

**Submission  
No 4**

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

**Organisation:** Business NSW

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# BUSINESS NSW

21 May 2021

The Hon. Tara Moriarty, MLC  
Chair  
Portfolio Committee No. 1 – Premier and Finance  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

By email: [PortfolioCommittee1@parliament.nsw.gov.au](mailto:PortfolioCommittee1@parliament.nsw.gov.au)

Dear Ms Moriarty,

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

Business NSW welcomes the opportunity to provide input to the NSW Legislative Council's Inquiry into the *Tax Administration Amendment (Combating Wage Theft) Bill 2021 (the Bill)*.

As NSW's peak business organization, Business NSW has more than 30,000 member businesses across NSW. We work with businesses spanning all industry sectors including small, medium and large enterprises. Operating throughout a network in metropolitan and regional NSW, Business NSW represents the needs of business at a local, state and federal level.

Business NSW supports the full payment of wages and entitlements to all workers. Whether an employer is from the public sector, charitable sector or private sector, Business NSW strongly opposes any deliberate attempt on the part of employers to underpay their workers. Deliberate fraud and concealment of records is reprehensible yet notoriously difficult to detect and prove.

It is also important to acknowledge how difficult it can be for employers, from both the public and the private sectors, to ensure they are calculating their workers' pay correctly. Despite the modernisation of industrial awards, which was supposed to alleviate this burden, calculating the correct wage remains a highly technical and sometimes confusing exercise.

This is especially so for industries such as the construction industry, where the award contains a plethora of loadings and allowances that are only payable in certain circumstances.

The 'permitted disclosures' section of the Bill contains an extremely broad provision (section 83A) giving 'a tax officer' carte blanche to disclose information about an employer '*obtained under or in relation to the administration of a taxation law in accordance with, and in the circumstances specified in, this section*'.

That section not only contains a subsection which refers to an investigation being conducted by the Fair Work Ombudsman in relation to underpayment of wages to an employee, but also contains a subsequent subsection that states that a '*disclosure may be made even where*' the Fair Work

Ombudsman has not conducted such an investigation, instead allowing the disclosure referred to in subsection (1) if '*the Chief Commissioner is satisfied*' of such an underpayment.

The requirement to produce records and undergo a Revenue NSW audit is both extremely onerous and taxing.

In the absence of being provided with the proposed contents of the Minister's guidelines, it would be unlikely that such an audit would be confined to whether or not an employer was underpaying its employees' wages, compliance with the deemed worker provisions would also be in scope. For NSW employers, complying with such an audit is an extremely onerous and challenging experience. Preparing for such an audit cannot be done by simply printing out an accounting software report.

Those provisions have been developed over time as and when needed, to counteract the effect of different working and payment arrangements designed to circumvent the effect of the PTA.

The challenge of reading these provisions – even for experts in the field - is borne out by the need of Revenue NSW's to use diagrams in order to explain their effect.

I am advised this complexity does not end there. There is then the calculation of 'wages' for payroll tax reporting purposes. This is often a trade-specific exercise, using different percentages to represent the deemed labour component of the contractor's payment

Increasing the penalties relating to the provisions to keep and retain records and failing to lodge a document, statement or return is too onerous, especially given the considerable pressure employers are under in the COVID-19 operating environment.

Amending the Bill to include provisions for a third party umpire, such as the NCAT, to assist employers and employees dissatisfied with the exercise of the Chief Commissioner's discretion should be considered. A model exists federally with ATO debt recovery actions, with the AAT empowered to pause or modify such actions (including an avenue to ensure payments are not required until the matter is settled by the new umpire).

In our submission, we separate the proposed amendments into two sections. Those we support, and those we don't. The reasons for each have been canvassed in this letter.

If you would like to discuss the enclosed submission in more detail, please contact Elizabeth Greenwood, Policy Manager, Workers' Compensation, WHS and Business Regulation

Yours sincerely,

**Elizabeth Greenwood**  
Policy Manager, Workers Compensation, WHS and Regulation  
Encl.

## **PORTFOLIO COMMITTEE NO. 1 – PREMIER AND FINANCE**

### ***Inquiry into the Tax Administration Amendment (Combating Wage Theft) Bill 2021***

#### **Introduction**

The Tax Administration Amendment (Combating Wage Theft) Bill 2021 contains amendments to be made to the *Tax Administration Act 1996* (the TAA). Business NSW supports the majority of the proposed amendments, but opposes others.

