Submission No 7

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

Organisation: National Retail Association

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Portfolio Committee No. 1 – Premier and Finance
Legislative Council
Parliament of New South Wales

By email: portfoliocommittee1@parliament.nsw.gov.au

Dear Committee Secretary,

Inquiry into the *Tax Administration Amendment (Combating Wage Theft) Bill 2021*
Submissions of the National Retail Association Limited, Union of Employers

The National Retail Association Limited, Union of Employer (**NRA**) welcomes the opportunity to comment on the Inquiry into the *Tax Administration Amendment (Combating Wage Theft) Bill 2021* (**the Bill**).

The NRA is the modern voice of retail in Australia, representing over 6,000 retail businesses ranging from mum-and-dad operations to major national and international brands, and has worked constructively with State and Federal governments in relation to the issue of wage theft on behalf of retailers.

1. General comment

1.1. The NRA has consistently been a supporter of legislation which aims to combat wage theft where that term is properly understood as being the deliberate underpayment of wages with the intent to deprive employees of the benefit thereof.[1]

1.2. The NRA has consistently supported the criminalisation of "wage theft" where that term is understood as the knowing and deliberate underpayment of wages to employees for commercial gain.

1.3. We have also consistently taken the view that the act of criminalising "wage theft" is, constitutionally, a matter for the Commonwealth rather than the States, however we note the Bill does not seek to criminalise "wage theft" *per se* and as such the constitutional issue does not arise.

1.4. With this in mind, the NRA does not object to the stated intentions of the Bill in principle. However, we have some concerns with the technical aspects of the Bill, particularly given that the concept of "wage theft" does not appear to be defined nor does any provision appear to be specifically targeted at addressing this issue to the exclusion of other matters. These matters are outlined in further detail below.

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[1] *Inquiry into Wage Theft in Queensland*, Education, Employment and Small Business Committee (Parliament of Queensland), submission 21; *Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020*, Education, Employment and Small Business Committee (Parliament of Queensland), submission 5; *Wage Theft Bill 2020* (Vic) public consultation, Department of Attorney-General (Victoria); *Inquiry into Wage Theft in Western Australia*, Department of Mines, Industry Regulation and Safety (WA); Select Committee on Wage Theft in South Australia.

2. Amendments to circumstances where reassessment beyond five years can be made

2.1. The proposed new s.9(3)(e) of the *Taxation Administration Act 1996* (NSW) (**TAA**) purport to give the Chief Commissioner the power to reassess taxation liability outside a five-year period where, as a result of an underpayment of wages, an employer's payroll tax liability has been underassessed.

2.2. For all practical purposes, an underassessment of payroll tax liabilities arising from an underpayment of wages already falls within the circumstances contemplated by s.9(3)(b), namely that the facts and circumstances on which the assessment was based are not fully and truly disclosed.

2.3. As such, where an underpayment of wages comes to light which indicates that payroll tax liability may have been underassessed, s.9(3)(b) already empowers the Chief Commissioner to undertake a reassessment where the facts on which the assessment was based – namely, the wages paid or payable to employees – were not truly disclosed.

2.4. We note that in the second reading speech, the Minister stated that a reassessment under s.9(3)(b) may only occur where the non-disclosure of the relevant facts and circumstances was deliberate. The NRA disagrees with this statement on two points:

(a) first, there is nothing in s.9(3)(b) which requires that, in order to reassess liability, the Chief Commissioner must first be satisfied that the failure to truly and fully disclose the relevant facts and circumstances on which an assessment was made was deliberate; and

(b) secondly, "wage theft" properly defined requires that the actions of the employer be deliberate rather than inadvertent; in this respect, if the TAA currently requires that a reassessment can only be undertaken where the misreporting of relevant information ***was*** deliberate, then in the context of combating wage theft (properly defined) this limitation ought to remain.

2.5. With this in mind, the NRA is of the view that the proposed amendments to s.9(3) are unnecessary, as the Chief Commissioner is already appropriately empowered under the existing law.

