

Inquiry into unlawful underpayment of employees' remuneration

Submission of the Centre for Business and Social Innovation UTS Business School

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About the Centre for Business and Social Innovation

The Centre for Business and Social Innovation (CBSI) provides a unique perspective on innovation research that integrates the technological, the economic, the environmental and the social. Our focus includes both the role of organisations in changing society and the role of society in changing how we do business.

Operating as a multi-disciplinary hub of engagement and collaboration with practitioners, businesses and the community, our purpose is to foster innovative practices in Australian industries and markets, examine the changing nature of work, identify leadership capabilities by promoting new business models and supporting the development of organisational and public policy practice in innovation. .

The Terms of Reference (TOR) for the Inquiry are closely aligned to the research interests of our members. These interests include:

1. Investigating how fairness, inclusiveness and productivity are maintained in the face of innovation and disruption
2. The future of work and professions
3. Maintaining labour standards in supply chains in the face of innovation and disruption
4. New forms of voice and employee representation
5. Addressing the risk of modern slavery

Specifically, the Inquiry's interest in identifying the following:

'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; (TOR c)

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

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;' (TOR g)

relate directly to current or recent research projects being undertaken by members of the Centre for Business and Social Innovation.

These projects include:

- An ARC Linkage project which fosters the development and assesses the efficacy of the Cleaning Accountability Framework (CAF), a multi-stakeholder initiative in improving labour standards in the cleaning supply chain (Enforcing labour standards in supply chains through voluntary frameworks).
- A project exploring strategies for improving labour conditions within the Australian cotton value chain
- The experience and identity of rideshare drivers in Australia
- An ARC Discovery project which uses empirical research to examine the practical operation and effectiveness of innovative Australian regulatory models designed to improve working conditions in supply chains in the clothing and road transport industries

Underpayment in Australia

Despite the existence of a number of legislative provisions in Australia to establish minimum labour standards, underpayment is becoming a prevalent issue in a number of industries.

Underpayment, commonly referred to as wage theft, can take a number of forms including¹:

- Being underpaid for regular hours
- Not receiving penalty rates
- Unpaid working hours or overtime
- Unpaid trials, internships or training
- Unpaid superannuation
- Illegal deductions

An estimate by the Australian Council of Trade Unions (ACTU) approximates that as many as one-third of Australian workers nationally are affected by underpayment of wages in the form of unpaid or underpaid superannuation.² For some industries and states these figures have been reported as being much higher. In Victoria, between 2013 and 2016, 79% of hospitality employers were identified as not complying with the national award system³. Nationally it is estimated that one in two workers in the hospitality industry are victims of wage theft, with similar figures in retail, beauty and the fast food sectors.⁴ Systematic underpayment has also been identified in industries such as cleaning, security and horticulture⁵. While wage theft can occur in any industry there are a number of structural characteristics of an industry which may make workers more vulnerable to wage theft. These 'structural characteristics' include⁶:

- Low wage, low skill jobs
- Weak or absent unions
- Extensive casual employment and subcontracting including supply chain outsourcing
- Intense commercial competition
- Labour cost minimisation as a dominant strategy
- Other features associated with poor job quality

¹ Peetz, D. 2019. *The Realities and Futures of Work*. ANU Press: Acton ACT at 293.

² Australia Council of Trade Unions 2019. *Wage Theft – The New Model for Big Business*. Australian Unions Fact Sheet: Canberra ACT.

³ Parliament of Australia. 2017. *Corporate Avoidance of the Fair Work Act*. Commonwealth of Australia: Canberra, ACT
https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/AvoidanceofFairWork/Report
 last accessed 11th February 2020

⁴ Ibid

⁵ Kaine, S. & Rawling M. 2019. 'Strategic 'co-enforcement' in supply chains: The case of the Cleaning Accountability Framework', *Australian Journal of Labour Law*, vol. 31, pp. 305-334; Clibborn, S & Wright, C.F. 2019 'Employer theft of temporary migrant workers' wages in Australia: Why has the state failed to act?', *Economic and Labour Relations Review*, vol. 29, no. 2, pp. 207-227

⁶ Clibborn, S & Wright, C.F. 2019 'Employer theft of temporary migrant workers' wages in Australia: Why has the state failed to act?', *Economic and Labour Relations Review*, vol. 29, no. 2, pp. 207-227 at 212.

