THE INSTITUTE OF CERTIFIED BOOKKEEPERS

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Senate Standing Committee on Economics
Parliament House
Canberra ACT 2600
[redacted]

Dear Committee Members

Inquiry: Unlawful underpayment of employees' remuneration

We provide the below specifically in response to the terms of reference of the inquiry.

Context

The Institute of Certified Bookkeepers (ICB) is a professional association of over 4300 certified bookkeeper members. Our community assists businesses in Australia to meet their business and compliance obligations specifically including all aspects of payroll provided by 90% of bookkeepers.

Our members, supported by the ICB, are at the forefront of endeavouring to assist employers to apply the workplace relations system correctly.

Summary

- The current cost of understanding and seeking to comply with the current complex system is detrimental to the ability of an employer to comply.
- The inability to obtain "certainty" as to application of the current "system" causes reluctance and is a disincentive for employers.
- Proposal: Government to develop the "employing tool" that compares an employment relationship to the easily understood and applied "Standard Requirements".
- Easily understood and applied "Standard Requirements" should be further developed.
- A "statement of employment compliance" should underpin Government procurement and also be made publicly available.
- Single Touch Payroll Reporting will drastically increase the visibility of employer behaviour.
- Timely compliance action by Government towards detected non-compliant employers is required.
- Underpayment is not and should not be considered an acceptable "cost of doing business".
- Government should continue to enable employer compliance.
- Not all underpayment is "wages theft"

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"causes, extent and effects"

Unlawful

We acknowledge that by definition the underpayment of wages is "unlawful", however not all underpayment is intentional nor deliberate.

Intentional

We acknowledge that there are instances of deliberate wages theft where the employer is actively and deliberately underpaying the employees. These cases include discrimination and decisions to underpay. This employer could be categorised as "they know but underpay anyway".

There will be some of these employers who have the means to; properly assess their obligations and to apply the remuneration at the correct levels and they choose not to or they intentionally do not seek to understand and apply correct payments.

Without detracting from the further "causes" below, we believe that Intentional or deliberate underpayment should not be tolerated.

However, the parameters to determine whether an underpayment is "intentional" should be further developed.

Complexity

The compliance obligations that the Australian industrial relations framework imposes upon an employer are numerous and complex. When an employer engages an employee, they must consider at least:

Fair Work,

- Onboarding / engaging the employee
- Determining the correct award
- Determining the Classification of the employee
- Law based requirements
- Award based requirements
- Paying the employee the correct rates as required by the award/agreement
- Entitlements including allowances and leave

ATO – Pay As You Go Taxation

Salary Packaging including salary sacrifice and novated lease management

Superannuation

Workers Compensation – state based, therefore potentially different requirements across multiple states

Payroll Tax– state based and therefore potentially different requirements across multiple states

Long Service leave (including possible portability schemes) – state based and different requirements across multiple states.
Centrelink / DHS implications (if applicable)
Child Support impact (if applicable)
Workplace safety (OHS etc)

A prevalent cause of mistakes in calculation or wages and entitlement to employees is NOT "theft" but it is due to the complexity: which laws apply? which award applies? How to set up software to properly apply the different complex requirements

How much will it cost an employer to get it right? Only to then be told by the advisors that there is no certainty until such time as they are defending a legal challenge.

It is a prohibitively costly process to endeavour to ensure that all possible implications of an employment arrangement have been considered and applied.

The tools provided by FWO endeavour to assist but are in themselves complex and require a level of advanced understanding in order to utilise the "help" services correctly.

Example: A search of the Occupation "Administration" generates 38 different results.
The employer is then to select their Industry and potentially sub-industry from a list of 4 which are not likely to be generally understood by most.
Which then states "there are multiple awards that match the occupation and industry you entered…please select the award that best matches the type of work being done"
Note the language and the lack of definitive direction being provided.
In my case the engine has generated two awards for Clerical" that definitely do not apply to the situation of an administration assistant.
When provided in print form there is no statement of certainty about the ability of the employer to rely on the information.

Good advisors to employers, have well established processes and procedures to assist the employer to ascertain which obligations apply to each employment relationship. However there remains much uncertainty and fear of failure and prosecution in providing advice or making decisions about how the law is to be applied.

