



LEGISLATIVE COUNCIL

SELECT COMMITTEE ON WAGE THEFT IN SOUTH AUSTRALIA

Watarru Room, Old Parliament House, Adelaide

Wednesday, 28 August 2019 at 11:15am

BY AUTHORITY OF THE LEGISLATIVE COUNCIL

WITNESSES

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MEMBERS:

Hon. I. Pnevmatikos MLC (Chairperson)
Hon. C. Bonaros MLC
Hon. T.A. Franks MLC
Hon. T.J. Stephens MLC
Hon. R.P. Wortley MLC

WITNESSES:

KNIGHT, STEPHEN, Executive Director (SA), Housing Industry Association

DO, HUAN, Workplace Adviser, Housing Industry Association

723 The CHAIRPERSON: Good morning, and thank you for coming today. My name is Irene Pnevmatikos and I am the chair of this committee. I will introduce the rest of the committee members: on my left is Russell Wortley, member of the Legislative Council; Lesley Guy, the secretary of this committee; on my right is Connie Bonaros, member of the Legislative Council; Terry Stephens, member of the Legislative Council; and our research officer.

The Legislative Council has given authority for this committee to hold public meetings. A transcript of your evidence today will be forwarded to you for your examination for any clerical corrections. Should you wish at any time to present confidential evidence to the committee, please indicate and the committee will consider your request. Parliamentary privilege is accorded to all evidence presented to a select committee; however, you should be aware that that privilege does not extend beyond the walls of this building.

All persons, including members of the media, are reminded that the same rules apply as in the reporting of parliament. You are welcome to make a statement of up to five minutes before we open up to questions and, before speaking, you might just introduce yourselves.

Mr KNIGHT: My name is Stephen Knight, and I am the executive director for the Housing Industry Association for South Australia. With me today I have Huan Do, who is the HIA's workplace adviser. Thank you for the opportunity to appear before the select committee this morning. We will be brief in this presentation; we don't want to repeat matters that are set out in greater detail in the written submission you already have.

We appear on behalf of the Housing Industry Association. HIA is a membership-based industry association and is the peak body representing the residential building industry. Our members represent small and large building companies, and they provide work to trade contractors, people working on the tools, large and small building product suppliers, manufacturers and suppliers of everything from kitchen cabinetry to raw building materials. We also have professional members such as surveyors, architects, designers, accountants and lawyers who service the construction business and projects.

HIA's membership has a common thread: they all work in the residential building industry as opposed to commercial and infrastructure. Residential building covers detached or cottage building, the small and large renovation sector, medium density housing, and your typical home unit-type developments.

The industry is heavily reliant on the use of independent contractors, and in this wage theft inquiry before this select committee we want to reiterate and make it clear that the HIA does not support the deliberate underpayment of wages and other entitlements to employees. With that said, it is the HIA's position that the offence of theft, whether that occur in the workplace or in another industrial context, is a matter for criminal law. Prosecutions for that type of unlawful behaviour should be taken by public prosecutors before a proper criminal court.

It's HIA's experience that underpayment of wages and entitlements are generally a result of mistake or error. There is no deliberate intention to deprive a person of something, which is a characteristic of theft. Also, the complex nature of the current workplace relations framework means that it is difficult to understand and apply sometimes. For example, employers in the residential building industry are required to understand and deal with at least five different regulatory arrangements that include complex provisions relating to the calculation of wages and redundancies.

We believe that the current regulatory framework under the Fair Work Act is sufficient to deal with these matters raised in the terms of reference, including the underpayment of wages and sham contracting. We are happy to answer questions.

724 The CHAIRPERSON: Thank you. I note your opposition to the term 'wage theft' as a term to describe underpayment of wages. Do you still object to this term where underpayment of employees is a deliberate practice?

Mr DO: In terms of the deliberate underpayments, obviously HIA does not support the deliberate underpayment of wages.

725 The CHAIRPERSON: Understood.

Mr DO: Our position is that a lot of the underpayments are a result of error and miscalculations because of the complex nature of our framework in terms of the industrial relations.

