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Brisbane QLD 4000
Australia

6 March 2020

Committee Secretary
Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee Secretary

Submission into unlawful underpayment of employees' remuneration inquiry

Enclosed is our submission for the Committee's consideration.

Please contact me if you would like to discuss it further.

Sincerely

Andrew Stirling
Partner, Tanda PaySure





About Tanda, Tanda PaySure and the author

Tanda is a Brisbane headquartered technology company, founded in 2012. Among other things, Tanda's cloud-based workforce management platform offers our customers rostering, time and attendance, and payroll calculation solutions.

Tanda's primary mission in business is to ensure that employees are paid fairly and lawfully every time they go to work. This is to protect both employers and employees. As a result of this mission, Tanda has invested significantly in its award interpreting payroll calculator. Tanda's payroll calculator is one of the reasons over 6,000 organisations have appointed Tanda as its Workforce Management Solution.

Tanda PaySure is led by Andrew Stirling. Andrew worked as an employment lawyer at the top-tier law firm Allens for twelve years, including four years leading its Brisbane employment practice. During his time at Allens, Andrew established his reputation as a thought leader in industrial relations compliance, regulation and policy. Andrew finished at Allens to start Tanda PaySure. Tanda PaySure combines Australia's leading payroll calculator, developed by Tanda, with Andrew's vision for technology-led compliance.

The comments in this submission are based on Andrew's experience and observations, both in private legal practice and as the head of Tanda PaySure.

Recommendations

| No. | Recommendation |
|-----|---|
| 1 | That the Government review whether the record keeping requirements in the Fair Work Act and the Fair Work Regulations are sufficient to ensure that underpayments can be identified and uncovered. |
| 2 | That the Government develop a rating system to measure and report on the extent to which off-the-shelf payroll calculation technology provides a compliant solution when used properly. |
| 3 | That the Government consider amending the Fair Work Act to make investment in compliant payroll calculation technology a factor that courts must consider when imposing civil penalties in the case of underpayments. |
| 4 | We recommend that the FWO pilot the use of a true payroll calculator on its website, i.e. a payroll calculator that results in the user getting an accurate picture of the gross wages payable under an award. |
| 5 | That the FWO be funded to invest in payroll calculation technology, so that it is capable of processing greater volumes of data as part of its compliance activities. |

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| 6 | <p>That any low-cost small wage claims tribunal pilot the operation of a payroll calculator to allow:</p> <ul style="list-style-type: none">• applicant employees to calculate the quantum of their application based on their version of the facts;• defendant employers to calculate the quantum of the application based on their version of the facts; and• the tribunal to calculate the quantum of the employer's liability (if any) based on the tribunal's factual findings. |
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Overview

The Australian employment contract is the only contract where neither party can be sure if the financial consideration is adequate to comply with the law. At its heart, this is because the terms and conditions in awards and enterprise agreements are very complex.

Employers are not to blame for the complexity, but are responsible for their compliance. Sophisticated payroll calculating technology is available and on the market to manage this complexity. Practical and legislative support from the Government would encourage uptake of this technology, which would in turn increase compliance and reduce underpayments.

Politicians and regulators need to take responsibility too. The complexity of the terms and conditions in awards and enterprise agreements are a direct consequence of their decisions. If politicians and regulators want to seriously address the current underpayment compliance issues, they will embrace technology as the only viable option for scaling to the size of the problem.

Forms of and reasons for underpayment of employee remuneration

Forms of underpayment

Broadly, underpayments can be intentional (i.e. "wage theft") or unintentional. This submission primarily addresses unintentional underpayments, because our experience is with employers who are doing their best to navigate the complicated industrial relations system.

Reasons for unintentional underpayments

Primary reason: The pay conditions in awards and enterprise agreements are very complicated, having developed over many decades to include numerous base rates, overtime rates, penalty rates, loadings and allowances.



Secondary reasons:

- **Too many employers are underinvested in technology.** Tanda's sophisticated payroll calculation technology can automate the application of the pay conditions in awards and enterprise agreements. The technology is easily adopted and available for modest unit cost; its effectiveness has been proven through its use by businesses of varying sizes and across a wide spectrum of industries. However, many employers are not investing in that technology, but are instead using either:
 - cheap foreign technology that is not adapted to compliance with Australian workplace law; or
 - manual processes (e.g. Microsoft Excel or paper).
- **The pay conditions that cannot be automated by technology are themselves complicated.** For example, it is not always clear what award applies to an employer or which classification level is appropriate for an employee's duties.
- **The Australian employment contract is the only contract where neither party can be sure if the financial consideration is adequate to comply with the law.** There are no mechanisms for employees to quickly and accurately check what their wages should be in any pay cycle. To be clear, this is not to suggest that the responsibility for ensuring payroll accuracy should be on the employee - that is not the case at all. However, if employees had a way of conducting checks themselves, it seems likely that payroll issues would be addressed sooner.
- **Employers try to "rise above" the complexities in awards by paying annual salaries or loaded hourly rates.** This inadvertently creates new compliance risks. For example:
 - as many employers are finding out, the salaries are not always sufficient to ensure every employee's pay is compliant; and
 - the mechanisms for lawfully using annual salaries and loaded hourly rates are not well understood. Confusion about these mechanisms has been compounded by recent amendments to many modern awards.