The change in laws and rates add to this cost of deciphering the complexity and endeavouring to apply it correctly.

Uncertainty

Many HR advisors have relayed the uncertainty of the application of the law, particularly the application of Fair Work laws to each employer-employee relationship. It is often stated, by

those involved in assisting employers resolve disputes, that "nobody can be certain of which award applies and how to apply an award until definitely decided by a court of law".

There is also much discussion about the many trivial breaches of law which can result in "on-the-spot" fines applied by Fair Work inspectors due to their interpretation of business circumstances without full consideration.

An example: The specific display of loading amounts on a payslip. The Fair Work website currently states

> "any loadings (including casual loading), allowances, bonuses, incentive-based payments, penalty rates or other paid entitlements that can be separated out from an employee's ordinary hourly rate. For example, a note could be included on a pay slip that the hourly rate incorporates the relevant casual loading"

We specifically draw your attention to the phrase "a note could be included on a payslip". However, we are aware of very recent cases where the Fair Work officer imposed on the spot fines for a number of payslip breaches because this loading was not separately specified. The website of the regulator says one thing, the officers apply the law and regulations which say another. Neither interpretation of which reflects the real-world practicalities of the adherence to regulations such as these.

When an employer or their advisor makes contact with Fair Work to seek guidance, the phone advice of the FWO is not supported by subsequent email confirmation of the advice or at a minimum reference to the website resources that could support the conversation. The FWO does not issue a statement that the employer can then rely on.

The information provided by the FWO on their website, noting their role as regulator and prosecutor of breaches contains a significant disclaimer

https://www.fairwork.gov.au/website-information/disclaimer

> "Disclaimer
> We are committed to providing advice that you can rely on.
>
> The information on this website is general in nature. If you're unsure about how it applies to your situation you can call us on 13 13 94 or speak with a union, industry association or workplace relations professional."

While the disclaimer provides a commitment to provide information "that you can rely on" this commitment is diminished by "The information on this website is general in nature….you can

call us…." The FWO itself says the law is too hard for them to explain in any way that can be relied upon and then don't provide definitive interpretation.

The FWO call centre team inform recipients of advice that their answers are general in nature and cannot be relied upon. If an employer cannot obtain certainty from the Regulator who is responsible for administering the regime, the most willing employer is at a loss to be able to comply.

Evolution of the employment environment

Another "cause" of underpayment which may then be deemed to be "unlawful" is that the intention of the system as designed, changes as the narrative changes. As the system seeks to solve one problem, the solution changes the discussion and impact on other situations which did not need to be changed.

> Example #1: Recent changes to force all employers to offer casual employees the right to be made permanent part time. Casual employment is not a bad thing. However, discussions over the past few years have led to it appearing so. It is positioned that employers take on casuals in order to minimise the rights of the employee. This is not (in the majority of situations) the real story. Many employee circumstances prefer the higher rate of pay of being a casual. Many employees prefer to retain flexibility of when they work (such as students). Many employers would prefer to take on casuals to again provide flexibility. Some employers took this "requirement to offer" as a statement that all employees now have to be permanent part time. It fundamentally changed the nature of employment relationships when it did not need to. The narrative of being a "casual" has changed and the application of law to the employer has changed.
>
> Example #2: Minimum hours of work. The system changed the discussion to require a minimum number of hours of work for each "shift" of any employee. Initially (noting that it did change) this required all retailers to pay for more hours than an employee may be required. Many employees (ie after school students) could no longer be employed for 2 hours because the minimum, legally, was 4. The problem that the system was endeavouring to fix, significantly negatively impacted many employers and employees. Further complexity, further need to understand and further cost.
>
> Example #3: Annualised Salary (Better off overall test). Again, the narrative has changed. While there might be a problem to fix in certain employment relationships, many salary-based arrangements suit both the employer and the employee and also facilitates a streamlined record keeping and payroll payment process. The current discussion requires every employer with a "salary" based employee to do a calculation

every year to check that their salary-based employees are better off than if they were paid on an hourly basis. Every salary based employee (and the employer must facilitate a system to do so) must now keep records of when and how long a person works i.e. a timesheet, to then calculate whether the employee is better off on salary or if they had been paid on an hourly basis. Immense record keeping and non-productive administration to fix a particular problem. Further complexity, further cost of compliance

Other examples would include a change in the narrative (interpretation) of; How many days personal leave, the payment for and timing of Breaks. (The current Mondelez Case)

We also note a trend of employers now allocating only 5-hour shifts to casual and part time employees thereby removing the need to allow for the legislated minimum half hour break. Employees report they do not wish to take the break, yet employers will be liable if they don't.