726 The CHAIRPERSON: I understand that, but in cases where it is deliberate do you say there's no role for the term 'wage theft'?

Mr DO: We don't support wage theft being characterised and being brought into the industrial relations framework. We believe that is already found under the Criminal Law Consolidation Act so we believe that there is sufficient legislative provision to deal with that under the criminal law.

727 The CHAIRPERSON: You seem to think that there's no place for criminal prosecution in an industrial setting. If an employee were to take money from a cash register do you think that would be dealt with in the criminal law?

Mr DO: We think it would be suitable to be dealt with within the criminal law.

728 The CHAIRPERSON: Why should it be different for employers then where it's deliberate? I am not talking about a mistake here but, where it's deliberate and it's a criminal act, why shouldn't it be dealt with in the criminal law?

Mr KNIGHT: I think the point we are making is that it's already dealt with under the Fair Work Act and, in our experience, I don't know that we have ever dealt with someone where it's been actual theft. We as an association often have to deal with where there's been an underpayment, but in every case where we have had to deal with that it's been as a result of a misunderstanding of what the actual payments were to be. So we believe that wage theft, as you call it, is not an issue for our industry.

729 The Hon. R.P. WORTLEY: Mr Knight, we have had quite a few submissions to this committee which would give a real indication to us that there is quite a bit of wage theft happening. You might not be aware of it, but it certainly is happening in the industry. If it is happening and someone is caught, why shouldn't it be dealt with under the criminal law?

Mr KNIGHT: There are already very significant penalties in place if you're caught under the Fair Work Act, so isn't that enough deterrent or is that not enough?

730 The Hon. R.P. WORTLEY: I imagine there could be higher penalties under the criminal act. If an employee is stealing from the cash register, gets caught and is sentenced under the criminal act, why should that be any different from an employer who deliberately goes about—not all of them do it. Most employers are very decent, let's get that quite clear, but it is happening out there and it's having very, very serious consequences on the lives of quite a number of people. Shouldn't the extreme—

Mr KNIGHT: Would you say that's in our industry?

731 The CHAIRPERSON: Let's look at that, your industry in particular, because between 2014 and 2015 the Fair Work Ombudsman conducted 610 audits of building and construction

companies; 24.6 per cent of those companies were found to be noncompliant in their obligations. To your knowledge, were any of those companies members of your organisation?

Mr KNIGHT: No, I couldn't say without knowing specifically who they were whether they are members or not.

732 The CHAIRPERSON: Are you aware if any of your members have been penalised?

Mr KNIGHT: No.

733 The CHAIRPERSON: For underpayment of workers?

Mr KNIGHT: No.

Mr DO: No.

Mr KNIGHT: That was a national figure you were giving or a South Australian figure?

734 The CHAIRPERSON: Yes, the Fair Work Ombudsman.

Mr DO: We would have to take that one on notice, but as far as I am aware—

735 The CHAIRPERSON: It would be interesting to know if any of your companies have been penalised, your member companies, for underpayment. One in four is what the Fair Work Ombudsman found who were non-compliant.

Mr KNIGHT: I am sorry, just to follow that through, that underpayment was as a result of a misunderstanding.

736 The Hon. C. BONAROS: No, they are not talking about underpayment. It's wage theft. It has been characterised as wage theft, not underpayment necessarily.

Mr KNIGHT: I would be happy to take that on notice.

737 The CHAIRPERSON: That would be useful because your submission speaks at length of the complexity of the current industrial regulatory system. What role do you play in educating your member organisations in terms of their obligations?

Mr DO: If I may, certainly, when we have members who call up to inquire about wages, wage rates, that sort of thing, through that whole process sometimes we identify where there has been a miscalculation or an error in terms of the payment—for example, travel allowance under the building general on-site award. In that instance, we would inform our members that they have an obligation to pay in certain circumstances. We offer our members an HIA information line as well, which is the information centre, based in Queensland, which deals with award determinations as well. In my role at the HIA, I provide the general legal advice to our members, including compliance with the Fair Work Act and related legislative provisions.