The best means of identifying and uncovering unintentional underpayments

Summary

There are two essential requirements for identifying and uncovering unintentional underpayments:

- **minimum data capture:** for any solution to work properly, certain data must be captured for the purposes of informing the calculation of pay; and
- **scalability and transparency:** any solution must use technology to cope with the volume of minimum data required to identify and uncover unintentional underpayments. To be trusted by employers and employees, those solutions need to be reliable and auditable.



Minimum data capture

What data points are necessary for identifying and uncovering unintentional underpayments under an award?

For unintentional underpayments under an award to be identified and uncovered, the employer needs to keep records of:

- **Relevant employee data.** Employees who work side-by-side doing the same work are not necessarily entitled to the same rate of pay. As a simple example, junior employees are entitled to a lower award rate of pay than adult employees. To ensure that award entitlements can be properly calculated, all of the variable information that is required to calculate that employee's pay must be maintained. Such information includes the employee's birth date, employment type (e.g. full-time, part-time, etc), their applicable industrial instrument and their classification.
- **Employer and location specific data.** Some award rates of pay are dependent on employer-specific factors (e.g. pay cycle or roster length) and location specific factors (e.g. local public holidays).
- **Roster data.** In some cases, award rates of pay (e.g. overtime) depend on when employees were rostered to work. For those awards, roster data needs to be retained to allow a comparison between rostered hours and actual hours worked.
- **Timesheet data.** The vast majority of the rates of pay in awards are based on actual hours of work, including break times.

There is no legal requirement to maintain records of these data points

The *Fair Work Act 2009* (Cth) (**Fair Work Act**) and the *Fair Work Regulations 2009* (Cth) (**Fair Work Regulations**) do not appear to require that employers capture all of this basic data, even though the data are necessary to calculate an employee's award pay. Since these data are necessary to calculate an employee's award pay, they are also necessary for identifying and uncovering unintentional underpayments.

We recommend that the Government review whether the record keeping requirements in the Fair Work Act and the Fair Work Regulations are sufficient to ensure that underpayments can be identified and uncovered.

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| 1 | That the Government review whether the record keeping requirements in the Fair Work Act and the Fair Work Regulations are sufficient to ensure that underpayments can be identified and uncovered. |

We expect employer associations to argue that it is unreasonable to require these records to be kept for all award covered employees. Employer associations made those types of



arguments in the Fair Work Commission in the course of arbitrating the new annualised salary clauses.

While we have sympathy for those arguments, in our view the series of underpayment (and now overpayment) announcements have undermined public confidence in the administration of the Fair Work Act. In our view, employers have a great deal to lose if the rule of law is undermined within employee and industrial relations.

Scalability and transparency

Any solution must use technology to cope with the volume of minimum data required to identify and uncover unintentional underpayments.

Solutions for employers

The current data-heavy environment necessitates technology as part of an effective and integrated compliance program. Sophisticated payroll calculation technology, such as the technology sitting at the heart of Tanda, can be programmed to process the payroll data referred to above in real time.

Tanda's payroll calculator is market-leading because it was purpose built for compliance with the complexities in the Australian award system.

All of our competitors claim to have "award interpretation" capabilities, but our overseas owned competitors in particular do not have the same eye to compliance that is core business in Australia. The extent of this issue has been recently highlighted with large retailers ascribing their underpayment difficulties to overseas software.

Small businesses need off-the-shelf technological payroll compliance solutions. They do not have the resources to invest in expensive legal and accounting services to help them interpret and apply awards. Instead, they need to have confidence that when they invest in a technological solution it provides them with compliance off-the-shelf. This technology is essential to avoiding, as well as identifying and uncovering, underpayments.

Practical and legislative support from the Government would encourage uptake of this technology, which would in turn increase compliance and reduce underpayments. In this respect, we recommend that the Government develop a rating system to measure and report on the extent to which off-the-shelf payroll calculation technology provides a compliant solution when used properly.