This change in the way employment conditions are described and interpreted, further results in employers being unable to remain up to date and then changing their circumstances to meet the "new" application of the system.

We specifically note that such inability to adopt the new application of the system is not a result of wishing to intentionally underpay or not allow employment entitlements.

Disregard

In some cases, the employer has not undertaken any due diligence to ascertain how the workplace relations system should apply or effect their operation. This includes ensuring that payroll IT systems are up to date and therefore compliant but also that they are correctly configured. In some cases, this is a deliberate decision. Intentional disregard should not be tolerated.

However, we observe that the complexity, the cost, the uncertainty can lead to an inability to give due "regard" to the system.

"Measures that can be taken to address the issue"

Simplify the system, make it easier to comply, allow employers to rely on the advice (certainty)

The causes, extent and effects of unlawful non-payment or underpayment of employees' remuneration by employers and measures that can be taken to address the issue, with particular reference to:

a. the forms of and reasons for wage theft and whether it is regarded by some businesses as 'a cost of doing business';

Refer above for the reasons that some employers may underpay which is not "wages theft".

We do not believe that the vast majority of employers embark on "wages theft". We do believe that underpayments and mistakes happen.

We acknowledge the intentional and deliberate action taken by some to exploit workers and in some cases the more vulnerable workers.

We do not believe that the vast majority of employers consider "wages theft" a "cost of doing business" nor do we believe that the vast majority consider unintentional underpayment "a cost of doing business".

> *"beyond financial capacity and management ability to comply with the overly complex requirements"*

As described, at least in part, above we believe that it is beyond the financial capacity and/or the management ability for an employer to comprehensively apply the "systems" interpretation and application of all facets of all employment obligations while utilising the current "help" solutions provided to them.

No! it is not a "cost of doing business".

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

When an employee is underpaid or in the worst case exploited, there is clearly a harm caused to that individual.

Without embarking on a full discussion to the economics and justification of superannuation, the funds and the investment impact of money administered by such funds, it would be argued that employers underpayment of Superannuation has a significant impact on the national economy: this impact would be seen to be a reduction in the investment by such superannuation funds in activity being conducted by business or in assets that are held.

Conversely it could be argued that by the employing business retaining those funds, that business may be able to conduct enhanced activity.

While the national economic impact can be debated, Government should still continue the journey to prevent underpayment.

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;

The recent imposition of Single Touch Payroll (STP) reporting requirements upon employers, takes advantage of efficient reporting, subsequent monitoring and where necessary, provides for compliance measures enabled by technology.

We are very aware of the approach being developed and implemented by the ATO in receiving, analysing and assessing employer behaviour as a result of STP data. We believe that the enhanced visibility and then embarking on necessary action by the ATO to validate payroll circumstances or address issues discovered will identify and uncover a significant component of issues by employers.

We also note the matching of superannuation data received by STP reporting of super obligations by employers, with the payments received data of superannuation funds, will also reveal anomalies and enable timely compliance action by the ATO.

However, while STP will expose those employers not reporting or those employers who are reporting "interesting" information, it only helps solve a part of the problem.

Our system is so complex and varied that regulators, their investigators, employers and their advisors cannot "identify and uncover" what is the correct wage and superannuation that should be paid, hence uncovering underpayment remains a challenge…..unless

The ideal world

The "best means of identifying and uncovering" issues in an **ideal world** would be;

- where the employment relationship is easily described according to a standard or template
- where that description can then be easily compared with the standard requirements
- where any anomalies of the described relationship can be made known and addressed.
- where the details of each salary arrangement calculation can be easily provided
- where those calculations can be compared to the established relationship and/or the standard
- where anomalies in payment can be identified quickly and resolved.
- Minimal administrative burden to achieve the above aims

Due to the complexity of the multitude of arrangements that exist, Australia has, to date, been unable to develop the technology or other capability to provide this ideal world solution.

