Response to the Senate Economics Reference Committee

Inquiry into the Unlawful Underpayment of Employees' Remuneration

Australian Retailers Association

AUSTRALIAN RETAILERS ASSOCIATION
1300 368 041
www.retail.org.au
policy@retail.org.au

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About the ARA

The **Australian Retailers Association** (ARA) is the retail industry's peak body, representing a $325 billion sector employing more than 1.3 million people. The ARA works to ensure retail success by informing, protecting, advocating, educating and saving money for its 7,800 independent and national retail members which operate over 60,000 shopfronts across Australia. The ARA ensures the long-term viability and position of the retail sector as a leading contributor to Australia's economy.

Members of the ARA include Australia's most trusted retailers, from the country's largest department stores and supermarkets, to specialty retail, electronics, food and convenience chains, to mum-and-dad operators.

Introduction

The **Australian Retailers Association** is pleased to submit to the Economics References Committee inquiry into the unlawful underpayment of employees' remuneration, and to address issues raised by the Inquiry's Terms of Reference.

At the outset, the ARA wishes to place on record its trenchant opposition to wilful, systemised underpayment of employee earnings and legally payable entitlements, and to state in the most emphatic terms possible that it has no truck with deliberate breaches of relevant legislative and industrial implements in this regard.

Overwhelmingly, ARA members take great care to ensure their responsibilities and obligations are discharged in full to this end. Where errors occur, our members have a solid track record of self-reporting, making restitution to their affected employees, and making best endeavours to implement procedures to prevent any recurrence.

Through our legal affiliate, Fisher Cartwright Berriman (FCB) Lawyers, ARA members who do not have the benefit of inhouse legal counsel are able to access uncapped and unlimited employment relations advice, including with regard to the interpretation and application of Award terms, and legal counsel on a fee-for-service basis for more complex matters; further, some of our larger members who have inhouse legal divisions also choose to utilise FCB's member services from time to time, whether for higher-level matters, for second opinions, or on specific tasks.

We note a great deal of comment in recent months, in social media and the press, suggesting voluntarily disclosed incidences of wage and entitlement underpayments in the retail sector are too widespread to be inadvertent. We reject sentiments of this kind completely.

The General Retail Industry Award (GRIA), which applies to most customer-facing employees of retail enterprises, features almost 1,000 different methods for classifying

employees for payment purposes. Many smaller retailers wishing to do the right thing find this a source of perpetual frustration when assigning relatively menial tasks to staff, such as opening the front door of the shop each day, attracts a higher rate of pay under the Award.

This complexity within the GRIA applies in exclusion to any additional requirements imposed by the National Employment Standards (NES) or in the case of businesses employing staff under multiple Awards – increasing the complexity of compliance requirements for even major retailers.

It is not credible to infer that so-called "wage theft" is uniformly a conspiracy to rip staff off when even major retailers investing significant capital outlays on state-of-the-art payroll systems advise that errors and underpayments still happen: the vagaries of the Award (or Awards, if staff are employed under multiple instruments) still need to be incorporated into those platforms.

While we are not prepared to name it (and give advance notice to the Committee that we will also decline to do so under privilege if called to appear), we recently became aware of a national retailer which uses independent external auditors to conduct rigorous annual checks of its financials, including staff payments, and which discovered an underpayment error that had gone undetected for four years *including by the independent auditing firm*. While the matter was quickly resolved and outstanding monies paid to affected staff, the example is instructive, underlining the point that inferences of conspiracy or ill-intent whenever an underpayment occurs are fatuously simplistic, and usually incorrect.

It is necessary to note the ARA is disturbed by the phraseology and tone used in framing the Terms of Reference for this Inquiry: the heavy use of emotive and loaded terms such as "theft," "stolen," "deterrence," and other formulations suggestive of serious criminal behaviour implies a level of prejudgement of, and guilt on the part of, business in general and our retail industry in particular that we reject in their entirety.

We further note that just as underpayments have occurred, overpayments occur just as frequently if not more so; our advice from ARA members is that when staff are overpaid there is rarely (if ever) action taken to claw the money back. If underpayments are to be highlighted, overpayments should equally be publicised but generally aren't for commercial reasons, including likely adverse shareholder reactions (especially given overpayments are rarely recovered). Consequently, the default position in what passes for "debate" on "wage theft" of portraying businesses in an unfairly poor light is reinforced.