Certain subsets of workers are also more likely to experience wage theft. Migrant workers, particularly those on temporary visas, are particularly vulnerable to wage theft. A large survey of temporary migrant workers in Australia found that approximately one-third of the workers surveyed were being paid less than half the minimum wage (\$12 per hour or less), despite at least three quarters recognising that they were being paid at below the minimum wage.⁷

Wage theft in supply chains

Supply chain outsourcing, which exists in a number of industries including the cleaning, construction, apparel and road transport industries, can operate to produce conditions that are positively conducive to worker exploitation and wage theft. Supply chain arrangements involve a series of contracting parties above the workers at the base of the chain. In a supply chain the business controller or lead client firm at the apex of the chain contracts out work to principal contractors. The work may then be successively outsourced to subcontractors until it reaches a direct work provider who engages the supply chain labour at the base of the chain who actually perform the necessary work. That is, at each stage in the contracting chain the obligations imposed by the lead firm (such as maximum amount of money to pay for the work and maximum amount of time to perform the work) are passed down the chain and each business in the chain takes its cut of profit. As Johnstone et al⁸ explain:

“these arrangements enable firms at or near the apex of the chain to avoid the legal proximity with workers that may attract various obligations and liabilities, but at the same time enable them to maintain effective commercial control over the work performed.”

These supply chain dynamics whereby firms at the apex of the chain influence work outcomes for supply chain labour, have rendered traditional employment regulation of direct employers inadequate⁹. The direct employer is frequently a weaker business operating with a very small profit margin that may not have the capacity or inclination to provide work in compliance with labour law. The direct work provider, being a less influential business in the supply chain, is frequently constrained in their ability to change the work parameters significantly in order to address workers' concerns about their pay and conditions. The power of lead firms to impact employment conditions through the supply chain has resulted in them also being referred to as the 'economic employers' of those down the chain - even though they do not directly contract with the workers. So where supply chains are prevalent, more robust mandatory supply chain liabilities and obligations are required to address worker exploitation including wage and superannuation theft.¹⁰

⁷ Berg, L. & Farbenblum, B. 2017. *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*. Migrant Worker Justice Initiative: Sydney.

⁸ Johnstone, R., McCrystal, S., Nossar, I., Quinlan, M., Rawling, M. & Riley, J. 2012. *Beyond Employment: The Legal Regulation of Work Relationships*. Federation Press: Sydney at p 66.

⁹ Rawling, M. & Kaine, S. 2012. "Regulating supply chains to provide a safe rate for road transport workers", *Australian Journal of Labour Law*, vol. 25, pp. 237-257 at 238.

¹⁰ See Workplace Express Extend "secondary liability" provisions: Academics (quoting submission by Professor Andrew Stewart and Dr Tess hardy) Monday, July 23, 2018

‘Wage’ theft in the gig economy

Another concern is the potentially rapid emergence of not-regulated work in the sector of the so-called “gig economy”. The gig economy corresponds to part of the economy in which digital platforms are used to connect workers with customers. Such intermediation has become increasingly common in industries such as delivery, couriership, household services and hospitality¹¹. One of the key issues brought with the emergence of gig platforms is that of the status of the workers and whether they should be considered as self-employed contractors or as employees - and thus entitled to Award conditions. One key feature of gig work is the predominance of self-employed status, which can be associated with very low hourly income (under \$9.90) and lack of work-related insurance¹². The systematic use of the self-employed status is thus a significant risk factor for wage theft. The potential for gig work to be a guise for ‘sham-contracting’ and the consequent non-payment of Award entitlements and superannuation.