738 The CHAIRPERSON: That's a more reactive role, so you respond if there is a request for information. What proactive measures do you have within—

Mr KNIGHT: Sorry. We have publications, which is like our regional news, housing, national publications. This sort of information is regularly provided within those documents.

Mr DO: We also develop information sheets for our members which are published on our website as well. Every time an information sheet is published, it gets sent out through our email list to our members as well. They could be a wide range of things: new laws in relation to industrial relations, contract arrangements, contract amendments and that sort of thing.

Mr KNIGHT: We are an RTO—a registered training organisation—and the cert IV training that we do incorporates subject matter on finance and a whole range of other things, so that would be included within those educational components. All our members are licensed and part of their requirement for running a business is to have done at least two subjects, which are finance and legal, so this would all be covered in those.

739 The CHAIRPERSON: Would you be able to provide us examples—not right now obviously but on notice—of information and articles that you have produced for the benefit of your member organisations?

Mr KNIGHT: Absolutely.

740 The CHAIRPERSON: That would be really useful.

Mr KNIGHT: Any time there is a change to legislation, we prepare practice material on those and they are distributed through our electronic media and they are available on our website.

741 The CHAIRPERSON: Do you think it's important that employers are expected to understand their obligations under an industrial regulatory framework?

Mr KNIGHT: Absolutely.

Mr DO: Absolutely.

Mr KNIGHT: Perhaps I could make one more comment. We represent the industry but not everybody in the industry belongs to us.

742 The CHAIRPERSON: Fair enough. That's the same with every representative body.

Mr KNIGHT: So we can only provide information to our member base.

743 The Hon. C. BONAROS: Can I just go back to your opening remarks about wage theft and the interpretation I imagine you have about wage theft? You talked in the context of mistakes and misunderstandings, and the figures that the chair has pointed to paint a very different picture in terms of whether these are simple mistakes or misunderstandings or whether they are deliberate actions which have resulted in underpayment of staff.

Do you accept that we are not just dealing with what you have classified as a mistake or a misunderstanding, particularly in your industry, which is one of the higher-ranking industries—insulation installers, building and construction—and is one of the highest offenders? Do you accept that we are not, perhaps, talking about wage theft in the same context?

Mr KNIGHT: You have only made us aware of those statistics now, so we would have to take on notice that we would like to consider that. Just anecdotally from my position, in South Australia and amongst our own membership, and with Huan—this is his place of work and what he does—every question we have related to this generally just comes back down to ignorance.

What you have to understand is that in our industry we have some large companies, but then we also have thousands of independent contractors/subcontractors who are trade based and not sophisticated in this area, even though we educate them as well as we can and provide services to them. It's a complex area and to me it's not surprising that they are not fully across it in some respects, which then relates back to the fact that they do have issues with underpayment.

744 The Hon. C. BONAROS: I suppose any—

Mr KNIGHT: Sorry, just to interrupt again, many of our contractors are independent contractors, so they don't work under an employment agreement. They are contracted to a builder under the terms of a quote for a job, for example, or some other workplace agreement for the work they do. They are not wage earners: they are actually subcontractors.

745 The Hon. C. BONAROS: That's a matter of some debate as to whether they are wage earners or not. Your industry would be amongst the highest in terms of subcontracting arrangements and also, potentially, I think labour hire arrangements, and those two fields have come under great scrutiny in relation to their arrangements or the question of whether they are actually employers or whether they provide services on a subcontracting basis. Do you accept that, within your industry, there is a lot of speculation around whether what is framed as a subcontracting arrangement actually is a subcontracting arrangement?

Mr KNIGHT: No. Do you want to answer that?

Mr DO: As I mentioned earlier, there are a lot of laws in place that small employers, small mum-and-dad businesses, have to undertake in order to classify an employee and a contractor. We've got provisions such as superannuation, which doesn't follow the common law, and then you've got the Fair Work Act, which follows the common law.

