
Inquiry into Unlawful Underpayment of Employees' Remuneration, Senate Economic Reference Committee

Submission of:
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Biographies

Anna Boucher is an Associate Professor in Political Science and Public Policy at the University of Sydney. She holds degrees in politics and law, from the University of Sydney and the London School of Economics and is a former Australian Commonwealth Scholar. Her research focuses upon immigration policy and its intersection with the welfare state, gender equality, industrial relations and employment law as it impacts upon immigration. Her work has been published in international journals, books and presented before intergovernmental and government agencies. She is a regular commentator in the news on immigration issues. In 2016, she was awarded an Australian Research Council grant (DE17010080) and a University of SOAR Fellowship (2019-2020) to create the Migrant Worker Rights Database Project. Some of the data from this Project is drawn upon and analysed in this submission.

Umeya Chaudhuri is a Bachelor of Arts Hons I/Laws graduate of the University of Sydney. She has a background working in policy and legal services in the community legal sector, and also as a research assistant on the Migrant Worker Research Database project. She currently works as an Associate to a judge of the Supreme Court of Victoria.

James Hall is a fourth year Bachelor of Arts/Law student from the University of Sydney. He currently works for the NSW government in law reform and policy. James also works at the University of Sydney as a research assistant and as coordinator of voluntary student work for under-resourced policy organisations.

We are also grateful to Nina Dillion Britton and Nela Salamon for statistical analysis of the Migrant Worker Rights Database (described herein).

This comments in this submission reflect the views of the authors herein rather than the University of Sydney.

Introduction

We thank the Economic Reference Committee for the opportunity to make a submission to the Inquiry into Unlawful Underpayment of Employee's Remuneration. We address the key terms of reference focusing upon the effects upon migrant workers, although at times we also discuss the broader implications for all employees within the Australian labour market. While there is not a singular definition of "migrant," in our analysis, we draw a distinction between long-term citizens and residents, and those who are on temporary visas or have resided in Australia for less than ten years (Boucher and Carney 2013). The visa position of these workers creates heightened forms of vulnerability to underpayment that we explore in our submission below. Temporary migrant workers also comprise a significant proportion of the Australian labour market, estimated at between 8 and 10 % of workers in 2019 (Ball 2019, 2; ABS 2016). This is not to discount possible unlawful underpayment against other sections of the Australian population. Rather, it is to focus in on a demographic that has been identified as strongly at risk of underpayment. Some of the data presented is drawn from Anna Boucher's Australian Research Council Project (DE17010080), a project that compiles all available court and tribunal cases of migrant workplace violations in Australia over the period 1996 through to 2016 (see further Boucher 2018).

Key recommendations of this submission

Recommendation 1: Fund research into employer perceptions of the cost of non-compliance, using robust methods to control for the effects of regulatory changes upon perceptions and bias in responses.

Recommendation 2: Proceed with implementation of the key recommendations of the Migrant Worker Taskforce (2019). These include i) increasing the education of migrant workers through a variety of social media campaigns; ii) further resourcing of the Fair Work Ombudsman to undertake more inspections and prosecutions in cases of underpayment; iii) a greater use of issuance of compliance notices to recover underpaid wages but with simplification of the process required of the Fair Work Ombudsman before proceeding with such a process.

Recommendation 3: Extend the Fair Entitlements Guarantee to temporary migrant workers alongside Australian citizens and permanent residents.

Recommendation 4: Parliamentary guidelines for taxation, and grossing up, to be factored in when making any court order for compensation. It is further recommended that an independent review of the superannuation recovery mechanisms be conducted to ascertain whether it is serving the needs of complainants efficiently.

Recommendation 5: The wage recovery scheme for textile, clothing and footwear outworkers in Division 3, Part 6-4A of the Fair Work Act 2009 (Cth) should be retained.

Recommendation 6: The wage recovery scheme for textile, clothing and footwear outworkers in Division 3, Part 6-4A of the Fair Work Act 2009 (Cth) should be extended to other supply chain industries including the cleaning, security, horticultural and meat processing industries.

Recommendation 7: Adopt key recommendations from the Migrant Worker Taskforce (2019), and expands upon recommendation 12, to strongly endorse a restructured small claims recovery process.

Recommendation 8: Consider a low-cost jurisdiction within the Fair Work Commission to cover small claims of underpayment.

Recommendation 9: The Federal Government should have procurement policies that ensure public contracts are only awarded to those businesses that do not engage in wage and superannuation underpayment, and that have made past positive contributions to industrial relations.

Recommendation 10: The Federal Government should have procurement policies that ensure public contracts contain terms that require businesses to continue to minimise breaches of workplace law throughout the contractual period.

We address each term of reference in turn.

Terms of Reference a) The forms and reasons for wage underpayment

As with many unlawful activities, the forms and extent of wage underpayment is difficult to measure. We note at the outset that there is a plethora of qualitative evidence of underpayment, alongside other forms of employment breaches, that has been well documented in existing government inquiries. As early as the Deegan Inquiry of 2008, there has been evidence of underpayment of migrant workers on temporary visas in Australia (Deegan 2008; Tham and Campbell 2014 for an overview). In the section below, we review some of the key empirical ways to identify wage underpayment and the challenges each present.

Surveys of migrants and employers on underpayment

Inquiries into the extent or range of underpayment can only be truly captured through quantitative methods. Yet, there are methodological challenges in measurement of this phenomenon. Surveys of workers have revealed evidence of wide-spread wage theft among migrant workers (Berg and Farbenblum 2017; 2018). However, it is difficult to develop a reliable population sampling frame for these studies given that some respondents may be more or less likely to respond and also given the transitory nature of migrants. Furthermore, such surveys are open access and anonymous meaning that there is no way to know if respondents have responded more than once to the instrument.

The Department of Employment and Home Affairs' jointly commissioned study on temporary migrant workers experience attempted to overcome this issue of sampling by using a population sample weighted against unpublished immigration statistics to address issues of under or oversampling. It surveyed the temporary population in Australia over a one-year period between May 2014 and April 2015 (Hall and Partners 2016). Based on this method, the study is perhaps the most reliable to date of migrant workers in Australia and found that one-third of temporary workers believed that they were underpaid compared with Australian workers (Hall and Partners 2016, 121). This is lower than the 62 per cent predicted in the Berg and Farbenblum (2017, 25) study, although the two studies are arguably not directly comparable as they adopt different measurements and benchmarks of underpayment.