An attendant issue relates to the incapacity of the current regulatory regime to capture the nuances of gig work as a form of employment. This results in a grey area in which gig workers cannot officially claim to be underpaid (or denied entitlements) as they do not officially earn wages despite sharing many similarities with Award dependent workers. As we noted in our submission to the Senate Inquiry into the Future of Work and Workers (2018) the 2017 decision in the Fair Work Commission in which Deputy President Gostencnik concluded current approaches to determining employment status (i.e. employee or independent contractor), had ‘developed and evolved at a time before the new “gig” or “sharing” economy’; and that:

‘It may be that these notions are outmoded in some senses and are no longer reflective of our current economic circumstances. These notions take little or no account of revenue generation and revenue sharing as between participants, relative bargaining power, or the extent to which parties are captive of each other, in the sense of possessing realistic alternative pursuits or engaging in competition. Perhaps the law of employment will evolve to catch pace with the evolving nature of the digital economy. Perhaps the legislature will develop laws to refine traditional notions of employment or broaden protection to participants in the digital economy. But until then, the traditional available tests of employment will continue to be applied’.

The legal liminality experienced by gig workers provides an additional hurdle that gig workers are required to overcome before being able to access remedies for under or non-payment of entitlements. As illustrated in the quote above, tribunals and courts are limited in what they can do by the legislative framework within which they work. This does not take into account the relative bargaining power between participants or ‘realistic alternatives’ for parties involved – particularly workers. Consequently, the capacity of the current regulatory framework to genuinely tackle underpayment and its broader economic implications is questionable as that framework currently excludes many ‘workers’ by virtue of definitional rigidity. There is an

¹¹ See: <https://www.gigwatch.com.au/>

¹² McDonald, P., Williams, P., Stewart, A., Oliver, D. & Mayes, R. 2019. *Digital Platform Work in Australia: Preliminary Findings from a National Survey*. <https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/6915/6081/7253/Digital_Platform_Work_in_Australia_-_Preliminary_Findings_18_June_2019.pdf>. Last accessed 2nd March 2020.

urgent need to address these shortcomings in the face of increased concern about the way in which new forms of employment are being used to undermine labour law.

There is a danger that a combination of the growth of gig work and the increasing prevalence of wage theft creates a normative shift for workers in which employment below the minimum wage becomes accepted due to expectations that underpayment is unavoidable, particularly within certain industries or for certain visa holders. Within this environment of culturally accepted wage theft, employers can use the implicit or explicit threat of replacing workers with those who will accept lower wages to pressure the existing workers to accept lower wages.¹³ Given the widespread implications of underpayment of employees' remuneration, it is imperative that the government take action to improve compliance (see section 'Improving Compliance' below).

Wage theft and Modern Slavery

If issues such as partial- or non-payment of wages, forced and unpaid overtime, and the denial of entitlements are prevalent and left unchecked, more severe exploitation can develop.¹⁴ Bonded or indebted labour, which occurs when individuals work to pay off a debt while losing control over working conditions and repayments, is a common form of modern slavery.¹⁵ Wage theft therefore increases the risk of modern slavery.

Evidence suggests that modern slavery is most commonly associated with labour intensive, poorly mechanised activities, requiring a low-skilled labour force.¹⁶ The reduction in labour costs is a key contributor to modern slavery, it is essentially "an attempt to under-price a key resource (labour) through illegitimate means".¹⁷ While companies may not be immediately aware of modern slavery in their operations and supply chains¹⁸ this does not mean they are incapable of understanding that there is a risk of modern slavery occurring.¹⁹

It is estimated that Australia is home to 15,000 modern slavery victims.²⁰ Australia introduced its Modern Slavery Act in 2018. It requires entities to perform a risk assessment and to publicly report on the actions they have taken as a result. The Home Affairs Department guidance states that "[t]he reporting requirement aims to support the Australian business community to identify and address their modern slavery risks and maintain responsible and transparent supply chains".²¹

¹³ Peetz, D. 2019. *The Realities and Futures of Work*. ANU Press: Acton ACT at 292.

¹⁴ Ethical Trade Initiative. 2018. *Managing risks associated with modern slavery: A good practice note for the private sector*. <https://www.ifc.org/wps/wcm/connect/5e5238a6-98b3-445e-a2d6-efe44260b7f8/GPN_Managing-Risks-Associated-with-Modern-Slavery.pdf?MOD=AJPERES&CVID=mR5Bx5h> Last accessed 11th February 2020.

