include the alteration of a record or the provision of information that causes the record to be misleading or false. The prosecution will be required to prove the falsification was done dishonestly with a view to obtaining a financial advantage or preventing a financial advantage from being exposed.

The definition of falsify will not capture people who accidentally mis-record details and rectify payroll errors in an appropriate and honest manner.

Penalty: Individuals who commit this offence will face fines of up to \$198,264 and up to 10 years in jail. Companies will face fines of up to \$991,320.

Failure to keep employee entitlements offence

The ‘failure to keep an employee entitlement record’ offence will hold employers who dishonestly fail to keep employment records criminally liable if their failure is accompanied by an intention to gain a financial advantage or prevent a financial advantage from being exposed.

This offence will cover circumstances where partial records are kept if this has been done with the intention to gain a financial advantage or prevent exposure.

The offence will be drafted to ensure that where the failure to keep an employee entitlement record is either expressly or implicitly authorised, the conduct can be attributed to the relevant body corporate, director(s) and ‘officer(s)’.

The offence will stipulate that the existence of a corporate culture that directs, encourages or tolerates the relevant conduct will amount to implicit authorisation attributable to the relevant body corporate, director(s) or ‘officer(s)’.

This construction of the offence recognises that an employer’s failure to keep a record may not be to gain a direct financial advantage, but to obscure a financial advantage being gained by another person.

The offence will not capture employers who fail to keep a record because of an oversight.

Penalty: Individuals who commit this offence will face fines of up to \$198,264 and up to 10 years in jail. Companies will face fines of up to \$991,320.

Defences

The offences will not capture employers who have done their best to comply with the law. The Government intends to be very clear that these employers will not be punished for unwitting errors. As such, a due diligence defence and, in circumstances where the officer may not have been directly involved in the offence, a reasonable measures defence, will be included in the Bill.

The due diligence defence will apply to the theft of employee entitlements offence and extend to ‘officers’, directors, corporations, partnerships and unincorporated associations.

The defence will specify that where the employer has undertaken all reasonable steps to pay or attribute employee entitlements within a reasonable time the offence will not be made out. Employers must demonstrate proper business practices and attempts to comply with the law. What is ‘reasonable’ for a company will depend on the circumstances and evidence in each investigation.

The Bill will stipulate the employer bears the legal burden of proving the defence on the balance of probabilities.

Enforcement

The Government intends to establish Wage Inspectorate Victoria (the Inspectorate) under the proposed Bill with responsibility for investigating and prosecuting the new wage theft offences. The Inspectorate will be established as a statutory body corporate and defined as a public entity for the purposes of the *Public Administration Act 2004*.

Governance

The Inspectorate will be provided with powers and functions related to the enforcement and prosecution of the offences created by the Wage Theft Bill 2020, as well as information and evidence gathering powers necessary to support the investigation of potential offences.

Commissioner and staff of the Wage Inspectorate Victoria

The Government intends for there to be a Commissioner of the Inspectorate appointed by the Governor in Council on the recommendation of the Minister for Industrial Relations. All functions and powers of the Inspectorate will be vested in the Commissioner, as well as the ordinary powers, duties, responsibilities and day to day management and governance functions. These functions and powers are set out in detail later in this Paper. The Commissioner will be responsible for undertaking the strategic leadership of the Inspectorate for the purpose of achieving the objects of the Wage Theft Act. The Commissioner will act fairly, impartially, independently and act in the public interest.

The Government intends that the Inspectorate will also incorporate current functions and powers with respect to the *Child Employment Act 2003*, the *Long Service Leave Act 2018* and the *Owner Drivers and Forestry Contractors Act 2005*.

The role of the Minister for Industrial Relations

The Government intends to provide the Minister for Industrial Relations with the authority to give written directions (of a general nature only) to the Commissioner about the performance of their functions.

Investigative and prosecutorial functions of the Inspectorate will be independent and not subject to Ministerial direction or control.

Confidentiality and disclosure obligations of Commissioner, staff and inspectors

The Government intends to provide confidentiality provisions and restrictions on the disclosure of information obtained in the course of administering the Act.

Enforcement Model

The Government intends that the enforcement model will include the necessary powers to enable the Inspectorate to inquire into and investigate wage theft offences, including the power to bring criminal proceedings.

The Inspectorate may also have functions to provide information and assistance to persons seeking to recover unpaid entitlements through new streamlined court processes.

Appointment of wage theft inspectors

The Government intends to provide for the appointment of wage theft inspectors with investigative power conferred upon them within the Wage Theft Act.

Wage theft inspectors will also become ‘investigating officials’ under Part III of the *Crimes Act 1958* by virtue of their investigative role, although it is not intended to rely on these powers to investigate and enforce wage theft offences.

Powers of the Inspectorate

The Government intends that the Commissioner will be the head of the Inspectorate. It is intended that the Inspectorate have the following powers:

- all functions and powers of a wage theft inspector, including but not limited to:
 - the power to enter premises (including with a warrant)
 - the power to obtain information and documents
 - the power to seize evidence
 - the power to bring criminal proceedings
- the power to apply for and execute search warrants
- the power to enter into agreements and contracts
- the power to accept undertakings, and enforce against any undertaking which may have been breached
- the power to recover costs (and pay any costs in the event that they are awarded against the Inspectorate); and
- the power to do all things necessary or convenient to be done for or in connection with the performance of its functions, achieving objectives, etc.