On account of high-profile cases in which wrongdoing was established at law, the ARA recognises the difference between a deliberate rip-off of retail staff and a genuinely inadvertent incident of underpayment that is self-reported and rectified. We do not accept the retail sector is over-represented in terms of unlawful misconduct compared to other commercial sectors or, indeed, to industries such as broadcasting or aviation.

The Committee must appreciate there is a correlation between the likelihood of underpayment, the complexity of award terms applicable to an industry and the working patterns within an industry. In a research paper presented to the Fair Work Commission's 2014 Award Review, the Fair Work Ombudsman said:

"Twelve modern awards clearly state the hours for which overtime are payable for all employees covered by the award. Therefore, there is an opportunity for overtime provisions in approximately 85% of modern awards to be made clearer. Five modern awards were found to clearly state the application of penalty rates for all employees covered by the award. Therefore, there is an opportunity for clauses in respect of penalties to be made clearer in 85% of modern awards."[1]

The government body responsible for enforcement, information and education in relation to "modern" Awards clearly acknowledges their complexity and lack of clarity in terms of penalty rates and overtime. It is therefore unsurprising that industries which have a high prevalence of hours worked which attract overtime and penalty rates would experience a higher incidence of inadvertent errors with respect to the application of those entitlements. The GRIA is one such Award in this respect.

Whilst we reiterate our rejection of deliberate breaches of industrial laws and the fact such wanton practices are anathema to the ARA, we believe it would be more constructive to frame this inquiry as a scoping study into how Awards and other relevant instruments could be simplified than the clear impression of a witch hunt the Terms of Reference as published convey.

The forms of and reasons for wage theft and whether it is regarded by some businesses as "a cost of doing business"

The root cause of underpayments in Retail is Award complexity, not criminal intent.

While the ARA acknowledges that cases of either deliberate underpayment of employees and/or failure to comply with enforceable undertakings entered into with the Fair Work Commission do occur, we reject the premise behind this clause – that businesses generally set out to rip staff off – entirely.

It is necessary to reiterate at this juncture that the ARA recognises the difference between deliberate rip-offs of staff and genuinely inadvertent instances of underpayment that are self-reported and rectified. The overwhelming majority of our retail members make every effort to do the right thing, and it is inappropriate to infer they are criminals if they make mistakes.

[1] *Research Paper on the Expression of Rates of Pay, Overtime and Penalty Rates in Modern Awards,* Fair Work Ombudsman, April 2014

That said, those who deliberately and maliciously engage in underpaying employees with the express objective of saving money, where this is established at law, can and should be prosecuted.

Generally, where underpayments occur, recent self-reported, high profile cases have affected small percentages of overall workforces (even if headline amounts of underpaid money are large). This reinforces the contention that these cases are not "wage theft" (clearly, were it to be otherwise, *every* employee in these businesses would be underpaid).

The cost of wage and superannuation theft to the national economy

The root cause of underpayments in Retail is Award complexity, not criminal intent.

The ARA acknowledges that withdrawing **any** money from the economy – be that in the form of tax increases, reductions in government spending or wages, or other mechanisms that depress economic activity – may adversely impact GDP.

Even so, we reject the apparent underlying premise of this clause – that underpayments automatically constitute criminal offences for which we must account – completely.

The ARA has been consistently and explicitly clear that in cases of wilful, deliberate and systemic underpayment of staff that occur with the intention of paying employees lesser amounts than those to which they are legally entitled, vigorous prosecution should ensue.

That said, we believe that in the context of a national economy of some $1.4 trillion annually, actual cases of underpayment that fall within the remit of criminal, malicious theft from staff (which excludes the overwhelming majority of cases of self-reported, voluntarily remedied underpayments) are – by their nature – impossible to meaningfully quantify in terms of their impact on GDP activity.

The best means of identifying/uncovering wage and superannuation theft, including ensuring those exposing wage and superannuation theft are adequately protected from adverse treatment

The root cause of underpayments in Retail is Award complexity, not criminal intent.

For as long as complexity and inflexibility exist in the GRIA – and for as long as both sides of politics refuse to address this – payment errors remain inevitable.