746 The Hon. C. BONAROS: Do you accept that there are businesses who understand the law—and this isn't a matter of ignorance—they understand their responsibilities well enough to overcome those requirements in terms of those sorts of arrangements?

Mr DO: Well, I imagine the larger businesses would understand that because of the resources available. Obviously, the smaller ones may not have that capacity.

747 The Hon. C. BONAROS: So it can't all be put down to a matter of ignorance because the Fair Work Ombudsman and the reports by the McKell Institute don't paint that picture. In many cases, it's actually highlighted as a deliberate effort to overcome the requirements that would otherwise apply to an employer arrangement.

Mr KNIGHT: When you are able to distinguish from those statistics which are residential building companies and which are commercial building companies, with the statistics you talked about—600 or however many there were—I would be interested to know how many of those were our member-type builders. We are then being included with large commercial builders, infrastructure companies, civil contractors, but they are a much different industry from the one that we are speaking about. That's what I said in my opening statement.

We are here only for the residential building industry—a cottage industry, as far as builders go—and I would suggest that that's a very different industry to the other sector. I might suggest that, maybe, if we had the statistics, we would be able to find out how big a concern it is for us, as opposed to maybe 700 of those 800 were in the commercial building sector.

748 The Hon. C. BONAROS: I think we are all trying to get to the bottom of how big an issue it is and which industry it's a bigger issue in. If we just focus on residential building sites for a moment, I imagine that there are lots of individuals who work in your industry, whether they think it's legitimate or not, on a subcontracting basis.

So you have a plumber and, instead of hiring plumbers to work under him or her, they enter subcontracting arrangements with other plumbers, and then there are questions of who's supplying the equipment that they are using, whether it's their own equipment, whether they are doing the majority of their work for that one person or whether they are doing it across the board for several people. These are the sorts of considerations that we are looking at in terms of considering whether indeed they are sham subcontracting arrangements or legitimate subcontracting arrangements.

Mr DO: On sham contracting arrangements, our view is that it should be a standalone. Just because someone makes a misclassification doesn't necessarily mean it's a sham contracting arrangement.

749 The Hon. C. BONAROS: But therein lies my problem with the response that we have received today. My concern is that we are looking at this as a mistake, a misunderstanding, ignorance and misclassification rather than considering whether indeed that is a problem that exists in the industry. I am not suggesting you're overlooking it but that it's one that is being rorted to an extent by members who work in the industry.

Mr KNIGHT: I don't have any anecdotal evidence which supports your statement. I was a builder for 30 years before I had this job, so I'm an industry professional. Our company was a medium-sized business. This whole issue of independent contractors has been something that has been on notice within our industry for 20 or 30 years, so I would suggest that most professional builders are across what's required and what describes an independent contractor and would have the necessary processes and paperwork in place to be certain that they are meeting the obligations in terms of that.

750 The Hon. C. BONAROS: I accept that. Again, please don't take this personally, as something I am saying against the HIA, but the issue we have with that is that, despite the lack of any anecdotal evidence that you say you have seen, the figures provided by the Fair Work Ombudsman and by the McKell Institute paint a very different picture in that light, so that's, I suppose, what I am trying to—

Mr KNIGHT: I take your point and I come back to my earlier one: I would be interested to know where that fits within residential industry and the commercial industrial sector. I would suggest it's not something we are familiar with within our own industry.

751 The CHAIRPERSON: It's appreciated that small businesses struggle with a range of issues in terms of running their business.

Mr KNIGHT: Absolutely.

752 The CHAIRPERSON: And I appreciate that in your sector, because it's residential housing, that is overwhelmingly the bulk of employer members that you represent. But you also, in your submission, mentioned recent high profile cases, including George Calombaris's hospitality group and Lush Cosmetics, as companies that mistakenly underpaid their staff. Do you really think that multimillion dollar companies can pass off failure to comply with their legal obligations as a mistake?

Mr KNIGHT: We can't speak for those companies you talk about.

