Business Council of Australia

SUBMISSION

Senate Economics References Committee Inquiry into the unlawful underpayment of employees' remuneration

March 2020

Business Council of Australia ABN 75 008 483 216

ABOUT THIS SUBMISSION

This is the Business Council of Australia's submission to the Senate Economics References Committee inquiry into the '*Unlawful underpayment of employees' remuneration*' (**the Inquiry**).

SUMMARY

'Wage theft' is the purposeful and wilful underpayment of remuneration through the manipulation of employment arrangements by an employer. Such conduct should not be tolerated. Stronger sanctions are justified where existing sanctions have been shown to be inadequate.

Most non-compliance by employers is not 'wage theft' but the result of system errors or inadvertent mistakes, many of which are the direct result of the complexity of Australia's workplace relations system and the compliance challenges this presents. Errors occur and they should not be excused, but they are not the same as purposeful manipulation with the intent to underpay employees.

It is crucial that any policy makes a clear difference between purposeful withholding or manipulation of entitlements and inadvertent errors.

The complexity of Australia's workplace relations system compounds the risk of errors. It has 122 modern awards containing thousands of award pay rates, plus multiple penalty rates, loadings and allowances on top of those rates. Many award provisions are unclear and open to differing interpretations, including questions of which award even applies to a worker.

This complexity should not excuse non-compliance by large employers, who have sufficient resources to invest in systems that can prevent errors. The situation is very different for smaller employers without such resources.

The Business Council believes that non-payment or underpayment of workers, where it occurs, is a problem that requires direct and immediate action by employers and governments as well as long-term policy solutions to reduce complexity in the industrial relations system. Unless such solutions are implemented, then errors will continue to happen. The extent of non-compliance could be substantially reduced if appropriate reforms are made to awards and the National Employment Standards (**NES**) to make them simpler and easier to apply by both employers and employees.

RECOMMENDATIONS

The Business Council recommends that:

1. The Committee should clearly define the problem of unlawful non-payment or underpayment in Australia, the many and varied reasons for its occurrence and propose proportionate and effective policy solutions. The Committee should avoid using the emotive term 'wage theft', which reflects a narrow part of the problem and does not accurately describe most of the instances of employee underpayments.

2. To reduce complexity and ambiguity in the system which can contribute to underpayment:

2.1 the Fair Work Ombudsman (**FWO**) should publish a wider range of advice or rulings on certain award or NES matters, including wage rates and award coverage. Employers should not be liable for sanctions if they follow such advice, even if the advice is subsequently found to be incorrect by a court. This regime would be modelled on that which applies to ATO rulings on tax matters.

2.2 The FWO should also be able to provide advice in response to specific queries by employers, with employers to also not liable for sanctions if they follow such advice.

2.3 Wherever possible, the NES, modern awards and enterprise agreements should be enhanced to reduce complexity and ambiguity, to better enable employers to comply with their obligations and better enable employees to understand their entitlements.

2.4 Employers should wherever possible review and update their payroll systems to ensure they are adequate. The Government should consider measures to encourage this process, for example by providing tax incentives for smaller businesses.

3. The FWO's approach to enforcement should provide incentives to employers to voluntarily report and rectify underpayments. Sanctions imposed should distinguish between employers that act responsibly to rectify problems and those who do not.

4. Any criminal sanctions for the most serious and deliberate forms of underpayment should reflect the elements of the offence of 'theft' that apply under the general law, i.e. knowledge and deliberate dishonest intent on the part of the employer.

THE ISSUES

The reasons for underpayments by employers vary in terms of both their causes and the degree of culpability by the employer.

Instances of non-compliance with employee remuneration obligations often arise from genuine errors or oversights that are caused by inadequate systems and processes on the part of employers, or the nature of the system in which they operate.

At one end of the spectrum, employers may make mistakes that lead to underpayments. At the more extreme end of the scale, negligence, wilful blindness or, in the worst case, intentional non-compliance akin to theft, can occur.

