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Submission to the Economics Standing Committee
Re: Unlawful Underpayment of Employees' Remuneration

As a senior academic with over 20 years' experience researching work and employment in Australia, and internationally, this submission encompasses my extensive and in-depth research related to 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.

I would be delighted to appear before the committee to give further evidence and I welcome the opportunity to do so.

Response to the Terms of Reference

a. Forms of and reasons for wage theft

Wage theft can take various forms and result from different causes. Most commonly, these can take the form of:

- i) Underpayment due to incorrect interpretation/application of job classifications, pay schedules and working hours stipulations contained in the relevant award or enterprise bargaining agreement (EBA). Such errors may be accidental or otherwise. Frequently, these errors are associated with reliance on annualised salaries (e.g. in hospitality and retail) and failure to adequately/correctly reconcile annualised salaries with working hours and rates of pay that would otherwise apply, as required by the relevant award or EBA. This problem is often claimed to be the result of regulatory 'complexity'. Annualised salaries were introduced in order to ease the administrative burden of payroll. If this goal is not being realised, and workers are also being underpaid, annualised salary options should be abolished.
- ii) The underpayments outlined above often occur for extended periods of time as a result of inadequate monitoring and enforcement of regulation, frequently associated with resourcing constraints.
- iii) Underpayments due to 'sham contracting', with payment being based on a *contract for service*, which effectively undercuts rates of pay applicable based on a *contract of service*, as per the relevant award or EBA. Such underpayments are especially common in cleaning, horticulture, labour hire and increasingly among gig workers (though their 'underpayment' relative to rates of pay applicable based on a contract of service may be lawful if they are legitimate independent contractors). 'Sham contracting' is increasingly common because it allows employers to shift risk and responsibilities onto workers and workers rarely have the knowledge or means to 'test' their employment status according to the law. Decisions to determine the status of workers as employees or independent contractors are expensive and time consuming. A new 'dependent' contractor employment status is being explored elsewhere (e.g. in the UK, see the *Taylor Review*) and this approach may have merit in Australia.

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

It is difficult to estimate exact costs without more accurate data regarding the frequency/extent of the problem. However, wage and superannuation theft will

undoubtedly impact the national economy negatively, both now and in the longer term. Wage theft exacerbates the wage stagnation and/or real wage cuts that are already negatively impacting the national economy by further suppressing consumer spending. Wage theft may also impede economic growth by reducing productivity. The impact of 'lost' superannuation will produce longer term, lagged, negative effects for workers and the national economy. Those industries known to include frequent wage theft (e.g. hospitality, retail and horticulture) rely disproportionately on low skilled and vulnerable workers (including young workers, women and im/migrants). Low skilled, low paid, vulnerable workers are bearing the brunt of wage and superannuation theft while they can least afford to do so. Moreover, these workers contribute the greatest proportion of their wages to our economy. Finally, instances of 'sham contracting' often result in lost revenue associated with taxation as workers may be unaware of (or neglect) their obligations.

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

Identifying and uncovering wage and superannuation theft, whilst protecting workers, will hinge on:

- i) More frequent workplace investigations to monitor compliance and enforce regulation along with the resourcing required to support such activities. Investigators need to inspect/audit employer records of time worked and wages paid. This could involve an expanded role for Fair Work Inspectors and/or expanded role for unions to inspect employer records of time worked and wages paid, with powers to refer errors to Fair Work for enforcement.
- ii) Research data are needed to establish the frequency/extent of problems, the reasons for these problems and to develop the most effective, targeted interventions. Ongoing research would also contribute to more effective monitoring and enforcement. Ideally, research of this kind would encompass a wider job quality remit that would enable development of minimum standards for work and employment that integrate gig workers and other contractors (including independent/'dependent' contractors (as per the UK's *Taylor Review*)), currently unprotected by our National Employment Standards and other employment regulation. Minimum standards of this nature are already being developed in the UK and regulation to protect those in the gig economy has advanced in Canada, Spain and Italy, for example. Such regulation would contribute to minimising underpayments. In its absence, downward pressure on wages is likely to intensify and expand via a 'race to the bottom'.