Inspector powers

The Government intends to provide that the purposes for which powers of inspectors may be exercised include inquiring into or investigating an alleged wage theft offence or verifying information received in relation to a wage theft complaint.

It is intended that inspectors will have the power to compulsorily examine on oath, with appropriate safeguards and protections for individuals.

Power to enter premises

The Government intends to provide inspectors with a power to enter premises, at a reasonable time, for the purpose of inquiring into an alleged wage theft offence. Inspectors must hold a reasonable belief that there are documents, persons or other things at the premises that are relevant to the suspected offence in order to exercise this power and may enter either by consent or through the service of a written notice.

It is intended to be an offence to fail to comply with the entry notice without a reasonable excuse and a statement to this effect must be provided as part of the notice.

The Government intends that an inspector who exercises a power of entry has the following powers:

- conduct inquiries into suspected or alleged wage theft offences;
- inspect or examine anything (including a document) at the premises;

- seize anything (including a document) at the premises that may afford evidence of the commission of an offence against the Act if the inspector reasonably suspects that the document or thing may be concealed or destroyed, or its forensic value diminished if not seized;
- inspect, and make copies of or take extracts from, any document produced;
- take photographs and document observations; and
- exercise any other power conferred on the inspector by the Act.

Power to require production of documents and answer questions

The Government intends to provide a power for an inspector who enters premises to require production of documents or part of a document, examine that document or part, and require a person at the place to answer any questions put by the inspector.

It is intended to be an offence for a person to, without reasonable excuse, refuse or fail to comply with this requirement.

Search warrants

The Government intends to provide inspectors with the power to apply for and obtain a search warrant in order to seize evidence in circumstances where the evidence is unable to be obtained using ordinary investigative powers. It is intended that the rules that apply for search warrants in the *Magistrates Court Act 1989* apply to search warrants under the Wage Theft Act and that search warrants be issued in accordance with the Magistrates Court Act and in the prescribed form under that Act.

Power to obtain information, documents or attendance

The Government intends that the Inspectorate be provided with a general power to obtain information or evidence for the purpose of ascertaining whether an offence has been committed or investigating a suspected contravention. This power can be exercised by serving a written notice requiring the recipient to:

- provide the Inspectorate any relevant information before a specified time and in a specified manner;
- produce to the Inspectorate any relevant document or thing in the person's possession, custody or control a specified time and in a specified manner; and
- attend and give evidence or answer any relevant questions on oath or affirmation before the Inspectorate at a specified time.

It is intended that the power to compel attendance and compulsorily answer questions only be used if the Inspectorate is unable to obtain the information by consent or through the exercise of other powers.

It will be an offence for a person who is given a written notice requiring attendance, without reasonable excuse, to refuse or fail to:

- (a) take an oath or make an affirmation when required to do so; or
- (b) answer a question that the person is required to answer by the Inspectorate.

The penalty for this offence is intended to be 240 penalty units or imprisonment for 2 years.

Power to accept undertakings

The Government intends that the Inspectorate will have the power to accept undertakings from an employer in relation to an alleged contravention of a relevant offence. The primary purpose of

the undertakings is to prevent future contraventions of the relevant offence. The undertakings will not be used to recover employee entitlements or seek similar remedies.

It is intended to be an offence to fail to comply with an undertaking and the Inspectorate can apply to the Magistrates' Court for an order enforcing the undertaking.

Criminal prosecution of the wage theft offences

The Government intends that the Inspectorate will be responsible for bringing criminal proceedings for the new wage theft offences. The decision to bring criminal proceedings will lie with the Commissioner following an assessment of the evidence and a determination that there is a reasonable prospect of conviction and it is in the public interest.

Criminal offences relevant to the exercise of the Inspectorate's powers

It is intended that when exercising powers or imposing a requirement upon a person, the inspector must show their identity card to the person and advise the person of their obligation to comply with the requirement, and that failure to do so will be an offence.

To the extent considered necessary to ensure that the inspectors exercise their powers and perform their functions in accordance with the Act, the Government intends to include the following relevant offences:

- intentionally hindering or obstructing an inspector in exercising his or her powers or inducing or attempting to induce any other person to do so
- intentionally hindering or obstructing a person assisting an inspector
- impersonating an inspector
- assaulting, threatening or intimidating an inspector or attempting to assault, threaten or intimidate an inspector
- assaulting, threatening or intimidating a person assisting an inspector or attempting to assault, threaten or intimidate a person assisting an inspector
- failing to produce documents when required, permit entry to premises or otherwise comply with a requirement of an inspector made in the exercise of a power under the Act; and
- giving information or producing a document to an inspector that a person knows to be false or misleading in a material particular.

These offences are intended to have a penalty of 60 penalty units, with the exception of the assault offences which should attract a maximum penalty of 2 years' imprisonment or 240 penalty units or both for natural persons. Consistent with the approach taken in relation to the wage theft offences, it is intended that bodies corporate will be liable for five times the penalty units of those imposed on natural persons.

Referrals to other Regulators

The Government intends for the Inspectorate to be able to refer wage theft matters to other agencies in appropriate circumstances and receive referrals from relevant agencies.

It is intended that there be information sharing powers to enable the Inspectorate to work collaboratively with other agencies.