3. New offence of tax evasion redundant in context

3.1. The proposed new s.58A proposed by the Bill for insertion into the TAA creates the offence of tax evasion.

3.2. The NRA questions the inclusion of such an offence in legislation purportedly aimed at targeting "wage theft", as such an offence is of general application to taxpayers across New South Wales rather than being limited to the circumstances of "wage theft".

3.3. The NRA also questions the utility of such an offence given that:

(a) the actions which would give rise to the offence of tax evasion, such as providing false or misleading information, falsifying records, or deliberately omitting information, are already offences under Part 8 of the TAA; and

(b) the Bill already proposes to increase penalties for these existing offences, in some cases providing for the same penalty as that provided for the proposed offence of tax evasion.

3.4. Given these circumstances, it is questionable if the proposed offence of tax evasion would serve any purpose.

4. Penalty regime disproportionate and unjustified

4.1. We note that in the second reading speech, the Minister observes that the Bill proposed to increase penalties under the TAA by a factor of 2.5 times, and in the case of more serious offences by a factor of five times, with the Commissioner noting that the size of penalties in the TAA have not been updated since it came into force.

4.2. With respect, the NRA submits that there is no evidence to suggest that an increase in penalties of this extent is proportionate to the nature of the conduct that is sought to be controlled. This is particularly so when the Minister specifically states that "this bill … will not criminalise (wage theft)".

4.3. The NRA questions how combating wage theft can be used to justify the Bill's proposed increases to penalties whilst simultaneously being subject to the disclaimer that the Bill does not, in fact, criminalise that conduct.

4.4. Separately, the NRA questions how wage theft can be used to justify the Bill's proposed increases to penalties when the offences affected contemplate all circumstances in which a taxpayer may commit an offence under the TAA, not merely the circumstance of wage theft (properly defined).

5. Disclosure provisions

5.1. Finally, the NRA has concerns with the ability of tax officers to make public disclosures of alleged underpayments to employees under the proposed s.83A of the TAA.

5.2. In particular, s.83A(3) is problematic, as it allows a tax officer to make a disclosure if the Chief Commissioner is satisfied that the employer has underpaid wages to an employee in the absence of an investigation from the appropriate regulator, the Fair Work Ombudsman (**FWO**), on this point.

5.3. The NRA questions whether the Chief Commissioner or their office has the appropriate expertise, or indeed jurisdiction, in the federal industrial relations system to be able to make such a determination in the absence of any input from the FWO.

5.4. Whilst such discretion may be reasonable in the case of non-national system employers, the appropriate agency to determine whether a federal system employer has underpaid their employees is the FWO.

5.5. The NRA also notes that there is a live question as to what may occur if a disclosure is made under s.83A(3) and the FWO, being the proper regulator of a national system employer, later determines that the Chief Commissioner's assessment was incorrect and the disclosure so made is similarly erroneous.

5.6. Whilst the guidelines referred to in the proposed s.83A(4) – (7) may mitigate this risk, that the legislation itself does not contemplate the possibility that the Chief Commissioner and the FWO may disagree in their assessment of whether or not an employer has underpaid their employees is deeply concerning to the NRA.

5.7. Disclosures under the proposed s.83A may have significant negative effects on businesses, potentially resulting in such significant damage that those businesses can no longer operate. Where such a disclosure is made erroneously, the potential consequences are not only dire but unwarranted. The NRA submits that no disclosures ought to be made without the input of the appropriate regulator, and as such the proposed s.83A(3) ought to be removed.

6. Conclusion

6.1. The NRA acknowledges that the deliberate underpayment of wages for commercial gain is a real issue in the Australian economy. Not only does it result in employees being deprived of their lawful entitlements, it provides those businesses engaging in the practice with an illegitimate commercial advantage over those businesses doing the right thing.

6.2. We are pleased to consult further with the Committee in relation to the Bill or any other matter pertaining to the issue of 'wage theft" at its convenience.

Yours sincerely,

Lindsay Carroll
Deputy Chief Executive Officer and Legal Practice Director
National Retail Association