Defining 'wage theft'

The terms of reference for the Inquiry do not define 'wage theft'. If the term is to be used, then the Business Council proposes that it be defined as the intentional and wilful avoidance of an employer's obligations through the purposeful manipulation of employment arrangements. This can include both underpayment or non-payment of wages and other conduct designed to avoid obligations, such as forcing employees to not take meal breaks or to work excessive hours.

The element of 'purposeful manipulation' does not extend to errors made by employers where those errors are not the result of any deliberate intent to avoid their obligations. Errors

should not be excused, particularly when made by larger employers, but they are clearly not 'theft'.

Complexity causes most cases of underpayment

Most breaches of workplace laws relating to underpayments are not intentional. In many cases they are the direct result of the complexity of Australia's workplace relations system and the difficulties that employers and payroll systems have in complying with certain provisions.

Australia's workplace relations system is unique in its complexity. Our system for setting minimum wages alone is more complicated than in most other countries. We are the only country that has a comprehensive system of industry and occupational awards. Unlike countries that set a single minimum wage (e.g. the United Kingdom, Germany and New Zealand) or a minimum wage that varies by state (e.g. the United States), the Australian system contains 122 modern awards with their own classification structures, plus thousands of award pay rates that currently range from the national minimum wage (currently $19.49) to over $170 per hour.[1] This is before penalty rates, loadings and allowances are applied.

The nature of employers' obligations can also change as a result of court decisions that may overturn commonly accepted interpretations of certain entitlements, such as those under the NES, with the result that employers who had followed the accepted practice can suddenly find themselves in breach and facing a significant historic liability.

As a small but representative sample of the problems created by the complexity of the award system, the Business Council notes the following three case studies:

1. The proliferation of award pay rates:

A typical large employer in the Retail sector is likely to be covered by multiple awards, each containing hundreds or thousands of separate hourly pay rates. Each base rate in the award can have multiple unique hourly rates derived from it as a function of shift loadings, penalties, allowances, or various combinations of each.

The three main awards that cover the sector have the following numbers of unique hourly rates, all of which could potentially apply to the largest employers in the sector:

General Retail Industry Award 2010	2,832
Storage Services and Wholesale Award 2010	720
Clerks Award 2010	2,960
Total unique hourly rates	**6,512**

2. Uncertainty in award coverage

Even the basic question of which award covers a workplace can be inordinately complex. The Business Council is aware of one case in which a large employer was faced with an award coverage issue that was so complex that it sought three separate advices from three different law firms and received three different answers. In some cases, businesses (not to

[1] Bishop J (2018), 'The Effect of Minimum Wage Increases on Wages, Hours Worked and Job Loss', *Reserve Bank of Australia – Bulletin – September 2018*, p.3.

mention workers, unions and the FWO) do not find out the correct answer until a court determines the issues at the end of the prosecution.

3. Complex calculations required to determine the correct wage rate.

Under the *Building and Construction General On-site Award 2010,* the application of various loadings and allowances requires a highly complex process for determining something as basic an employee's hourly base rate of pay. For example, to determine the hourly rate of pay for a 'daily-hire' carpenter who works for a small building business and who supervises two others as a leading hand, a payroll system will need to be configured with up to 23 separate inputs and multiple different formulae to generate the correct rate. In addition, the order in which a formula or allowance is applied can mean that the hourly rate is calculated incorrectly. The FWO's calculation methodology for this award is set out at **Appendix 1**.

Inadvertent errors and inadequate payroll systems

Non-compliance by business can be a result of various factors that are unintentional and arise from inadequate payroll systems and/or mistakes. They can include coding entry errors, mis-classification or data entry errors, which can lead to both underpayments and overpayments. These errors often have consequences that compound over time. A small mistake can ultimately have significant consequences for a business and compound into a large 'headline' figure. In such cases, the size of the figure is not a reliable guide to the extent of the culpability by the employer and may often be highly unreliable in this regard. Many of the recent high-profile examples of underpayments by large employers were the result of such errors and arose as a result of those employers uncovering the errors as a result of reviewing their compliance systems.