753 The CHAIRPERSON: But you commented about them.

Mr DO: In terms of our references to those cases, what we are saying is that it was identified as a mistake, and they have been corrected. As far as whether or not it's been deliberate, we are not aware of that in terms of the underpayments.

754 The CHAIRPERSON: It was \$6 million. That's a mistake?

Mr KNIGHT: We can't comment on that. We have no information on the background of that. If that's what the determination was, well, that's what it was.

755 The CHAIRPERSON: You mention a number of instances in which significant penalties have been imposed on companies for sham contracting. Are any of these companies in the building and construction sector and, if so, are they members of your organisation?

Mr KNIGHT: I believe we've answered that question earlier. We will take it on notice and find out.

756 The CHAIRPERSON: Don't know?

Mr KNIGHT: Don't know. Again, I come back to my initial point: were they really in residential building or were they in commercial building? I don't know.

757 The Hon. T.J. STEPHENS: Thanks for your evidence, Mr Knight. Do you have the capacity to actually find out whether any member of your organisation has been prosecuted for wage theft? How would you go about trying to find that out?

Mr DO: We do have contacts in the Fair Work Ombudsman and within the government.

758 The Hon. T.J. STEPHENS: So that's how you would gather that information?

Mr DO: Sometimes they would also approach us if they have a legal issue, in which case we become aware of it, but if you are after information, I can take it back to senior management and we can certainly try to find out if our members have been prosecuted.

759 The Hon. T.J. STEPHENS: I just didn't think it would be the sort of thing that a member would necessarily volunteer to his organisation—that he had been operating in an underhanded way—that's all.

Mr DO: Any information or discussions that we have with them are protected. We don't disclose that. It's all confidential, so there is no reason why they wouldn't approach us.

760 The Hon. T.J. STEPHENS: Okay, thank you.

761 The Hon. R.P. WORTLEY: Thanks for coming and giving evidence today. I do notice you are a little bit defensive. This is not an inquisition. Actually, you are one of quite a number of employers who are coming here in our quest to find the problems and solutions to wage theft. I have dealt with the HIA over a number of years, and I have always found them a very reputable and good organisation that represents their members' interests, but I notice you distinguish the commercial

and big end of town from the people you represent in housing. On these bigger firms, these big construction sites, they are very heavily unionised and have very strict agreements, so it's much harder for those people there to actually get involved in wage theft.

762 The Hon. C. BONAROS: Is it?

763 The Hon. R.P. WORTLEY: Well, much harder, I said. It's not impossible. With your industry, they are very highly ununionised and there are a lot of individual contractors. I just worry that you've got this head in the sand attitude where you think it doesn't happen in your industry. Our information is that it does happen. It might not be big, it might not be large, but it does happen, so I think it's important that people understand that there is an issue out there. We are hearing that it is an issue of a reasonable size. When you have communicated with your members, have you ever put something in your newsletters to say, 'Be careful about underpaying your wages because it is a serious offence'? You do that? You communicate with them?

Mr DO: Yes, through our e-news, which we distribute to our members, through building news articles, which we do, and information sheets, as I said earlier, which we distribute as well to our members. They are available on our HIA website.

764 The Hon. R.P. WORTLEY: Okay, but do you accept that there is a possibility in your industry that there are cases where wage theft is happening? You might not be aware of where it is, but just the law of probability is there is something happening out there.

765 The Hon. C. BONAROS: Well, it's not the law of probability: it's facts from the Fair Work Ombudsman.

766 The Hon. R.P. WORTLEY: Statistics then. It's just a bit of a worry that you are not wanting to acknowledge that it could be an issue, not at your fault.

Mr DO: Certainly. If I may, again, we don't accept the characterisation that it's wage theft. Certainly, deliberate underpayments may or may not occur within the residential industry. We are not aware of it.

767 The Hon. C. BONAROS: Mr Do, can I ask you a question on that? If it is a deliberate case of underpaying somebody, what is the objection to classifying it as wage theft?