Generally, survey data on workers perception of underpayment can be unreliable because it only provides one perspective and respondents' recollections may not be perfect. As Hall and Partners (2016, 115-6) note, "self-reported financial data in particular is subject to bias or misreporting for a variety of reasons, but it would not have been in scope to independently verify financial details given (e.g. by citing pay slips or tax returns) as may be possible in smaller scale or other forms of research." Furthermore, employees and employers can have very different perceptions of underpayment. In the Hall and Partners (2016, 177) survey, employers were also surveyed, and only five per cent agreed with the proposition that they were underpaying workers. Eighty-one per cent claimed that they paid overseas workers the same as domestic workers. Several things are possible to conclude from these disparate findings on underpayment that emerge between surveyed migrants employees and their employers:

- i) It is possible that employers are under-representing the extent of underpayment of migrant workers;
- ii) Alternately, employers are unaware of correct awards to pay to migrant workers and are thus not aware of that underpayment;
- iii) Migrant workers believe that they should be paid more than they are actually entitled to and therefore are asserting underpayment when this is not the case;
- iv) A final possibility is that migrant workers are being underpaid but so are Australian workers and long-term residents, leading to a position among some employers that migrant workers are not worse off than their Australian counterparts but in fact all are being underpaid.

Without prejudice to any of these possibilities, it is clear that surveying employees or employers has its limitations in ascertaining unlawful underpayment. Several other methodologies exist.

Codification of court cases that capture underpayment

University of Sydney Associate Professor Anna Boucher has collected data from written judgments of all court and tribunal cases brought in Australia over the period 1996 through to 2016 of wage underpayment (among other forms of workplace violations). Collectively these cases form the Migrant Worker Rights Database (MWRD).¹ One key advantage of relying upon court and tribunal cases is they represent adjudicated documentation of workplace violations by an independent decision-maker (a judge or tribunal member). Further, those decision-makers are reaching their determination based upon available evidence and the legal regulations at place at the time. In this way, court or tribunal judgments can be viewed as a more objective measure of underpayment than surveys of workers as judgments are considered through an interpretation of compliance with the *Fair Work* architecture. That said, such an evidence base almost certainly undercounts the full scope of violations occurring in the labour market as it cannot account for cases that are not pursued, are settled or are unpublished.²

¹ The Database also codes cases from England, Canada (Alberta, British Columbia and Ontario) and California over a twenty-year period, amounting to over 1000 court and tribunal cases. The data are currently being analysed into a book being drafted by Anna Boucher. This funding for this project comes from the Australian Research Council and the University of Sydney's SOAR and Laffan Fellowships.

² An alternate position is that court and tribunal cases only captured those instances of underpayment that have made their way into the legal system and therefore fails to identify cases which do not proceed for access to justice reasons. These include individual fear or lack of knowledge of the court system, risk of visa reprisals

The Australian data of the MWRD comprises of 355 cases in which 946 individuals brought claims. The Database also measured the “event” or the types of legal violations that were documented in the judgment. In the following section, we set out instances of underpayment and differentiate between claims of underpayment and underpayment and claims that were *successful* before a decision maker.

Claims of underpayment by migrant workers

In Australia, there were 1120 events, of which unpaid wages comprised the largest single category. We captured different types of underpayment (due to an insolvent employer; unpaid leave; unpaid superannuation; breach of minimum wage requirements; non-payment of penalty rates; meal and rest period violations; and unlawful business practices) although only aggregate underpayment is represented here:

- Approximately half of all claims in Australia over this period (530/1120) were for unpaid wages or underpayment of some form;
- This means that in the recorded data, underpayment was the single biggest type of workplace violation that was litigated by migrant workers;
- The next largest category was for unfair and unlawful dismissal (144/1120).

There are also some revealing demographic data that emerge from the study:

- Male migrants had higher rates of underpayment claims than female migrants (111/1120 for men and 45/112 for women). However, there was a large amount of missing data for gender for this variable so care must be taken in interpreting these data.³
- Migrants in the lower-level occupations (International Standard Classification of Occupations Five or below) have a higher reported number of underpayment cases compared with other categories. This is consistent with findings in the Deegan Report that those in the lower-occupational categorisations of the former 457 visa were more likely to experience underpayment than those in higher-ranked occupations with more negotiation power in the workplace (Deegan 2008).

Findings of underpayment

It is also useful to compare these findings related to claims by migrants with determinations by judges or other decision-makers. As noted above, the central benefit of such a method is that it can address the instances of when an individual may feel they have been underpaid but it is not made out at law. When considering successful outcomes data:

- Unpaid wages were still the most common claim however, only 191 events for underpayment were successful, compared to 530 claims for underpayment. This success rate by migrants in underpayment cases of 36% is lower than the overall success rate across all forms of claims at 66% (Boucher and Chaudhuri 2020). In contrast, other types of violations – such as being subjected to misrepresentation – have far higher

against individuals who bring actions, lack of funds to bring an action or available legal representations, visa expiration. We explore some of these issues in the remaining sections of this submission.

³ For 374 of the 530 documented cases of underpayment, the gender variable was missing

success rates for migrants, such as 95 per cent. It is important to note that the fact that underpayment cases have a lower success rate does not mean that the migrant did not experience underpayment, there could also be evidentiary issues in the case that led to these higher rejection rates by decision-makers, such as an inability of migrants to present accurate proof of underpayment.

- Those on the 457 visa (now known as the TSS visa) were most successful in their claims for unpaid wages, the least successful were those on the following visas: business visas; criminal justice stay visas; permanent residents; Medical Practitioner (Temporary) visas; Sponsor Visas; Spouse visas; generic temporary visas and those with undocumented status. It is however possible that permanent residence status was simply not mentioned in judgments and therefore these cases did not come within the remit of the Database search terms.
- Country-of-origin also seemed to be important. Those from Korea, China and India had the highest rate of successful underpayment cases. Nationals of the following countries had lower rates of success, although they may also have brought fewer claims: Taiwan; Colombia; Germany; Iran; Italy; Nepal; Pakistan and South Africa.