¹⁵ Nolan, J. and Boersma, M. 2019. *Addressing Modern Slavery*. Sydney, UNSW Press.

¹⁶ Allain, J. et al. 2013. *Forced labour's business models and supply chains*. Joseph Rowntree Foundation

¹⁷ Crane, A. 2013. 'Modern Slavery As A Management Practice: Exploring the Conditions and Capabilities for Human Exploitation', *Academy of Management Review*, vol.38, no. 1, pp. 49–69 at 51.

¹⁸ Phillips, N. and Mieres, F. 2015. 'The governance of forced labour in the global economy', *Globalizations*, Vol. 12, No. 2, pp. 244–260.

¹⁹ Burmester, B., Michailova, S. and Stringer, C. 2019. 'Modern slavery and international business scholarship: the governance nexus', *Critical Perspectives on International Business*, Vol. 15, No. 2/3, pp. 139–157.

²⁰ International Labour Organization and Walk Free Foundation. 2017. *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*. Available at: http://www.ilo.org/global/publications/books/WCMS_575479/lang-en/index.htm

²¹ Home Affairs (2019) *Commonwealth Modern Slavery Act 2018 - Guidance for reporting entities*. Canberra, p. 96. Available at: <https://www.homeaffairs.gov.au/criminal-justice/files/modern-slavery-reporting-entities.pdf>, at 13.

The Australian guidance documents recognise that modern slavery sits on a continuum of exploitation and should not be addressed in isolation. This indicates that there is a spectrum of abuse and it is not always clear at what point, for example, poor working practices and lack of health and safety awareness seep into instances of human trafficking, slavery or forced labour in a work environment. This outlook recognises that people can be exposed to conditions that worsen over time, sometimes leading to modern slavery.²²

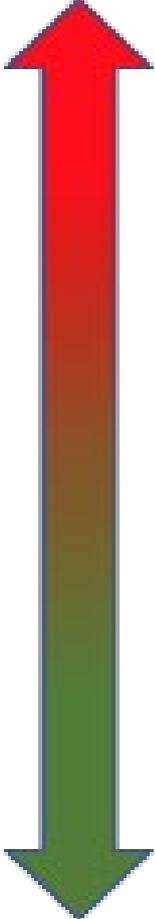
	MODERN SLAVERY
	Worker cannot refuse or cease work because of coercion, threats or deception.
	Worker may also be deprived of personal freedom.
	DANGEROUS OR SUBSTANDARD WORKING CONDITIONS
	Worker can refuse or cease work but doing so may lead to detriment.
	Worker is not paid fairly and does not receive some or all entitlements.
	Worker may be required to work excessive hours.
	Workplace is unsafe.
	DECENT WORK
	Workers' rights respected.
	Worker free to refuse or cease work.
	Worker paid fairly (at least the minimum wage).
	Workplace is safe.

Table 1: Where Does Modern Slavery Fit? (Adapted from Home Affairs, 2019, pp. 9)

In order for policy makers, companies and stakeholders to develop and enforce effective solutions, modern slavery should be seen as a complex labour and human rights issue. As can be seen in Table 1, underpayment and denial of entitlements is a substandard working condition that can result in more severe forms of exploitation.

²² Lewis, H. et al. 2014. *Precarious Lives*. Bristol University Press.

Improving Compliance

Historically, Australian unions played a key role in preventing labour exploitation such as wage theft. However in the context of union decline, the Fair Work Ombudsman (FWO) has been increasingly important in both the identification and rectification of underpayments to workers. Since the identification of widespread exploitative practices by 7-Eleven franchisees in 2014 by the FWO a number of well-known companies have been identified as, or admitted to, committing wage theft. A recent significant undertaking was the Inquiry into the Procurement of Cleaners in Tasmanian Supermarkets, which identified that 90 per cent of cleaning contractors in Woolworths' Tasmanian stores were not complying with workplace laws, with some cleaners paid as little as \$7 an hour.²³