More serious reasons for non-compliance can include neglect of compliance obligations by businesses that fail to give sufficient priority to compliance with their obligations.

None of these reasons should excuse non-compliance by larger employers, who have the resources to put adequate systems in place and who deal with many other complex matters as part of their operations. The situation is much more challenging for small to medium sized businesses that have fewer resources and for whom full compliance in the most complex situations may be almost impossible.

Deliberate non-payment and underpayment

The purposeful and deliberate underpayment of remuneration should not be tolerated and stronger sanctions should be considered if existing sanctions have been shown to be inadequate.

Most non-compliance by employers is not the result of dishonest attempts by employers to steal from their employees. As such, employers who commit such breaches are not 'thieves' and they ought not be treated as such. It is important that the Inquiry bears this distinction in mind.

The term 'wage theft' has been devalued and the concept trivialised, as it is now used to describe any form of underpayment, non-compliance or payroll system error, regardless of the degree of malfeasance by the employer.

GETTING THE SOLUTIONS RIGHT

Addressing the problem of underpayment by employers requires a range of solutions that are effective in compensating employees and which provide a proportionate response to the identified problem.

These include immediate and direct actions that employers and the FWO should take to remedy problems and compensate employees, as well as longer term policy solutions by governments to reduce unnecessary complexity in the system. Governments also need to implement strong compliance provisions that deal effectively with intentional non-payment or underpayment.

Getting these policy settings right will give workers greater assurance that they are being paid appropriately and support a productive and growing economy that creates jobs and pays higher wages.

Actions by employers

In the first instance, employers should assume greater responsibility for their own affairs without the need for intervention by regulators or changes to workplace laws. The onus must always be on them to have adequate systems in place and to accept responsibility when shortcomings arise.

There are a number of measures that employers put in place, as well as cultural norms within their workplace, in order to prevent non-compliance. These include:

1. Payroll systems that are fit for purpose and enable any errors to be detected and corrected in a timely way
2. Employee representatives who are engaged and alert to possible problems as they arise
3. Employees are able to know what they should be receiving and can address possible problems with their employer as they arise.

Large employers are currently investing greater resources in compliance, particularly in relation to improving payroll systems. This has been driven, in part, by the greater awareness generated by recent instances of large-scale underpayments by large employers.

This process has also been aided by advances in new systems for managing such obligations. Single-touch payroll systems have greatly assisted employers to meet their obligations and avoid errors in relation to their employee tax withholding obligations. Similar systems should be readily available for employers to manage their general payroll obligations. The rollout of single touch systems has also prompted employers to audit their existing payroll systems and uncover underpayments. In certain cases, this has led to errors being uncovered, which has been one factor in the growth of reported instances of underpayments and voluntary disclosures to the FWO.

The Business Council believes that the accelerated take up of more modern payroll systems will significantly reduce the level of non-compliance by employers, particularly small and medium sized businesses. As such, the Business Council recommends that the Government consider incentives to encourage smaller sized businesses to adopt such systems, for example tax incentives.

FWO guidance and advice

The Business Council recommends that the FWO should publish a wider range of advice and rulings on certain award or NES matters, including wage rates and award coverage. In addition, employers should be able to have comfort that they can rely on such advice.

The FWO should also be able to provide advice in response to specific queries by employers, with employers to also not be liable for sanctions if they follow such advice. At present, an employer may contact the FWO for advice and receive a response from the FWO to the effect that it cannot give the 'correct' answer with confidence on a particular question. As a result, the employer itself has no confidence that its arrangements are correct, or that it will not be exposed to sanctions in future, despite having made every effort to do the right thing.

Under this proposal, employers should not be liable for sanctions if they follow FWO advice, even if the advice is subsequently found to be incorrect by a court. This regime would be modelled on that which applies to ATO 'binding rulings' on tax matters.