Many retailers in Australia, irrespective of size – concerned about inadvertent underpayments of staff – are now self-auditing, and we expect to see activity to this end increase. The ARA is of the view that any errors involving the self-reporting of underpayments of wages and/or superannuation, provided they are disclosed within a

reasonable timeframe after their discovery and promptly resolved, should be given immunity from prosecution or other punitive measures that may emerge from various "wage theft" proceedings currently on foot at both federal and state level.

Once again, this level of amnesty should not extend to businesses found to have deliberately short-changed their staff and/or which have refused to make good on arrangements to repay staff who have been underpaid.

The taxation treatment of people whose stolen wages are later repaid to them

The root cause of underpayments in Retail is Award complexity, not criminal intent.

Irrespective of whether underpayments of wages and entitlements are inadvertent or are able to be described (following proceedings at the Fair Work Commission or other applicable jurisdiction) as *bona fide* wage theft, the ARA envisages two possible models under which restitution may be made to rectify historic underpayments:

1. Outstanding wages (plus interest, penalties and/or other remedies that may apply) be paid to the employee at the marginal tax rate that would have applied had these monies been paid in the financial year in which they were earned; or
2. A concessional flat rate of income tax be levied on historic balances of, say, 30%. Such a methodology would be particularly useful in taxing entitlements accrued but not paid in instances in which the obligation on the employer occurred more than five years before the underpayment was discovered (i.e. after the record-keeping requirements of the Australian Taxation Office had passed).

In either case, the ARA envisages the role of the ATO in administering these arrangements – and administering any procedure set down in legislation for taxing backpaid entitlements in this regard – would be central.

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

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The ARA believes it is unreasonable in the extreme to suggest that businesses should, in effect, be held accountable for the behaviour of their suppliers.

In cases where supplier businesses have actually engaged in what the ARA would concur is "wage theft" – systemic, deliberate underpayments with the specific intention and objective of illegally cutting wage costs – the clients of those businesses may be unaware of this. Indeed, there may be no way for them to reasonably be aware of this.

This consideration raises a secondary point: the question of retrospectivity. If Business A has been buying goods from Business B over a ten-year period, and Business B is then discovered to have been deliberately underpaying its staff for the duration of that period, what liabilities and obligations would this place on Business A as a consequence?

A further example is small businesses that discover they had accidentally underpaid staff. Small retail businesses may only buy from a handful of suppliers; were those suppliers obliged to stop selling to small enterprises that made payroll mistakes it could kill those businesses off – destroying both the livelihood of the retailer and the jobs of his or her staff, in addition to increased welfare costs borne by the Commonwealth.

Where *bona fide* cases of wage theft are found to have occurred (irrespective of where in supply chains this happens) the ARA believes the ATO (or other entity with jurisdiction) should first enter into enforceable undertakings with the business involved, and – if these are reneged on – initiate proceedings to wind the business up.

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

The root cause of underpayments in Retail is Award complexity, not criminal intent.

In cases of *bona fide* wage theft – that is, deliberate, malicious and systemic underpayment of wages – a huge regime of deterrence including heavily punitive fines and other significant penalties is well indicated.

However, the ARA reiterates its caution that the overwhelming majority of so-called "wage theft" cases particularised in recent media were inadvertent, self-reported, and quickly rectified: the fact the Terms of Reference of this Inquiry appear fixated on the prejudged language of "theft" concerns us that businesses (including large entities) which make errors that are not deliberate would be treated no differently than those actively pursuing a rip-off.

Where *bona fide* wage theft occurs, is it possible to garnishee corporate revenue (in the same way the ATO garnishees income to retrieve debts owed by taxpayers)? This may offer both a remedy and a deterrent. Again, we emphasise that great care would be needed to ensure those businesses making genuine errors (and making redress) were not subject to regime that could and should apply to actual criminal misconduct.

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

The root cause of underpayments in Retail is Award complexity, not criminal intent.

In cases of *bona fide* wage theft – that is, deliberate, malicious and systemic underpayment of wages that has been established at law – the ARA heartily endorses this proposal.

It would be critical to exclude businesses found to have made inadvertent, self-reported and quickly remedied underpayments from this policy, if enacted.

