



NSW Young Liberal Movement Submission to the Senate Inquiry into the Unlawful Underpayment of Employees' Remuneration

February 2020

Prepared by members of the NSW Young Liberals
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14 February 2020

Senate Standing Committee on Economics

Re: Senate Inquiry into the Unlawful Underpayment of Employees' Remuneration

Dear Secretariat,

Please find attached a submission prepared by the NSW Young Liberals for the Senate Inquiry into the Unlawful Underpayment of Employees' Remuneration.

As a Movement, we are concerned about instances of underpayment of employees' remuneration. We believe this is an issue which affects the public at large, but which also has a significant impact on young Australians.

We believe that in the policy debate surrounding unlawful underpayment a distinction must be made between intentional or deliberate underpayment and unintentional or innocent underpayment. Underpayment, whether intentional or unintentional, needs to be addressed, but the policy responses to each must be properly calibrated. While we argue for strong action to be taken to enforce against instances of intentional underpayment, we believe that heavy handed policy suggestions are wholly inappropriate as a solution for unintentional underpayment.

Fundamentally, unintentional underpayment needs to be addressed by addressing and reforming the quagmire of the piecemeal industrial relations framework. A complex web of 'modern' awards and industrial relations legislation can entrap even the most prudent business owner and prevent individuals from even identifying instances of underpayment. It is also important to recognise the role of unions in weaving this web, which often comes at the expense of the payment of better wages for employees. Costs of compliance with the patchwork of workplace laws stifle business and deprive Australians, and particularly young Australians who are employed in most centralised industrial relations industries such as hospitality and retail, from obtaining employment.

It is our hope that any options considered by the Inquiry will avoid a knee-jerk reaction towards heavy-handed government interventions which will impact young Australians rather than helping them.

We thank the Inquiry for considering our views.

We would be happy to respond to the Inquiry should you have any further questions. If we can be of further assistance, Director George Bishop can be contacted at [REDACTED]

Sincerely,

A black rectangular redaction box covering the signature of Chaneg Torres.

Chaneg Torres
President
Young Liberal Movement of Australia
(NSW Division)

A black rectangular redaction box covering the signature of George Bishop.

George Bishop
Director, Party Constitutional Affairs and
Submissions
Young Liberal Movement of Australia
(NSW Division)

Underpayment and young Australians

Underpayment is a significant issue which particularly impacts young Australians. Employers are required to pay employees in accordance with the minimum wage, an enterprise agreement, an award, a contract or a combination. Underpayment occurs when employers do not honour those wage agreements and legal prescriptions. Most underpayments occur because of simple human error or by the behemoth of compliance which businesses must undertake. A complex web of so-called 'modern' awards and industrial relations legislation can entrap even the most prudent business owner. It is also important to recognise the role of unions in creating this behemoth. Unions continue to argue for more and more layers of the industrial relations framework and yet only too quick to negotiate pay cuts for workers to achieve it. Recently, there have also been several high profile instances of sinister and deliberate wage theft. We are appalled by these and we argue for strong enforcement action to be taken in cases of intentional underpayment.

The *Fair Work Ombudsman* found reports of underpayment in the year 2018-2019 were highest in the hospitality industry (36%), followed by retail (13%) then building and construction (5%). According to the *Labour Market Information Portal*, the median age of employment across the food services industries is 26, and across the retail trade industry it is 32, lower than the national median employment age of 39. In 2014, the *Career Industry Council of Australia* reported that 43% of employees in the accommodation and food services industries were aged between 15 and 24. This shows a correlation between young workers and underpayment and shows why underpayment is such a critical issue for young Australians.

Young Australians and immigrants are particularly vulnerable to workplace exploitation due to their lack of experience in Australia's workforce. They often lack knowledge about the minimum wage and award rates, about the rules of paid and unpaid internships, or don't know about mechanisms available to provide support for them or a place to voice concerns about their treatment as employees. Due to their lack of experience, these employees experience a sizable disparity in bargaining power and are less able to call out instances of underpayment and enforce their legal rights.

Young Australians struggle to navigate the complex web of the industrial relations framework. The patchwork framework of Modern Awards, enterprise bargaining agreements, contracts of employment and the National Employment Standard means that young people struggle to understand their entitlements and wage rate. Similarly, employers, particularly small businesses without legal or HR departments, struggle to navigate the quagmire of rules and regulations to ensure compliance.

There are many scenarios in which underpayment can occur. One scenario is where young people trust they are being paid correctly, and do not check that their pay is accurate. While it is important for employees to take a degree of responsibility to ensure they are paid in accordance with their contract, employees should be able to vest a certain degree of trust in their employer that they will be paid in accordance with the law.