Mr DO: Because every mistake or every miscalculation may potentially result in someone being labelled as a criminal. There is that risk as well, and we are saying that there are criminal laws under the Criminal Law Consolidation Act to deal with theft. We don't think it's appropriate to incorporate criminal into an industrial relations system.

768 The Hon. C. BONAROS: But with any definition of wage theft will also come certain parameters as well. It wouldn't just be a matter of, yes, you have underpaid somebody their wages and you haven't paid them their super; therefore, you are going to be prosecuted and receive the top end of the penalty. You are still going to be prosecuted anyway under the fair work arrangements, so I am just trying to understand. Obviously, there will be protections built into any criminal charges that apply under the definition of wage theft, so I am struggling to understand why we are so opposed to classifying it as—

Mr DO: Well, we haven't seen what those protections are and what those levels are, so we can't really comment on that, but our position—

769 The Hon. C. BONAROS: But we accept that if it was somebody working at a cash register in a supermarket, and they put their hand in a till, take out \$1,000 and put it in their pocket, then that would warrant a criminal charge of theft.

Mr DO: Under the Criminal Law Consolidation Act I can't see why it wouldn't.

770 The Hon. C. BONAROS: And if an employer deliberately underpaid a staff member on an ongoing basis for months on end—knowing that that staff member was none the wiser—and they did so to line their own pockets, then you wouldn't see that in the same light?

Mr DO: Why couldn't you prosecute the employer under the Criminal Law Consolidation Act?

771 The Hon. C. BONAROS: I suppose the issue is that this has become such a big issue now—and a lot of evidence is coming to the fore which shows that it is a much bigger issue than any of us probably envisaged—that we need much tougher penalties. I suppose that is the simple answer.

For too long employers have got away with underpaying or with not paying, or deliberately not paying, their staff appropriately without any adequate penalty, and if employers are going to clean up their acts then the penalties have to be commensurate with their actions. Is that not an appropriate—

Mr DO: At this stage we don't think it is appropriate. At the risk of repeating myself, we believe that wage theft, theft, should be dealt with as a criminal act under the criminal laws, not be brought within the industrial relations system. As I said, the potential to label someone as criminal just because of an incorrect miscalculation is unfair.

772 The Hon. C. BONAROS: But it wouldn't be in relation to a miscalculation. If you look at wage theft—and I apologise, Chair—it can take a number of different forms, and they would include things like deliberately not paying someone their full entitlements, deliberately not paying someone their super, deliberately not paying them penalty rates, overtime rates, deliberately not paying them their leave and other entitlements, issues like that.

These are deliberate actions on the part of an employer in order to save money. That is what we are considering, and if they are deliberate actions, as opposed to miscalculations or mistakes, then that is something that would presumably be identified. So in relation to those deliberate actions, you don't think there is a case for wage theft—

Mr DO: We don't think wage theft should be brought within the industrial relations system, again.

773 The CHAIRPERSON: Your submission actually applauds the Fair Work Ombudsman as being competent in enforcing industrial regulations. That is in stark contrast to the findings of the McKell Institute, which notes that the Fair Work Ombudsman is chronically underfunded and has audited a mere 1 per cent of companies in South Australia. On that basis the McKell report suggests there is no cop on the beat, which has allowed noncompliance to run rampant.

The difficulty this committee is facing is that all employers are being lumped in one group. There are a number of employers who do the right thing, who follow the regulations, follow the rules, play by the rules and pay by the rules. There are some who don't, and that is to the detriment of those employers who are doing the right thing. The noncompliant employers have a competitive advantage as opposed to those who are compliant. You do not see that dichotomy?

Mr KNIGHT: We can only speak for our own industry, and the statistics you have given us we cannot support or deny because we don't have that information.

774 The CHAIRPERSON: They are online, you can get the reports.

Mr KNIGHT: What I am saying is in relation to our industry. We can only take it on notice that you are saying there is an issue within our industry: we are suggesting there isn't. What happens in other industries is not for us to comment on.

775 The CHAIRPERSON: Thank you for your time.

THE WITNESSES WITHDREW