To further encourage uptake of the technology solutions that are necessary for avoiding underpayments, as well as identifying and uncovering them, we also recommend that the Government consider amending the Fair Work Act to make investment in compliant payroll calculation technology a factor that courts must consider when imposing civil penalties in the case of underpayments.



We are not recommending that employers be able to avoid making good underpayments. However, since technology is so integral to ensuring payroll compliance, employers should have legislative encouragement to invest in it. Making investment in compliant payroll technology a factor that courts must consider when imposing civil penalties is a proportionate degree of encouragement, while allowing the court to ultimately determine what civil penalty (if any) is appropriate.

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| 2 | That the Government develop a rating system to measure and report on the extent to which off-the-shelf payroll calculation technology provides a compliant solution when used properly. |
| 3 | That the Government consider amending the Fair Work Act to make investment in compliant payroll calculation technology a factor that courts must consider when imposing civil penalties in the case of underpayments. |

Solutions for employees

As it stands, the technological solutions available to employees for identifying and uncovering unintentional underpayments are very rudimentary.

Last year, the Fair Work Ombudsman (**FWO**) had over 6 million calculations performed on its “Pay Calculator”, with the website fairwork.gov.au receiving some 17 million hits. The FWO’s “Pay Calculator” is the only publicly available way for employees to check their wages.

The difficulty is that the “Pay Calculator” does not calculate pay at all and so is insufficient for the purpose of employees properly checking their wages. It simply provides rates of pay based on award classification and age.

At best, the information in the FWO’s “Pay Calculator” may assist the employee to identify or uncover that they are being paid the incorrect hourly rate. Award classification and age alone are insufficient to determine how much an employee should have been paid in total. Armed with the correct hourly pay, an employee would still need to manually calculate their pay based on rules in the modern award to determine if they had been underpaid and to what extent.

We recommend that the FWO be funded to pilot the use of a true payroll calculator on its website, i.e. a payroll calculator that results in the user getting an accurate picture of the gross wages payable under an award. This type of payroll calculator would allow:

- employees to identify and uncover underpayments in real time; and
- employers that do not have a compliant payroll calculator to check their employees’ gross wages. This would cut through any award complexity, and allow employers who want to be compliant to uncover any underpayments before they arise.



The aim of the pilot would be to validate demand for a proper payroll calculator on the FWO's website, as well as determine the best way to meet that demand. Based on the current use of the FWO's "Pay Calculator", it can be reasonably predicted that this calculator will be a popular means of ensuring compliance, as well as for identifying and uncovering underpayments.

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| 4 | We recommend that the FWO be funded to pilot the use of a true payroll calculator on its website, i.e. a payroll calculator that results in the user getting an accurate picture of the gross wages payable under an award. |

A true payroll calculator, available to both employers and employees, is far more likely to lead to widespread compliance than simply giving the FWO more funding to undertake more of the same regulatory activities. More of the same is not enough. Australia needs to completely rethink how compliance can be achieved and monitored at scale.

Solutions for the FWO

Our understanding is that the FWO still audits employer payroll using spreadsheets. The FWO's reliance on spreadsheets must severely restrict its capacity for identifying and uncovering underpayments.

To maximise the FWO's enforcement efforts, we recommend that the FWO be funded to invest in payroll calculation technology, so that it is capable of processing greater volumes of data than its existing use of spreadsheets would allow. This technology would greatly enhance the FWO's ability to identify and uncover underpayments.

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| 5 | That the FWO be funded to invest in payroll calculation technology, so that it is capable of processing greater volumes of data as part of its compliance activities. |

Changes to the existing legal framework that would assist with recovery and deterrence

Prior to the 2019 Federal Election, the Australian Labour Party promised to introduce a new low-cost small claims jurisdiction that would give employees another forum in which to claim unpaid wages.

If the current environment is any indication, and if such a tribunal were to be created, it is reasonable to expect that it would be heavily subscribed. The question then becomes how the tribunal could possibly manage such a large workload.

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The tribunal's processes would be a matter to be determined, but it is reasonable to assume that the process would be something like the following:

1. employee application;
2. employer defence/ response;
3. mediation/ conciliation;
4. arbitration/ hearing;
5. decision on:
 - a. facts;
 - b. liability, including quantum.

To be able to manage the workload appropriately, we recommend that any low-cost small wage claims tribunal pilot the use of a payroll calculator to allow:

- applicant employees to calculate the quantum of their application based on their version of the facts;
- respondent employers to calculate the quantum of the application based on their version of the facts; and
- the tribunal to calculate the quantum of the employer's liability (if any) based on the tribunal's factual findings.

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