Estimation of underpayment using tax data

More recently, federal linking of immigration and tax data has empowered government to estimate the extent of underpayment of migrant workers (ABS 2019). Known as the Personal Income Tax and Migrants Integrated Dataset (PITMID), these data are only collected for permanent visa holders and those on transitional visas, rather than temporary visa holders. This is a central limitation of the data as temporary migrants have been identified as a high-risk category for underpayment. Further, temporary migrants are the largest growing section of immigration into Australia (CEDA 2019). Nonetheless, these data may be useful in identifying instances where taxable income does not accord with occupational standards as required under awards, and thereby provide a means to estimate pockets of underpayment across different sectors and industries. These could then become the focus for investigations by the Fair Work Ombudsman. In general, developing a solid empirical basis upon which to decide which industries or employers to focus on for wage underpayment investigations is a challenge for enforcement agencies across multiple countries. Better information on where underpayment is occurring could assist government in targeting inspection and litigation strategy (Boucher 2020, Enforcement chapter).

Supply chain analysis

Recent work in Finland, funded by the European Union, is using business tools to analyse each stage of the supply chain where underpayment occurs (Jokinen and Ollus 2020). Drawing attention to tax fraud, fraudulent booking and corruption can help identify wage underpayment as well. This project clarifies that auditing tools used to identify tax evasion may therefore also be useful in identifying various forms of worker exploitation, of which underpayment can be viewed as one of several offences (Jokinen and Ollus 2020). This might also be a pathway forward in Australia although the analysis in Europe is still nascent.

Reasons for wage underpayment

There are differing views about the reasons for wage underpayment. In the Pricewaterhouse Cooper ('PWC') report 'Australia Matters', they cited the three main causes as i) the 'underinvestment in payroll systems,' ii) 'the complexity of the industrial relations system'; and iii) the 'declining presence of unions as a source of oversight' (Thorpe and Coates, 2019). Underpinning the first and third point (but to a lesser extent the second) is the idea that wage underpayment is often deliberate and a means to extract profits within a business model. This point is made by Jokinen and Ollus (2020) in their analysis of Finland where they argue that cost reduction is one of two clear business models in labour exploitation cases. This cost reduction can take several forms but a central one is underpayment of wages. Under such an approach, non-payment or underpayment of wages is deliberate, often criminal and a means to extract profits. There may be more underpayment in some sectors than others. For instance, research on the hospitality sector in Australia, suggests that underpayment is institutionalised and endemic (Robinson and Brenner 2020). We explore some of these other possible arguments below.

"The cost of doing business"

It is often argued that businesses may engage in underpayment because the possible level of fines are "the cost of doing business." Unfortunately, as noted, surveys to date on this have not revealed this perception among employers. This may be because respondents are unlikely to be honest in surveys on their own unlawful behaviour. Alternately, such a statement may overestimate the extent of knowledge of the penalty system among employers (Hardy and Howe 2018). Another criticism would be that the Fair Work Ombudsman needs more resources to investigate reported cases of underpayment and that at present, the regulatory signal is insufficiently strong to deter such practice by some employers (Clibborn 2019). Clibborn's analysis documents in detail how FWO funding has dropped in the decade leading to 2020 at the same time as the labour force has grown substantially faster (Clibborn 2019, Table 1).

Complexity of the award system

An alternate perspective, and one that places blame on existing structures rather than employer behaviour, is that the award wage system in Australia is complex. Under this explanation, non-deliberate underpayment is more common in Australia than in systems with more simplified wage arrangements and explains most of the underpayment that is occurring (i.e. Marin-Guzman 2019). This would perhaps explain underpayment in small businesses without recourse to adequate financial advice but not in larger companies. Furthermore, access to adequate financial and accounting advice should be considered as a key cost of business.

It is important to note however, that even in countries with more simplified wage systems than Australia, such as the State of California or England, migrants also bring high rates of claims for underpayment. Comparative data from the Migrant Worker Rights Database indicates that wage underpayment was also the single highest claim in the State of California and in England, wages were the third highest claim (following dismissal and discrimination on the grounds of race, ethnicity and national origin). Therefore, on these comparative examples and data, it would not seem that claims for underpayment in Australia are exclusively a product of the complex wage system. Migrants in both simple and complex wage systems frequently bring claims for underpayment.

In order to understand better whether employers are underpaying due to a perceived low nature of fines and penalties, or whether it relates to a lack of knowledge of the award system, more detailed research is needed that builds response bias into existing survey design. It would appear that assurances of respondent confidentiality are insufficient to adequately address the issue of response bias. It is also necessary to design studies that can measure and account for implicit bias in responses. Furthermore, it would be necessary to construct studies that measure the effects of changes in perceptions of compliance before and after regulatory reform.

Recommendation 1: Use the PITMID and other instruments to fund research into employer perceptions of the cost of non-compliance, using robust methods to control for the effects of regulatory changes upon perceptions and bias in responses

Terms of Reference b. The cost of wage and superannuation theft to the national economy;

There is limited research to date on the economic costs of wage and superannuation underpayments to the broader national economy. This gap in our understanding extends beyond the individual workers to broader economic indicators. As wage growth stagnates in Australia (Cassidy, 2019; Australian Treasury, 2017) and in other economies (Arsov and Evans, 2018), discussions around wage underpayment and the consequential impact on limited household income and spending is of importance.

Further, the level of “pass through” from firm productivity to workers appear to be decreasing in Australia. Longitudinal microdata analysis from 2001-2016 by Dan Andrews, Nathan Deutscher, Jonathan Hambur, and David Hansell from the Australian Treasury Department showed that since 2012, businesses that previously would share profit with workers, have moderately reduced their dispersions to workers (Andrews et al, 2019). Changing business practices and models in this respect are worthy of further attention. Iain Campbell has written;

“Business models centred on underpayments aim to realise an unfair financial advantage, primarily by paying employees less than what is required by law but sometimes — in the case of undeclared work — with an additional bonus from avoiding taxation and superannuation liabilities.” (2019: 193).