Another scenario is where an employee lacks awareness of when their entitlements or wages should increase or change (with the passage of time or changes to the enterprise bargaining agreement or Modern Award). This prevents them from correcting potential errors made by

their employer. Often, employees are not aware of what Award on the basis of which they are employed. Where this is the case, any employee may find it difficult to determine their wage and workplace entitlements. This is especially the case when employees haven't signed an employment contract, when they only saw the part of the contract they needed to sign and not the part with their award or hourly rate, or when they are being paid in cash. If this is the case, it may be difficult to establish what industry award covers their employment.

Another common scenario for youth underpayment is where young employees are kept at traineeship and introductory levels for longer than necessary, thereby being paid less than what they are legally entitled to. They can be unknowingly exploited as unpaid interns; working for periods of time, or taking on a workload greater than is allowed for unpaid interns. Employees might be afraid to speak up if they're aware of being underpaid. Employers may also behave in a bullying or intimidating manner, exacerbating this problem.

There are also unfortunate cases of employers lying to their employees. A member of the Young Liberal Movement has given their story anonymously (F,19):

When I questioned my employer about what I was getting paid (less than \$10 an hour when it should've been \$15), they told me the rest was getting put into a superannuation account which they had set up for me. But, I later found out that the superannuation account didn't exist.

Another Young Liberal (F, 22) shared their story:

I worked as a casual employee of a retail clothing shop. Often, my boss refused to believe that I had worked certain hours and required verification from 1-2 other colleagues to prove when I worked. My employer constantly questioned my integrity and used this as a basis to pay me for less than the hours for which I had in fact worked.

Underpayment is a serious issue, particularly for young Australians. It is because of our commitment to the rule of law as a society that it is right and fair for employees to receive their due payment under contract and law for their services rendered. Workplaces which deliberately underpay their employees are preying on the vulnerable. For young people in particular, there can be a significant power imbalance between the employer and the employee. It is vital that young people experience honest workplaces; if nothing else, because they are the future leaders and future employers themselves who must learn to operate businesses with integrity. Workplace relations can often be challenging to navigate, but at the bare minimum people should be able to have the assurance that their workplace agreements are being honoured. This is necessary for a productive society based on the rule of law and a society where individuals who work hard should be remunerated and given the opportunity to improve their lot in life.

Concerns of heavy handed policies for unintentional underpayment

Heavy handed policy responses to the issue of underpayment, while perhaps well intentioned, create an unnecessary and inappropriate burden on business. This is particularly pronounced in small business, where the impact is not merely economic, but is personal as well. A heavy handed policy response will increase stress for business owners, increase the load of

paperwork and administrative duties that would divert attention away from the productive aspects of the business which generate economic activity and wealth.

It is inefficient for either the employer or the employee to bear the entirety of the risk of underpayment as both employer and employee are capable of taking steps to minimise that risk which the other cannot. A policy response must recognise this fact and touch both sides of the market. The policy response must also recognise the realities of business, particularly small business, and that many instances of underpayment are unintentional.

In the case of unintentional underpayment, where understandably a small business owner is stressing about the substantive business and may not have a large HR or legal department, a policy framework should be created to ensure that it is easier for businesses and employees to take an appropriate level of care to reduce the risk of underpayment.

Currently, employees are prevented from exercising a high degree of care and control over instances of underpayment. This is because the format of modern awards is not streamlined or easily accessible to employees who are not legally trained. Nor is understanding the relationship between the awards, enterprise bargaining agreements, employment contracts and the National Employment Standards. We argue that at a minimum, the format of modern awards need to be simplified and made more accessible. Employees need to be able to have a quick snapshot of their entitlements and wage rate.

However, the problem of the inaccessibility of the industrial relations framework goes deeper. Employees do not have a single source of truth as to the terms and conditions of their employment. This is inherent in the piecemeal relationship between modern awards, enterprise bargaining agreements, contracts of employment and the NES. Employees, and, in many cases, employers do not feel equipped to determine whether an instance of underpayment has occurred. Without this knowledge, employees will not access remedies available through the Fair Work Ombudsman, nor will employers be able to comply with their payment obligations.

As discussed, both employees and employers need to bear some of the risk for underpayment. However, suggestions on how to best incentive business to minimise the risk of underpayment are uncalibrated, blunt and poorly targeted. Inevitably there are calls for greater reporting obligations for business, more government oversight and control in the running of business or calls to standardise or mandate the form of payslips. These suggestions should be rejected as imposing a significant burden or decreasing the agility and flexibility of our industrial relations system.