On a note of caution, we note underpayments identified by Qantas, which were well documented in the media. This does not appear to have been an example of deliberate underpayments; Qantas self-reported and remedied the issue. It is a major supplier of travel services to the federal government. In our view it would be wrong to blacklist Qantas as a government supplier on this basis, not least as an unknown (but probably substantial) number of jobs at Qantas would senselessly be lost as a consequence.

We also understand Qantas discovered a spate of overpayments to its staff at the time the underpayments were identified, although these received scant media attention.

This speaks to one of our underlying concerns with the entire process and apparent assumptions inherent in this Inquiry: that it is a populist, jingoistic witch hunt. The federal government (or any other government) would be heavily culpable if blacklisted businesses that did not conspire to rip their employees off were to collapse as a consequence, destroying jobs and livelihoods over a mistake (even if the headline value of underpaid amounts is large).

Conclusion

The ARA is disappointed that this Inquiry, judged by the phraseology used in its Terms of Reference, appears designed more as a witch hunt than as a serious attempt to rectify a problem – to the extent such a problem may exist.

The ARA has repeatedly attempted to engage the Minister for Industrial Relations, Hon Christian Porter, to discuss complexity in the GRIA. This has invariably proven fruitless. The Minister simply refuses to engage, and we understand a plethora of other representative bodies have experienced similar problems. With no disrespect to the adviser to whom we were directed on one occasion, it is clear from the Minister's public utterances on this subject that he is driving the government position directly – and that he regards "complexity" a copout.

We are deeply disturbed by the prevailing industrial relations climate in which the Coalition seems uninterested in meaningful reforms – including Award simplification –

lest it be accused of embarking on "WorkChoices Mk II," and in which the ALP (which enacted most of Australia's current industrial framework) seems uninterested in revising the complex, inflexible Fair Work regime demanded of the Rudd-Gillard government by unions and uninterested in surrendering the right to accuse the Coalition of "WorkChoices Mk II" by engaging in constructive reform discussions that may elicit buy-in from business.

In the meantime, Australia's economy – marked by low productivity, low wage growth, and sluggish GDP growth – continues to stagger along at a snail's pace.

We believe the AWU, which engineered a series of workplace agreements that cut employee entitlements below Award levels, **must** be held to account in any genuine examination of wage theft: as unions purport to be unimpeachably conversant with "modern" Awards in every detail, the agreements brokered by the AWU were unambiguous instances of wage theft. As self-styled champions of the worker, this activity was reprehensible.

We are also concerned that the jingoistic, populist method in which "wage theft" has been pursued by involved parties – with a get-square mentality toward businesses that make errors after struggling with complex industrial instruments – has excluded the reciprocal issue of overpayments. The ARA's feedback from its members is not only that overpayments occur (with similar frequency to underpayments) but that such overpayments are *rarely if ever* clawed back. (We note the Commonwealth claws back overpayments of its staff where errors to this end are made).

It remains the ARA position that complexity of so-called "modern" Awards is the root cause of underpayments, not some universal inclination toward criminality on the part of business.

We understand this Inquiry has been instituted to achieve the objectives of unions represented by some members of the Committee, but until meaningful reforms to simplify a complex and inflexible industrial relations framework are seriously considered by either or both major political parties, the ARA believes it is the wrong priority at the wrong time, and will achieve nothing to address the primary reason for the problem.

In the final analysis, the ARA believes the obsessive fixation in some quarters on "wage theft" is wrongly motivated by a penalty/enforcement mentality when Award simplification would alleviate most instances of underpayments, which are a consequence, not a causal factor.

If the cause remains unaddressed, the consequence will continue to occur unabated. We believe the Coalition, the ALP and unions would be better served setting aside ridiculous political agendas and opportunistic grandstanding and engaging in the reform of an industrial relations framework that is not only unfit for purpose but a primary driver of torpid wage growth and GDP performance in an economy that is increasingly uncompetitive by OECD standards.

Australian Retailers Association

For further information, please contact:

Russell Zimmerman

Executive Director

The Australian Retailers Association

Suite 104, 40-48 Atchison Street,

ST LEONARDS NSW 2065

[redacted]

Yale Stephens

Head of Public Affairs

The Australian Retailers Association

Level 1, 112 Wellington Parade

EAST MELBOURNE VIC 3002

[redacted]