The analyses surrounding cutting labour costs through various business models have focused to date on independent contracting and labour-hire companies, where direct employment is replaced through fractured employment relationships (Bornstein, 2019: 160; Riley, 2017; Victorian Inquiry into the Labour Hire Industry and Insecure Work, 2016). With over 122 different industry-based awards, the effects of underpayments vary significantly as shown by the PWC ‘Australia Matters’ report. Using Fair Work Ombudsman data and economic modelling, PWC reported that underpayments total \$1.35 billion per year, with the main sectors affected included; construction, with losses of \$320 million; healthcare and social assistance approximating \$220 million, accommodation and food services with \$190 million, and retail with approximately \$180 million (Thorpe and Coates, 2019). These estimates affect an estimated thirteen per cent of the total Australian workforce.

With such widespread underpayment, there is a strong economic incentive to address the systematic underpayment of workers across various sectors.

Terms of reference c. the best means of identifying and uncovering wage and superannuation theft, including ensuring that those exposing wage/superannuation theft are adequately protected from adverse treatment

As noted above, new innovations with linking tax and immigration data may provide one means to expose underpayment at the population level although to date, this has not been explored broadly.⁴ There can be additional challenges in this regard including the use of phoenix companies, use of illegal subcontractor arrangements and franchising to circumvent labour laws (Jokinen and Ollus (2020)). All of these arrangements generate complexity for government in investigating underpayment.

Enforcement policy can also play an important role in increasing attention to wage theft (Clibborn 2019). Greater funding of the FWO's inspectorate and litigation functions could increase the number of inspectors per worker and thereby increase the rate of detection of underpayment. The Fels Migrant Worker Taskforce argued for an increased role for the Fair Work Ombudsman in the enforcement of migrant worker wages. We endorse their key recommendations (Migrant Worker Taskforce 2019, see in particular Chapter 4):

Recommendation 2: Proceed with implementation of the key recommendations of the Migrant Worker Taskforce (2019). These include: i) increasing the education of migrant workers through a variety of social media campaigns; ii) further resourcing of the Fair Work Ombudsman to undertake more inspections and prosecutions in cases of underpayment; iii) a greater use of issuance of compliance notices to recover underpaid wages but with simplification of the process required of the Fair Work Ombudsman before proceeding with such a process.

Regarding superannuation, it is important to point out, as has been addressed elsewhere that temporary migrants do not have access to the Fair Entitlements Guarantee, including any unpaid superannuation, in the event of liquidation or bankruptcy of a company. The Migrant Worker Taskforce recommended that this protection be extended to migrant workers and we endorse this recommendation (Migrant Worker Taskforce 2019, 96).

Recommendation 3: Extend the FEG to temporary migrant workers alongside Australian citizens and permanent residents.

Terms of reference d. the taxation treatment of people whose stolen wages are later repaid to them

There has been some uncertainty about taxation treatment when courts award compensation that does not relate to personal injury. The position at common law is for the judiciary to take into account the tax implications from an order of compensation when assessing damages, as established by Justice Kaye in *Davinski Nominees Pty Ltd v I & A Holdings Pty Ltd* [2011] VSC 220 at [58]. Justice Kaye noted that it would be 'grossly unfair' not to factor in the tax implication when ordering compensation. In numerous cases judges have applied such a discretion to factor in taxable income (Davinski at [39]–[40]): *Wheeler v Philip Morris Ltd* [1989] FCA 230; (1989) 97 ALR 282 per Gray J; *Grout v Gunnedah Shire Council* [1995] IRCA 117; (1995) 129 ALR 372 per Moore J; *Byrne v Australian Airlines Ltd* (1992) 45 IR

⁴ Correspondence with the ABS by Boucher indicated that this analysis has not yet been undertaken by government.

178 per Hill J; *Reilly v Praxa Ltd* [2004] ACTSC 41 per Gray J; and *Patterson v Middle Harbour Yacht Club* (1996) 64 FCR 405 per Whitlam J).

However, when it comes to the recovery of wages, there is no statutory scheme or delegated legislation to guide judges making such repayment orders to factor in taxation. This leaves claimants with a lump-sum repayment of past wages in one financial year that they are then liable to pay tax on at the contemporaneous rate rather than the historic rates as the income were payable. In the context of compensation claims, judges have “grossed up” the compensation amount to account for the taxation liability on a discretionary basis. We submit that this is an established approach of the courts, and should similarly be adopted in the wage recovery process. The ‘grossing up’ approach was also applied in the Federal Court on the same reasoning that it would be unfair to burden a claimant with a higher tax liability for the financial year they recover unpaid wages (*Construction, Forestry, Mining and Energy Union v Hail Creek Coal* [2016] FCA 1032).

Furthermore, tax cannot be paid on superannuation “because it is not considered to be ordinary time earnings” if a worker is compensated for unpaid superannuation. However, if superannuation is paid into a nominated fund as a lump sum, it will be considered taxable income [see *Smith v SBP Employment Solutions Pty Ltd & Ors* (No.3) [2019] FCCA 3516]. This means that recovering unpaid superannuation through a debt recovery or small claims mechanism will have the unfortunate side effect of depriving workers of the benefit of untaxable superannuation payment, and instead will be returned as a lump sum taxable payment. The current mechanisms to recover unpaid superannuation, which require making a complaint to the Australian Taxation Office (ATO) who will have to audit the employer and then recover these unpaid superannuation payments through a lengthy compliance regulatory process. Further, the ATO is not mandated to recover unpaid superannuation, its role is as a revenue collecting body. This process will be particularly difficult for migrant workers, some of whom will have left Australia at the point they may seek to engage in these processes.

Recommendation 4: Parliamentary guidelines for taxation, and grossing up, to be factored in when making any court order for compensation. It is further recommended that an independent review of the superannuation recovery mechanisms be conducted to ascertain whether it is serving the needs of complainants efficiently.

Term of reference (e): ‘whether extension of liability and supply chain measures should be introduced to drive improved compliance with wage and superannuation-related laws.’

Migrant workers are particularly likely to be underpaid if they work in an industry with complex supply chains (McKell Institute Victoria 2019, 11; Australian Senate, Education and Employment References Committee 2016). This is because migrants often make up a significant proportion of workers in these industries (WEstJustice 2016, 1), such as in horticulture (Howe et al. 2019, chapters 4 and 5), textile, clothing and footwear (Fair Work Ombudsman 2019, 5, 10; Burchielli et al. 2014, 86), hospitality, cleaning, food processing, construction, distribution, security and care work (WestJustice 2016, 2). Further, migrant workers face cultural and linguistic barriers which prevent them from understanding their workplace entitlements and seeking to have them respected (Fair Work Ombudsman 2019, 5).