#### **Part A: The provisions that Business NSW supports**

Any deliberate attempt by an employer to underpay their workers is reprehensible. Yet fraud, in any form, is notoriously difficult to detect and prove.

It is for these reasons, we support the following proposed amendments to the TAA:

##### ***Increased penalties for sections 49,52 and 57***

Increasing the penalty from 100 to 250 penalty units for:

- Section 49 as it relates to additional records which the Chief Commissioner has required (by written notice) the person to keep.
- Section 52 – Keeping records in the English language.
- Section 57 – Failure to lodge documents.

##### ***Increased penalties for sections 50, 54, 55,56 and 58***

Increasing the penalty from 100 penalty units to 500 and/or 1000 penalty units for:

- Section 50 – Inclusion of false or misleading information.
- Section 54 – Wilfully destroying records.
- Section 55 – Knowingly giving false or misleading information.
- Section 56 – Deliberately omitting information.
- Section 58 – Falsifying or concealing identity.

##### ***The introduction of a new tax evasion offence***

The proposed new offence of section 58A Tax evasion in its current form is:

*“A person must not, by act or omission, knowingly evade or attempt to evade tax.  
Maximum penalty – 1,000 penalty units or 2 years imprisonment or both.”*

##### ***The amendments to the section 82 permitted disclosure entities***

It is proposed to insert the following clauses into paragraph 82(k) of the TAA:

*“(xxi) The Fair Work Ombudsman for the purpose of assisting the Fair Work Ombudsman to perform the functions of the Fair Work Ombudsman under the Fair Work Act 2009 of the Commonwealth section 682(1)(b), (c) and (d).*

(xxii) *the Secretary of the Department of Premier and Cabinet for the purpose of investigating a breach of the Long Service Leave Act 1995, or”*

The relevant parts of the *Fair Work Act 2009* relate to the Fair Work Ombudsman’s functions:

- *to monitor compliance with this Act and fair work instruments;*
- *to inquire into, and investigate, any act or practice that may be contrary to this Act, a fair work instrument or a safety net contractual entitlement;*
- *to commence proceedings in a court, or to make applications to the FWC, to enforce this Act, fair work instruments and safety net contractual entitlements;*

A new definition section (section 81A) is to be inserted as an interpretative aid for these clauses. Business NSW supports the inclusion of definitions for ***fair work instrument***, ***safety net contractual entitlement*** and ***Fair Work Ombudsman***.

## **Part B: The provisions that Business NSW opposes**

Business NSW does not believe it is appropriate to increase penalties and impose extremely onerous back-payment obligations on businesses who have made (and continue to make) a concerted effort to ensure they understand and comply with the reporting, payment, and record-keeping requirements relating to their workforce.

When read as a whole, this bill seeks to treat both deliberate and inadvertent underpayment of wages on an equal footing. The opening paragraphs of the second reading speech dated 6 May 2021 supports this interpretation.

This is a not only a disproportionate reaction to the inadvertent underpayment of wages, but describing both behaviours as ‘wage theft’, is misleading and inappropriate.

We oppose the following proposed amendments:

### ***Increased penalties for sections 48, 51 and 53***

Business NSW does not support the increased penalty (from 100 penalty units to 250 penalty units) for the following sections of the TAA:

- Section 48 – the obligation to keep proper records
- Section 51 – the obligation to keep a record that ‘is able to be readily produced’
- Section 53 – period of retention

### ***Allowing ‘permitted disclosure’ in the circumstances described in section 83A***

Business NSW also opposes the introduction of a new provision which would allow a permitted disclosure in the circumstances as described in section 83A.

Apart from the overlap with the proposed amendments to section 82 (which Business NSW supports), the powers as described in section 83A are too broad, especially in relation to subsections 83A(3) – (7) which, in effect, grant a discretion to the Chief Commissioner which, until the proposed guidelines are issued, will be an unfettered one.

Business NSW also opposes the use of Ministerial guidelines as a regulatory mechanism for circumscribing this discretion as its contents will not be subject to parliament's consideration.

It follows that, as Business NSW opposes the inclusion of section 83A into the TAA, it also opposes the inclusion of employer and wages in section 81A amendment as well as the amendment to section 9 re-assessment amendment.

## **Contact Details**

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