In addition, the FWO needs to be provided with a wider range of resources to assist employers to conduct proactive reviews of their own practices, and then allow them an opportunity to rectify identified errors. The Australian workplace relations system is complex, with overlapping requirements that come from multiple sources. For small and medium businesses, it is often a daunting task to have systems that are sufficient to manage even apparently straightforward obligations.

Reduce complexity that leads to non-compliance

As outlined above, Australia's system of workplace regulation is inherently more complex than others. It has been made needlessly more complex by the manner in which certain award terms have evolved.

When the Fair Work Commission undertook research in 2014 to better understand the experience of small business employers with modern awards, consistent themes emerged:

1. The layout of modern awards was found to have *"elicited negative sentiment and was considered daunting by some participants. The documents were seen as difficult to use, but in-line with their low expectations of a government, regulatory/policy document, i.e. complex and challenging"* [2]

2. Components of the modern awards such as layout, content structure, language and ease of use, were found to be:
   - "**Convoluted …** Too long and unwieldy, suggesting a time intensive and difficult process.
   - "**Complex …** The language was difficult to understand, with 'legalese' and jargon.
   - "**Ambiguous …** Information provided was not clear, requiring too much interpretation.
   - "**Of questionable relevance …** Difficult to identify which award was most relevant when employees' roles varied and did not clearly fit into a single industry.

[2] Sweeney Research for the Fair Work Commission, *A Qualitative Research Report on: Citizen co-design with small business owners*, 14 August 2014, p.5.

- "**Not for them …** Written for the benefit of "bureaucrats and lawyers", with no consideration of end-user needs or capability".[3]

A lack of confidence and certainty in the award system was described as *"disempowering for small business owners in the study, and had led to some active avoidance"*.[4] The researchers noted that while there were barriers to the use of modern awards, the small businesses in the study were 'acutely aware' of the need to follow them:

> *"To manage this apprehension, most participants reported simply paying a little above modern award pay rates as a form of insurance, so they didn't get caught out. They also reported providing basic holiday and leave entitlements but relied on reaching some understanding with employees about many of the other provisions around breaks and penalties. Some participants were changing their employment practices in order to avoid dealing with the modern awards, i.e. not hiring or moving towards contract labour.*
>
> *"In summary, the challenges faced by the smaller end of the business community suggest that* ***regulatory documents will struggle to have optimal impact if not presented in a manner that demonstrates an appreciation of the needs and capabilities of the end-user. Information that is too hard to deal with may result in 'best guess' solutions or avoidance of the document altogether."*** (emphasis added).[5]

Criminal sanctions

Proposed criminal sanctions must be limited to conduct that is genuinely criminal in nature, as outlined below. It is crucial that any criminal offence that is introduced into the *Fair Work Act* must include the elements of dishonesty and intent on the part of the employer, and that these must be satisfied to the criminal standard of proof. Only conduct that satisfies this test should properly be considered 'wage theft'.

The Business Council proposes that serious non-compliance that warrants criminal sanctions under the Act should be defined as:

1. the intentional and wilful avoidance of an employer's obligations;
2. through the purposeful manipulation of employment arrangements;
3. with the intention of permanently depriving an employee of a lawful entitlement.

This definition is intended to reflect the elements of 'theft' under the general law, for example, 'theft' as defined in the Victorian *Crimes Act*:

> *"**72 Basic definition of theft***
>
> *(1) A person steals if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.*
>
> *(2) A person who steals is guilty of theft; and "thief" shall be construed accordingly.*[6]

[3] Sweeney, p.5.

[4] Sweeney, p.5.

[5] Sweeney, p.7.

[6] section 72 of the Victorian *Crimes Act 1958.*

The definition could also provide that the offence includes actions or arrangements that have the effect of satisfying the elements of 'theft'. This would cover things such as:

- Deliberate underpayments
- 'Cash back' arrangements
- Intentional sham contracting where an employee is fraudulently characterised as a contractor in order to avoid employee entitlements
- Deliberate falsification of employment records to facilitate such conduct.