A large number of government bodies have recommended that the Federal Government consider introducing several ‘extension of liability and supply chain measures’ including through statutory reform that would:

- enable recovery of unpaid wages in supply chains (Migrant Worker Taskforce 2019, recommendation 11; Australian Senate, Education and Employment References Committee 2018, Recommendation 10; Australian Senate, Education and Employment References Committee 2016, Recommendation 31; Australian Senate, Education and Employment References Committee 2017, Recommendation 10);
- make franchisors and holding companies responsible for their franchisees or subsidiaries' contravention of payment-related laws (Migrant Worker Taskforce Report, Recommendation 11; Australian Senate, Education and Employment References Committee 2018, Recommendation 10; Australian Senate, Education and Employment References Committee 2016, Recommendation 26; Australian Parliamentary Joint Committee on Corporations and Financial Services 2019);
- establish a national labour hire registration scheme (Migrant Worker Taskforce Report 2019, Recommendation 14; Australian Government Joint Standing Committee on Foreign Affairs, Defence and Trade 2017, Recommendation 48; Western Australia Government 2019, Recommendation 22; Queensland Parliament, Education and Employment References Committee 2018, Recommendation 13);
- allow the Fair Work Ombudsman to enter into certain compliance partnership deeds with businesses (Migrant Worker Taskforce 2019, Recommendation 11; Australian Senate, Education and Employment References Committee 2018, Recommendation 3; Australian Senate, Education and Employment References Committee 2017 Recommendations 2-4; Australian Senate, Education and Employment References Committee 2016, Recommendation 32);
- require certain entities to report on 'modern slavery' in their supply chains (Australian Government Joint Standing Committee on Foreign Affairs, Defence and Trade 2017, Recommendations 8-19); and
- extend protections of the *Fair Work Act 2009* (Cth) to all workers in supply chains (Australian Senate, Education and Employment References Committee 2017, Recommendations 20 and 25).

The issue has been partially addressed through legislation introduced to:

- enable recovery of unpaid wages in supply chains (*Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012* (Cth)), and
- make franchisors and holding companies responsible for their franchisees or subsidiaries' contravention of payment-related laws (*Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth)).

This submission considers how the first of these recommendations and legislation – that is, legislative schemes enabling recovery of unpaid wages in supply chains – drives improved compliance with wage and superannuation-related laws. However, we urge careful consideration of how all of these recommendations could drive improved compliance with wage and superannuation-related laws.

Recovery of unpaid wages in supply chains

Current legal framework

In federal legislation, there are currently two schemes enabling outworkers⁵ in the textile, footwear and clothing (TCF) industry to recover their unpaid wages from others in the supply chain. These are:

- Division 3, Part 6-4A of the *Fair Work Act 2009* (Cth),⁶ and
- Schedule F, Clauses 8.1-8.3 of the *Textile, Clothing, Footwear and Associated Industries Award 2010* (Cth).⁷

The scheme under the *Fair Work Act* works as follows. If the person responsible for paying the outworker (the 'responsible person') fails to pay the outworker, the outworker may demand, in writing, payment from any other person they reasonably believe is a party to the chain of arrangements that led to the performance of their work (the 'indirectly responsible entity'). If the indirectly responsible entity fails to pay the outworker within a specified time (at least 14 days), then in the next 6 years the outworker or their representative may commence proceedings in a relevant court, during which the court will order the indirectly responsible entity to make the payment (plus interest, if applied for), unless the entity proves it is not liable.

The scheme under the *Textile, Clothing, Footwear and Associated Industries Award* works as follows. If the person responsible for paying the outworker (the 'principal') fails to pay the outworker, the outworker may claim, by serving a statutory declaration within 6 years of the work's completion, payment from any person they believe their work was carried out for (the 'apparent principal'). The apparent principal must make the payment unless: (1) within 14 days they serve the claim on another person they know or reasonably believe is liable to pay (the 'liable party') and the liable party pays the outworker within 14 days of them being served, or (2): the principal or apparent principal proves the work was not done or the claimed payment is in excess of the amount to which the outworker is entitled.

There are also legislative schemes enabling outworkers in the TCF industry to recover unpaid wages in the following states:⁸

- NSW – in Part 11, Division 3 of the *Industrial Relations Act 1996*⁹
- Victoria – in Part 2, Division 2 of the *Outworkers (Improved Protection) Act 2003*¹⁰

⁵ Outworkers are contractors or employees who perform their work at home or at a place that would not normally be thought of as a business premises. See, for example, *Fair Work Act 2009* (Cth) s 12. See also Fair Work Ombudsman, 'Outworkers', accessed 26 January 2020, available online at: <https://www.fairwork.gov.au/employee-entitlements/types-of-employees/outworkers>.

⁶ This Part was introduced by the *Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012* (Cth). Since then, three minor amendments to the Part have not changed the substance of the scheme, but were intended to ensure harmony with other Acts: Statute Law Revision Act 2012 (Cth); Fair Work Amendment (Transfer of Business) Act 2012 (Cth); Federal Circuit Court of Australia (Consequential Amendments) Act 2013 (Cth).

⁷ The substance of these clauses first existed in the *Clothing Trades Award 1982* (Cth), which was incorporated into the *Clothing Trades Award 1999* (Cth) cl 47.23, which in turn was incorporated into the current *Textile, Clothing, Footwear and Associated Industries Award 2010* (Cth).

⁸ Note that the scheme under the *Fair Work Act 2009* (Cth) does not prevent the recovery of unpaid wages under state or territory industrial law: s 789CA(1).

⁹ This was introduced by the *Industrial Relations Amendment Act 2006* (NSW).

¹⁰ Introduced as stand-alone legislation by the *Outworkers (Improved Protection) Bill 2003* (Vic), following recommendations of this report: Victorian Parliament, Family and Community Development Committee, *Inquiry into the Conditions of Clothing Outworkers in Victoria* (September 2002).