The FWO indicated the underpayment was its focus for the 2019/20 Financial Year with its priority areas been²⁴:

- Fast food, restaurants and cafes
- Horticulture and the harvest trail
- Supply chain risks
- Franchisors
- Sham contracting

While the FWO plays a significant role, it needs a much bigger budget to address wage theft in Australia.²⁵ Without increased resources for enforcement the FWO will struggle to identify breaches of employment law systematically, rather than on a case by case basis.²⁶

One solution to the burgeoning of wage theft, in the context of union decline and limited government funding for FWO, is to create a partnership between unions and FWO (as envisaged by Hardy and Howe²⁷). Given that the FWO is unlikely to be able to meet the demand for addressing underpayment alone, this submission argues that, not only should the FWO be better funded, but civil society organisations with an incentive to enforce labour standards such as the NGO CAF, discussed below, as well as unions should also be funded to address wage theft. Closer ties between unions, NGOs and FWO could then be forged in tandem with this increased federal government funding so that there is a co-ordinated and extensive response to employer wage theft in Australia. This type of collaboration is not unprecedented with examples of what is often called 'co-regulation' being documented internationally.²⁸ CAF, which is discussed below, is one Australian example of the beginnings of such an approach.

²³ See Fair Work Ombudsman Inquiry into the Procurement of Cleaners in Tasmania Supermarkets <https://www.fairwork.gov.au/reports/inquiry-into-the-procurement-of-cleaners-in-tasmanian-supermarkets>> last accessed 11th February 2020.

²⁴ Fair Work Ombudsman. 2019. *Fair Work Ombudsman and Registered Organisations Commission Entity Annual Report 2018–19*. Fair Work Ombudsman: Canberra. <<https://www.transparency.gov.au/annual-reports/fair-work-ombudsman-and-registered-organisations-commission-entity/reporting-year/2018-2019>> last accessed 11th February 2020.

²⁵ Patty, A. 2019. 'Wage theft watchdog needs bigger budget to enforce tougher laws', *Sydney Morning Herald*, November 3, <<https://www.smh.com.au/national/wage-theft-watchdog-needs-bigger-budget-to-enforce-tougher-laws-20191028-p534xb.html>> last accessed 11th February 2020.

²⁶ Hardy, T. & Howe, J. 2015. 'Chain Reaction: A Strategic Approach to Addressing Employment Non-compliance in Complex Supply Chains', *Journal of Industrial Relations*, vol. 57, pp.563–584; Bruce, M. 2019. 'Why the government's wage theft crackdown might be a PR exercise', *The New Daily*, September 19, <<https://thenewdaily.com.au/finance/finance-news/2019/09/19/wage-theft-prison-fines-employers/>> last accessed 11th February 2020.

²⁷ T Hardy and J Howe, 'Partners in Enforcement? The New Balance Between Government and Trade Union Enforcement of Employment Standards in Australia' (2009) 23 *Australian Journal of Labour Law* 306

²⁸ Fine, J. (2017). Enforcing labor standards in partnership with civil society: Can co-enforcement succeed where the state alone has failed?. *Politics & Society*, 45(3), 359-388. and

The Cleaning Accountability Framework

While mandatory standards are essential to enforce and maintain labour standards, voluntary measures that utilise supply chain pressures can play a role in positively influencing compliance. An Australian example of a supply chain initiative that aims to do this is the Cleaning Accountability Framework (CAF). CAF is an independent, multi-stakeholder initiative comprised of representatives from across the cleaning supply chain including property investors, building owners, facilities managers, cleaning companies, employee representatives, FWO and industry associations.²⁹

CAF focuses on the cleaning industry due to the high levels of non-compliance that characterise the industry, due to its market structure and characteristics. The contract cleaning industry is characterised by long supply chains, extensive casual employment and subcontracting, limited success of union activity, intense commercial competition and labour cost minimisation as a dominant strategy³⁰ – meeting a number of the ‘structural characteristics’ of industries associated with underpayment identified earlier³¹.