It is important that employers can easily access information from the Fair Work Ombudsman. The government could also consider updates to the single touch payroll platform so that it includes information from Fair Work.

Fundamentally, however, government efforts to tell business how to do its job in minimising the risk of unintentional underpayment will never be as effective as businesses innovating and tailoring effective payroll solutions to the needs and context of their business.

The need for effective deterrents for intentional underpayment

It is right that as a society based on the rule of law a policy response to intentional underpayment of staff should be strong. We believe that stronger preventative measures such as stricter fines, forced reimbursements of underpaid wages and director disqualification orders may be appropriate in combating the deliberate underpayment of staff and should be applied with a zero tolerance policy.

The Federal Government should establish a system of strike warnings for businesses and corporations that have been found to be breaching payment laws without intention. Where instances of underpayment are found, the business must immediately reimburse their employees for the lost wages. At the first instance, including penalty rates and overtime pay.

If a company (or its related entities) are found to have accrued at least three strikes against their company then Fair Work and/or ASIC should have at its disposal powers to be exercised in accordance with the seriousness of the circumstances including director disqualification orders, enforcement orders or fines or, in the most serious cases, deregistration.

Enforcement for instances of intentional underpayment

The resolution of intentional wage underpayments, is only ever as effective as its enforcement. Without a robust compliance enforcement mechanism, penalties will not be ordered and lost wages will not be recovered, reducing the deterrent nature of retribution.

An example of the importance of compliance enforcement is evident through understanding the funding of the Fair Work Ombudsman and their success in recovering wage underpayments, both caused by intentional underpayment and unintentional underpayment.

In 2018-19, the government funded the Fair Work Ombudsman to the tune of \$119,692,000 and funding has increased dramatically since 2005-06 (under the Workplace Ombudsman).

In the 2006/07 financial year, Workplace Inspectors of the the FWO predecessor, "Workplace Ombudsman" were able to recover \$13.5 million for 9,600 employees. As it is recognised that honest mistakes can occur, 99.3 percent of underpayments were recovered without escalating to litigation. Court ordered penalties culminated to \$409,055 in the 2006/07 year. In 2018/19, Fair Work Inspectors recovered more than \$40,000,000 for 18,000 employees. Court ordered penalties on the other hand were \$4,400,772. In a 12 year span, wage underpayments have almost tripled while court ordered penalties have increased tenfold.

Although the higher court ordered penalties and recovery of unpaid wages could be attributed to a variety of factors such as an increase in media focus, public awareness or greater confidence by employees to pursue individual cases, it is recognised that any pursuit of justice is only as effective as a robust compliance and enforcement mechanism. We strongly support ensuring that individuals and businesses have easy access to the Fair Work Ombudsman and that the Ombudsman is able to effectively enforce and restitute instances of underpayment.

In every instance of public outrage where there is yet another example of intentional exploitation of vulnerable workers, this is suitably met with calls for justice and action. However, it is important to distinguish between the deliberate exploitation of migrant workers and the small business owners who make an honest mistake in interpreting modern awards and calculating complex allowances. The calls for criminalisation should be reserved for repeated instances of exploitation and intentional underpayments.

For employers, the requirement to repay unpaid wages and the potential for civil penalties can be an effective punitive measure and act as deterrent for those who may engage in such behaviour. The criminalisation of wage underpayments is often considered as an alternative to civil remedies as this would provide options for penalties such as jail time. This is because the civil remedies of repayment or penalties may be attributed as a “cost” or running business that is budgeted for and is therefore not effective as a deterrent. The potential of jail time for owners or directors could provide a greater deterrent due to the loss of individual liberty as opposed to pecuniary punishments where business can continue trading without interruption. However, even if the calls for criminalisation are successful, they will only ever be as effective as the compliance. As the criminal trial process is lengthy and provides less avenues for alternative dispute resolution, the enforcement will only be effective if it is accounted for in the increased expenses for the Fair Work Ombudsman and is budgeted accordingly.

Concluding remarks

Underpayment is an important issue for young Australians. It undermines our commitment to the rule of law and denies aspirational workers from the opportunity for wealth creation and improving their lot in life. It is important, however, to distinguish between intentional and unintentional underpayment in the policy debate. We call for strong enforcement and increased funding for the Fair Work Ombudsman to tackle instances of intentional underpayment.

Yet calls for heavy handed, command and control style solutions to underpayment should be rejected. They are poorly calibrated, ineffective and place the heavy yoke of government on the engine room of our economy. Fundamentally, the problem of unintentional underpayment is not caused by business but by the quagmire of the piecemeal industrial relations framework. Business and employees must know the law to ensure compliance with the law.