- South Australia – in Part 3A, Division 3 of the *Fair Work Act 1994*¹¹
- Queensland – in Chapter 8, Part 2, Division 4 of the *Industrial Relations Act 2016*¹²

These state legislative schemes also allow an outworker to claim unpaid remuneration from a person they believe is their employer within 6 months of completing the work (Australian Government, Department of Employment 2014, Attachment B1). There are no such legislative schemes in Tasmania, Western Australia, the Australian Capital Territory or the Northern Territory.

The scheme for unpaid wage recovery in the Fair Work Act should be retained

We recommend that the scheme enabling TCF outworkers to recover unpaid wages in Division 3, Part 6-4A of the *Fair Work Act 2009* (Cth) be retained. As explained below, this is because:

- available evidence suggests the scheme has improved the ability of TCF outworkers to receive the payment to which they are entitled, and
- under the alternative federal and legislative schemes, it is more difficult to ensure TCF outworkers receive the payment to which they are entitled.

First, the scheme under the *Fair Work Act* should be retained because there is evidence that it has improved the ability of TCF outworkers to receive the payment to which they are entitled. The Federal Government reviewed the scheme in 2014 and heard evidence that the scheme acted as a deterrent that made it more likely that those with responsibility to pay TCF outworkers would meet their payment obligations to TCF outworkers (Australian Government, Department of Employment 2014, [5.2.3], [5.3.3]). The Government also heard evidence from some businesses in the TCF industry that the scheme was a greater burden to them and a disincentive to manufacture clothes in Australia (Australian Government, Department of Employment 2014, [5.2.3]). However, this might only suggest that such businesses were underpaying their workers. Prior to the implementation of this legislation, several other businesses in the TCF industry reported that the scheme benefited them because it meant other businesses in the sector were now facing the same costs of compliance with wage laws, which likely meant they became more competitive (Australian Government, Department of Employment 2014, [5.2.3]). The review ultimately concluded that the scheme should remain in place, but also recommended that further evidence be collected to properly evaluate the scheme (Australian Government, Department of Employment 2014, 35-36). Academic scholarship is also generally supportive of the scheme (see, for example, Burchielli et al. 2015; Nossar et al. 2015). We also encourage evaluating the effectiveness of similar schemes that exist in state and territory legislation.

Given the well-documented underpayment and poor working conditions of TCF outworkers (see, for example, Australian Government, Department of Employment 2014, Attachment C; Nossar et al. 2015), such a scheme should be designed to enable TCF outworkers to recover unpaid wages to which they are entitled in the easiest way for them possible, so long as it does

¹¹ This scheme was introduced by the *Industrial Law Reform (Fair Work) Act 2005* (SA), following public consultation on draft legislation. See South Australia Parliament, Legislative Assembly, *Hansard* (13 October 2004), 390-395.

¹² Introduced following the 2015 review of Queensland government relations: Industrial Relations Legislative Reform Reference Group, *A review of the Industrial Relations Framework in Queensland: A report of the Industrial Relations Legislative Reform Reference Group*, (December 2015). See also Queensland Parliament, Finance and Administration Committee, *Report No. 32, 55th Parliament – Industrial Relations Bill 2016*, (October 2016).

not cause excessive detriment to legitimate business activities. It is easier for a TCF outworker to recover unpaid wages under the scheme in the *Fair Work Act* than under the alternative federal scheme in the *Textile, Clothing, Footwear and Associated Industries Award*, including in the following ways:

- under the Award, the outworker must claim payment within 6 months of completing the work (CI F(8.3)(b)), whereas under the Act the outworker may claim payment at any time after it is overdue;
- under the Award, the outworker must claim payment by a statutory declaration (CI F(8.3)(b)), which is more prescriptive in content and requires a witness, while under the Act the outworker may claim payment in writing without the difficulties of a statutory declaration (s 789CC);
- under the Award, it is unclear whether the outworker is entitled to recover interest on their unpaid sum, while under the Act the outworker is expressly entitled to recover interest (see, for example, s 789CD(7)), and
- under the Award, it is unclear whether the unpaid amount that the outworker is entitled to recover includes amounts payable in respect of leave, contributions to a superannuation fund, or reimbursements for expenses incurred, while under the Act the outworker is expressly entitled to recover these forms of payment (s 789CA(2)).

The scheme in the *Fair Work Act* is also preferable to the alternative schemes in state legislation mentioned above, including in the following ways:

- under all the schemes in state legislation, the outworker must claim payment within 6 months of completing the work (Australian Government, Department of Employment 2014, Attachment B1), whereas under the Act the outworker may claim payment at any time after payment is overdue, and
- under all the schemes in state legislation, the outworker must claim payment by a statutory declaration of more prescriptive content (*Industrial Relations Act 1996* (NSW) s 129D(3)-(4); *Outworkers (Improved Protection) Act 2003* (Vic) s 6(3)-(4); *Industrial Relations Act 2016* (Qld) s 382(5)-(6); *Fair Work Act 1994* (SA) s 99D(4)-(5)), while under the Act the outworker may claim payment in writing without these difficulties.

In addition, the scheme under the *Fair Work Act* is preferable because it creates a consistent approach throughout Australia, which will make businesses' payment obligations and outworkers' payment rights clearer for all.

Recommendation 5: The wage recovery scheme for textile, clothing and footwear outworkers in Division 3, Part 6-4A of the Fair Work Act 2009 (Cth) should be retained.

Extension of the scheme for unpaid wage recovery in the Fair Work Act to other supply chain industries

We recommend that the scheme for TCF outworkers to recover unpaid wages in the *Fair Work Act* should be extended to other industries with supply chains, including the cleaning, security, horticultural and food processing, distribution, retail, hospitality and construction industries, where workers at the bottom of the supply chains are vulnerable to underpayment. There is no equivalent scheme in these other industries. One related scheme is that introduced by the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth) in 2017, which makes franchisors and holding companies responsible for their franchisees or subsidiaries'

contravention of payment-related laws. However, this scheme is designed for franchisor-franchisee business arrangements, and does not adequately provide for unpaid wage recovery in complex supply chains (Australian Senate, Education and Employment Legislation Committee 2017, [3.48]-[3.53]). The scheme does not, for example, enable a worker to recover unpaid wages from a party they merely reasonably believe, but do not know, is party to the chain of arrangements leading to the performance of their work. The unpaid wage recovery scheme for TCF workers does provide for this, which is important for workers in complex supply chains who often have limited knowledge of each entity in the supply chain, including the entity responsible for their payment (see, for example, Australian Senate, Education, Employment and Workplace Relations Legislation Committee 2012, [2.47])

As expressed in the relevant second reading speech (House of Representatives, 22 March 2012, 3971-3975), the rationale for introducing the unpaid wage recovery scheme for TCF outworkers in the *Fair Work Act* was because they are frequently underpaid, and find it difficult claim unpaid wages, including because they.