d. Whether extension of liability and supply chain measures should be introduced to drive improved compliance

Extension of liability and supply chain measures should be introduced in order to 'level the playing field' and eliminate avenues that precipitate a 'race to the bottom'. Elements of the *Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012*, pertaining to outworkers involved in supply chains, may prove useful in this regard.

e. The most effective means of recovering unpaid entitlements and deterring wage and superannuation theft

Recovering unpaid entitlements and deterring wage and superannuation theft, will hinge on:

- i) Monitoring and enforcement, as per (c) (i), above
- ii) Research data and regulatory amendments, as per (c) (ii), above
- iii) Education and assistance, with a focus on employers and employees/workers. Research should be used to target those most at risk and in need, and to determine the content of the information provided to employers and employees/workers, e.g. based on identified 'hot spots' and reasons for underpayment
- iv) Fines for underpayment need to be increased, with a sliding scale for repeat offenders in order to deter re-offending
- v) Naming and shaming of offenders via Fair Work's website and/or positive endorsement for employers who are compliant based on employer records of time worked and wages paid

f. 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

Public contracts should only be awarded to those businesses that do not engage in wage and superannuation theft. This criterion will assist in 'levelling the playing field' and ensuring that a floor of minimum standards is maintained.

Recommendations

1. Annualised salaries were introduced in order to ease the administrative burden of payroll. If this goal is not being realised, and underpayment is occurring, annualised salary options should be abolished.
2. Consideration of a new 'dependent' contractor employment status (refer to the UK's *Taylor Review*, for example) to ameliorate 'sham contracting' and associated underpayments
3. Regular workplace investigations must be conducted to monitor compliance and enforce regulation. Investigators need to inspect/audit employer records of time worked and wages paid. This could involve an expanded role for Fair Work Inspectors and/or expanded role for unions to inspect employer records of time worked and wages paid, with powers to refer errors to Fair Work for enforcement.
4. Research data are needed to establish the frequency/extent of problems, the reasons for these problems, and to develop the most effective, targeted interventions and/or regulatory amendments required. These data could be gathered, in part, by Fair Work Inspectors and should inform the development of required regulatory amendments. For example, if specific regulation is found to be especially complex, amendments may be recommended in order to simplify the regulation and minimise problems. Ongoing research would also contribute to more effective monitoring and enforcement.

5. Development of minimum standards for work and employment that integrate gig workers and other contractors (including independent/'dependent' contractors), currently unprotected by our National Employment Standards and other regulation. Minimum standards of this nature are already being developed in the UK (refer to the *Taylor Review* and *Measuring Good Work: The Final Report of the Measuring Job Quality Working Group*) and regulation to protect those in the gig economy has advanced in Canada, Spain and Italy, for example. Such regulation would contribute to minimising underpayments. In its absence, downward pressure on wages is likely to intensify and expand via a 'race to the bottom'.
6. Education and assistance, with a focus on employers and employees/workers, including contractors. Research should be used to target those most at risk and in need, and to determine the content of the information provided, e.g. based on identified 'hot spots' and reasons for underpayment
7. Fines for underpayment need to be increased, with a sliding scale for repeat offenders
8. Naming and shaming of offenders via Fair Work's website and/or positive endorsement for employers who are compliant based on employer records of time worked and wages paid
9. Extension of liability and supply chain measures should be introduced in order to 'level the playing field' and eliminate avenues that precipitate a 'race to the bottom'. Elements of the *Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012*, pertaining to outworkers involved in supply chains, may prove useful in this regard.
10. Public contracts should only be awarded to those businesses that do not engage in wage and superannuation theft. This criterion will assist in 'levelling the playing field' and ensuring that a floor of minimum standards is maintained.