Accordingly, the recommendation is to make the employment relationship system less complex, more understandable, easily implemented and measurable to the "standard requirements".

While it is easy to propose "a simpler employment relationship system", we note significant barriers to achieving such a concept.

Concepts to consider progressing towards the "ideal world" with a touch of realism:

- The simpler system could first be applied to a general class of employees eg below $100,000 salary, or
- The simpler system could be applied to a general class of employers eg whatever is deemed to be "small business" (be that less than 20 employees or less than $20m (or was it $10m or is it $50m turnover)), or
- The first set of comparisons could be to the "simpler system" standard*, or
- The different awards should be stripped of all the provisions in the "Standard" and the awards become the statement of respective pay scales, or
- One or a selection or all of the above

* Comparison tools are yet to be established (refer below)

Today's real world

The "best means of identifying and uncovering" issues in **today's real world** would be; through the establishment of definitive comparison and analysis tools which can be relied upon with certainty. These tools would be available to the employer and are the same tool utilised by the respective regulators.

The comparison tool is able to be relied on definitively. An employer would be able to generate a report on their situation and assess compliance. This report would be made available should there be any enquiry. Due to the complexity and ambiguity of interpretation current solutions fail to provide the necessary understanding with certainty.

Similarly, the employee would be able to use the tool and utilise the reports for appropriate discussions when entering an employment relationship.

The "means of identifying and uncovering" would be through the report of anomalies in the relationship by the tool and then a comparison of actual payments to the tool described requirements.

Accordingly, the recommendation is for government to facilitate the development of the tool and then require the regulators to provide certificates of certainty to the employer.

Somehow the employer and regulators must be provided with the means to cost-effectively interpret and apply whatever the employment relationship law ("system") is to be.

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

The lesser of:

a/ the amount that the person is would have been taxed if the payment had been received at the proper time, or

b/ the amount that the person would be taxed in the year that they do receive the payment.

Late payment of superannuation should not affect that years superannuation cap.

e. whether extension of liability and supply chain measures should be introduced to drive improved compliance with wage and superannuation-related laws;

In short yes! There is complexity in how the primary purchaser could have visibility and therefore assurance that all parties in their supply chain are also compliant.

We envisage a system of "statements of compliance". The analysis and comparison tool suggested above could generate the "statement of compliance" of an employer, who can make that statement available to their client. The statement would have to be current and renewed at least annually. A further enhancement to the public information available through the Modernising Business Register of every employer could be their "employment compliance status".

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;

Recovery

Timely compliance action. In effect prevention is proposed as being a more advantageous set of solutions than the likelihood of recovering significant unpaid amounts.

Providing an easy means for an employer to establish their fault, acknowledge and quantify past errors and then provide a positive avenue to correct and progress forward. This would

include minimising the current negative media around those employers that have not deliberately nor wilfully underpaid wages and are making a genuine attempt to resolve the situation. The negative media for genuine mistakes deters employers from self-reporting.

Deterrence

A scaled set of impacts and consequences. Including specifically encompassing an assessment of intention as compared to matters arising as a result of the system complexity.

It has been argued that measures such as non-tax deductibility of late payments and significant penalties should be applied. Some consider that these measures result in a disincentive to embark on a journey towards compliance. Such penalties are a cause of an employer either never seeking to address any issue or a cause of not seeking to correct past errors

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; and

Refer “e” above. Without the “Statement of employment compliance” which results from the employment analysis tool, a business should be unable to provide any service to Government.

Conclusion

Not all underpayment is “wages theft”.
The majority of underpayment can be prevented through the development of an employment arrangement analysis tool which is made available to all employers and also used by the regulator to compare employment arrangements to the “standard”. Reported anomalies can be addressed, leading to a “statement of employment compliance”.

Please contact the author to clarify or further develop any of the matters described herein.

Yours faithfully

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