- work in extremely long and complex supply chains, meaning it is difficult for them to identify who is responsible for paying them (3973, 3975), and
- often have poor English language skills and a lack of understanding of relevant payment-related laws (3971). This in turn connects back to the focus on migrant workers.

These features of TCF outworkers are equally present in the case of workers in other supply chains. There is strong evidence that workers in many industries supply chains, across several industries, are underpaid (McKell Institute Victoria 2019, 11; Australian Senate, Education and Employment References Committee 2016). Furthermore, many workers in supply chain contexts face cultural and linguistic barriers that make it difficult for them to understand relevant payment-related laws and enforce their rights (WEstjustice 2016, 1-2; Fair Work Ombudsman 2019). Therefore, unpaid wage recovery schemes for workers in these other industries should be introduced for similar reasons to those justifying the introduction of the unpaid wage recovery scheme for TCF outworkers. Various academics have made similar arguments for extending the TCF outworker unpaid wage recovery scheme to other industries (WEstjustice 2016, 183; Australian Senate, Education and Employment Legislation Committee 2017, [3.48]-[3.53]).

Recommendation 6: The wage recovery scheme for textile, clothing and footwear outworkers in Division 3, Part 6-4A of the Fair Work Act 2009 (Cth) should be extended to other supply chain industries including the cleaning, security, horticultural and meat processing industries.

Term of Reference (f): the most effective means of recovering unpaid entitlements and deterring wage and superannuation theft, including changes to the existing legal framework that would assist with recovery and deterrence;

Several debt recovery mechanisms that have been raised in previous government inquiries related to migrant workers, including the Migrant Worker Taskforce Report (2019). Core recommendations in that report related to recovery processes included:

“Recommendation 8: It is recommended that the Fair Work Act 2009 be amended by adoption of the model provisions relating to enforceable undertakings and injunctions contained in the Regulatory Powers (Standard Provisions) Act 2014 (Cth).

Recommendation 12: *It is recommended that the Government commission a review of the Fair Work Act 2009 small claims process to examine how it can become a more effective avenue for wage redress for migrant workers.*

Recommendation 13: *It is recommended that the Government extend access to the Fair Entitlements Guarantee program, it should be done following consultation regarding the benefits, costs and risks, and it should exclude people who have deliberately avoided their taxation obligations (Ibid, 10-11)."*

Core recommendations relevant to deterring wage and superannuation theft included:

Recommendation 5: *It is recommended that the general level of penalties for breaches of wage exploitation related provisions in the Fair Work Act 2009 be increased to be more in line with those applicable in other business laws, especially consumer laws.*

Recommendation 7: *It is recommended that the Government give the courts specific power to make additional enforcement orders, including adverse publicity orders and banning orders, against employers who underpay migrant workers.*

Recommendation 19: *It is recommended that the Government consider developing legislation so that a person who knowingly unduly influences, pressures or coerces a temporary migrant worker to breach a condition of their visa is guilty of an offence.*

Recommendation 20: *It is recommended that the Government explore mechanisms to exclude employers who have been convicted by a court of underpaying temporary migrant workers from employing new temporary visa holders for a specific period" (Ibid, 10-11)."*

Recommendation 7: This submission adopts all of the above recommendations from the Migrant Worker Taskforce (2019), and expands upon recommendation 12, to strongly endorse a restructured small claims recovery process.

(i) Restructuring the Wage Recovery Process

The current system under the Fair Work Act has a small claims recovery process through the Federal Circuit Court that is readily available to any worker, however practical difficulties arise for temporary migrants seeking to use such a mechanism. Obstacles include:

- Despite facilitating self-represented parties in the small claims division, there is still complexity in legal procedures and process;
- Filing fees for claims in the Fair Work Small Claims Division under \$10,000 are \$240 and for claims between \$10,000-\$20,000 they are \$390, which can be prohibitively expensive, especially for claimants on low incomes;¹³ and
- The length of time it takes to finalise a matter does not meet the quick, just and efficient resolution of disputes, with the Migrant Worker Taskforce Report (2019, 94) noting that in 2016-17 'the average time between filing a claim and finalisation was 4.3 months'. Migrants, especially those on temporary visas, may have left the country by the time these matters are heard.

There is a current small-claims recovery mechanism through the Fair Work Ombudsman, where advisors can assist workers in an amicus curiae capacity. However, as it has been noted by academics elsewhere, there are numerous objects and functions of the Fair Work

¹³ This figures are at the time of writing the submission in February 2020.

Ombudsman as set out in Ch 5, Div 2 of the *Fair Work Act 2009 (Cth)* that set up numerous and multifarious purposes for the regulator (Charlesworth and Howe, 2018; Hardy and Howe, 2017). As such, the Fair Work Ombudsman is caught between competing priorities and roles, including representing employees, commence proceedings, and enforcing the Act.

Given the resourcing difficulties the Fair Work Ombudsman faces with meeting its multifarious objectives (see Clibborn, 2015), a better case may be made to reform the judicial small claim recovery process to make it better accessible for individual workers in the following ways:

1) Reduction of Fees

The MWT recommended waving filing fees for migrant workers (2019, 94). Having an established mechanism to waive fees, when amounts claimed for underpayments are small is a realistic policy to ensure access to the courts. Access to the courts has been noted to be ‘inherent in the rule of law’, as the UK Supreme Court unanimously held in a decision concerning the fees to access the Employment Tribunal (*R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent)* [2017] UKSC 51[65]). Having a system of small claim recovery through the FCC that cannot be functionally or pragmatically accessed due to the high filing fees results in substantive deprivation of access to the courts for many lower-paid workers. On this point, the low number of cases in the Migrant Worker Rights Database (355 over a twenty-year period) could reflect some of these fundamental access to justice issues.