Proposals to extend liability beyond the direct employer

The Business Council does not support the further extension of liability beyond direct employers other than in circumstances where another party is clearly culpable for non-compliance by the direct employer. Such a proposal is referred to in term of reference (e) of the Inquiry.

The *Fair Work Act* currently extends liability beyond the direct employer in certain situations. This can include parties higher up a contractual chain in supply chain or outsourcing arrangements. The Act allows for accessorial liability in situations where an employer is 'involved in' a contravention, through aiding or abetting, counselling or procuring a contravention by another party.[7]

Where breaches occur in a supply chain, liability should only extend beyond the direct employer to another party when there is genuine culpability. This requires knowledge and intent, in addition to control. This is distinct from normal supply chain arrangements, in which non-related parties freely enter into contracts in situations where one party does not have any pre-existing control over the other. For example, in the retail sector, fresh produce suppliers will sell to multiple buyers, such as supermarkets, further up a supply chain. Attributing liability to just one buyer or apportioning liability between buyers would be a completely arbitrary and unfair exercise.

The legal obligation of an employer to correctly pay employees must always remain with the direct employer. Exceptions to this principle should only apply where another party bears responsibility because they are genuinely 'involved in' the non-compliance of the sub-contractor, as already provided for under the Act.

[7] section 550

Appendix 1: Formulae required to determine one hourly rate under the Building Award

The extract below is a snapshot of the FWO's calculation methodology for determining a typical hourly pay rate under *Building and Construction General On-site Award 2010*:

Hourly pay rate

Result
$26.60

Calculations
The employee's hourly base rate of pay $26.60 Detail >>

- **The employee's hourly base rate of pay without loadings** : $26.60 Detail >>
  - **The employee's hourly base rate of pay amount** : $26.60 Detail >>
    - **The employee's daily hire hourly wage** : $26.60 Detail >>

`$963.63 / 38 + $1.24 = $26.60`

- **The employee's daily hire weekly wage with applicable pre-base rate allowances and the special allowance** : $963.63 Detail >>

`52 / 50.4 x $926.52 + $7.70 + $0.00 x 38 = $963.63`

- **The multiplier to apply to the calculation of the employee's daily hire minimum wage** : 52
- **The divisor to apply to the calculation of the employee's daily hire minimum wage** : 50.4
- **The employee's daily hire weekly wage with applicable pre-base rate allowances** : $926.52 Detail >>

`$862.50 + $0.00 + $31.91 + $32.11 + $0.00 = $926.52`

- **The employee's full-time adult minimum weekly wage** : $862.50
- **The employee's mobile crane capacity adjustment** : $0.00
- **The employee's industry allowance amount** : $31.91 Detail >>
  - **The industry allowance amount** : $31.91

`3.70% x $862.50 = $31.91`

- **The employee's tool allowance amount** : $32.11 Detail >>
  - **The tool allowance amount** : $32.11
- **The underground allowance amount per week** : $0.00

- **The employee's special allowance amount** : $7.70
- **The employee's refractory bricklaying allowance amount** : $0.00
- **The average number of ordinary hours a full-time employee works per week** : 38

- **The divisor applicable to the employee** : 38
- **The employee's hourly leading hand allowance amount** : $1.24 Detail >>
  - **The hourly leading hand allowance amount** : $1.24 Detail >>

`$47.16 / 38 = $1.24`

- **The weekly leading hand allowance amount** : $47.16 Detail >>
  - **The weekly leading hand allowance amount for a daily hire** : $47.16

`$45.71 x 52 / 50.4 = $47.16`

- **The divisor applicable to the employee** : 38

BUSINESS COUNCIL OF AUSTRALIA
42/120 Collins Street Melbourne 3000 T 03 8664 2664 F 03 8664 2666 www.bca.com.au