2) Case Management Reform

There are currently significant resources with Magistrates or Judges managing pre-hearing processes for small claims applications. There may be utility in having the courts adopt similar non-adversarial processes of compulsory mediation, or the FWC becoming involved in the non-judicial aspects of a small claim. The Migrant Worker Taskforce (2019: 95) recommended that the ‘FWC could provide registry functions to the Federal Circuit Court for small claims matters or could be delegated functions in relation to small claims similar to those that currently apply to general protections — see sections 372–375 of the Fair Work Act relating to non-dismissal dispute conferences.’

Data from the MWRD indicates that the two most common court jurisdictions that migrant workers file their claims are in the Fair Work Commission (FWC) and the Federal Circuit Court (FCC); with 102 filed in the FWC (or Fair Work Australia as it was formerly known as), and 93 filed in the FCC (or Federal Magistrate’s Court as it used to be known).¹⁴

Court	Number of Cases
Fair Work Commission	72
Fair Work Commission Full Bench	3
Fair Work Australia	25
Fair Work Australia Full Bench	2
Federal Circuit Court	60
Federal Magistrate’s Court	33
Total N	195

¹⁴ This table excludes the remaining tribunals and courts in which a smaller array of cases were brought.

There is likely a higher number of claims brought in the FWC jurisdiction as it hears all unfair dismissal and general protection matters, and many claimants will roll their underpayment claims during conciliations in the Commission. The FWC jurisdiction also has a much lower filing fee of \$73.20 for such claims compared to the higher filing fees for the Federal Circuit Court mentioned previously.

In light of the more frequent use of the FWC jurisdiction by lower-paid migrant workers, we propose the introduction of a small claims jurisdiction that sits alongside the Fair Work Commission to provide simple, low-cost, plain language access to justice for workers who wish to bring underpayment actions.

In the State of California, the Labor Commissioner's Office, which is the regulator and enforcer, when an underpayment is reported, a settlement conference occurs and that pending that outcome, a wage claim hearing is then set to adjudicate the matter. The vast bulk of underpayment cases in California are heard or settled quite efficaciously in this office (Boucher 2020, Enforcement Chapter). Whilst Australia cannot replicate the same structural organisation due to the limitations of Chapter III powers of the judicature, a small claims tribunal can be set up to expeditiously determine all claims under \$100,000.

Recommendation 8: Consider a low-cost jurisdiction within the FWC to cover small claims of underpayment.

Term of reference (g): whether Federal Government procurement practices can be modified to ensure that public contracts are only awarded to those businesses that do not engage in wage and superannuation theft.

A number of government inquiries have recommended that Federal or State governments have procurement practices that ensure public contracts are not awarded to businesses that breach employment-related laws, for example by underpayment of wages and superannuation (Australian Government, Joint Standing Committee on Foreign Affairs, Defence and Trade 2017, Recommendation 12; Western Australian Government 2019, Recommendation 23). The underlying rationale is that these procurement practices will make businesses who behave responsibly and fairly towards their employees more competitive for public contracts. This is because the price of their services will not be undercut by unscrupulous businesses who save costs by breaching employment laws, for example through underpayment (Western Australian Government 2019, 158).

Consideration should be given to ensure procurement practices use clear criteria to determine whether a business is eligible to enter into a public contract. One example is the recommendation of the Inquiry into Wage Theft in Western Australia that the Western Australian government should not enter into a contract with a business which has been found by a court or tribunal to have systematically and deliberately underpaid their workforce (Western Australian Government 2019, Recommendation 23). The Inquiry also recommended that the same policy should apply to businesses which have a director or owner who has been found to have underpaid their workforce in a similar manner (Western Australian Government 2019, 159). This importantly acts as a deterrent at an individual level, in addition to at the level of corporations.

Though term of reference (g) focuses on modifying procurement practices that assess business eligibility for public contracts based on whether the business has engaged in wage or superannuation theft, consideration should be given to including a broader range of criteria in this assessment. For example, Queensland's procurement policy requires consideration in determining whether to award a public contract to a business, of the businesses' historically commitment to positive industrial relations, including whether the business has been issued any infringement notices or convicted of any offences (Queensland Government, Office of Industrial Relations and Office of the Chief Advisor – Procurement 2018, 13). Such a policy adopted elsewhere could encourage improved industrial relations behaviour among businesses seeking public contracts, which helps to prevent wage and superannuation underpayment/nonpayment at a general level.

Recommendation 9: The Federal Government should have procurement policies that ensure public contracts are only awarded to those businesses that do not engage in wage and superannuation theft, and that have made positive contributions to industrial relations in the past.

The procurement policies discussed so far, and the language of term of reference (g), focus attention on improving the behaviour of businesses in the process of seeking the award of public contracts, up until the point of contract formation. Though we support these recommendations, we also encourage consideration of how procurement practices can be modified to continue affecting the behaviour of businesses after they enter into contracts, in a way that minimises breaches of employment laws.

One way to do this is by ensuring government procurement practices require that public contracts contain terms that require businesses to continue to minimise breaches of workplace law throughout the contractual period (Western Australian Government 2019, 157-158). For example, the Western Australia Department of Finance's *Request Conditions and General Conditions of Contract* (2018) document contains a clause that goes some way to achieving this:

The Contractor must ensure that the remuneration and terms of employment of all Contractor Personnel for the duration of the Customer Contract will be consistent with the remuneration and terms of employment that reflect the industry standard as expressed in awards and agreements and any code of practice that may apply to a particular industry (Western Australia Department of Finance 2018, clause 18.3).

Another example is the recent recommendation that Federal Government procurement policy should require that a tenderer not enter a contract with any corporation or an associated entity that has been penalised on multiple occasions for being non-compliant with employment-related laws (Australian Senate, Education and Employment References Committee 2018, Recommendation 9).

Finally, it is important to note that the effectiveness of contract terms aimed at minimising wage and superannuation theft require monitoring so that they can be enforced. Significant resources may be required to do this given that governments are engaged in a large number of contracts (Western Australian Government 2019, 158-159).

Recommendation 10: The Federal Government should have procurement policies that ensure public contracts contain terms that require businesses to continue to minimise breaches of workplace law throughout the contractual period.

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