CAF aims to lead and transform the cleaning services industry by³²:

- supporting sustainable and efficient cleaning services
- ensuring compliance with workplace laws and regulations
- engaging workers and contractors
- fostering accountability and transparency in the cleaning services industry
- recognising stakeholders who have implemented best practice standards.

CAF achieves this through auditing buildings, generally nominated by the building owner, against CAF’s Star Standard, and awarding those who pass the audit with CAF Certification. The CAF Star Standard is based on minimum legal standards relating to wages and entitlements, safe and secure work, respect in the workplace, and freedom of association. A key feature of the CAF audits that distinguishes it from some other certification frameworks is the inclusion of robust worker engagement.

While it is important to recognise the key role CAF is playing to lift standards in the cleaning industry, we would like to emphasise the continued essential role of mandatory standards. Given that competitive market pressures tend to lead to an undercutting of purely voluntary measures, it is imperative that the government ensures that mandatory standards are appropriate to avoid driving down labour standards. Multi-stakeholder initiatives are also better able to promote compliance when they receive greater support from formal regulatory institutions, including governments.³³

²⁹ Kaine, S. & Rawling M. 2019. ‘Strategic ‘co-enforcement’ in supply chains: The case of the Cleaning Accountability Framework’, *Australian Journal of Labour Law*, vol. 31, pp. 305-334 at 305

³⁰ Campbell, I. & Peeters, M. 2008. ‘Low Pay, Compressed Schedules and High Work Intensity: A Study of Contract Cleaners in Australia’, *Australian Journal of Labour Economics*, vol 11, no.1, pp. 27-46 at 27, 28.

³¹ Clibborn, S & Wright, C.F. 2019 ‘Employer theft of temporary migrant workers’ wages in Australia: Why has the state failed to act?’, *Economic and Labour Relations Review*, vol. 29, no. 2, pp. 207-227 at 212.

³² Cleaning Accountability Framework. 2020. *About Us*. <<https://www.cleaningaccountability.org.au/about-us/>> last accessed 11th February 2020.

³³ Kaine, S. & Rawling M. 2019. ‘Strategic ‘co-enforcement’ in supply chains: The case of the Cleaning Accountability Framework’, *Australian Journal of Labour Law*, vol. 31, pp. 305-334 at 312.

A key way the government can support this multi-stakeholder initiative to promote compliance with labour laws, and ensure Federal Government procurement practices only award public contracts to businesses that do not engage in wage and superannuation theft, is to ensure that CAF requirements are introduced for all Commonwealth leased office property. This will both improve conditions for cleaners in government buildings and send a strong market signal that compliance with labour standards is non-negotiable when conducting business with Government.

Recommendations and conclusion

We recommend to the Committee that the following actions be pursued by the Federal government:

- a. Enact federal legislation to create secondary liability of lead firms up the supply chain for wage theft occurring within their own supply chains.³⁴
- b. Enact federal legislation to address 'wage' theft in the gig economy so that all gig workers regardless of their work status receive minimum wages and superannuation.
- c. Increase federal government funding for civil society organisations such as CAF and unions with an interest in, and experience of, identifying and addressing wage theft. The funding could be by way of a government grant scheme under which such civil society organisations could apply to the federal government for funds to address wage theft and labour exploitation.
- d. Require all government departments and agencies require buildings, which they own or in which they are tenants, to become CAF certified.
- e. Require all government departments and agencies to undertake audits of their service supply chains to identify and remedy instances of underpayment of wages, non-payment of entitlements and sham contracting and develop ongoing monitoring processes.
- f. Promote the extension of the CAF model to other sectors of the economy where worker exploitation is common; or where supply chains are extended such as the security industry, transport and logistics industry, construction industry and potentially the personal care services industry

Our submission has outlined several areas in which members of CBSI have carried out research that is directly related to aspects of underpayment relevant to the Inquiry. We have also outlined a number of recommendations that are particularly relevant to the Inquiry's interest in 'measures to address' unlawful non-payment and underpayment. We have drawn these recommendations from a combination of our own research, academic literature, policy debates and legal cases. We are available to discuss our research and our recommendations in greater detail should that be of interest to the Committee.

³⁴ As mooted by the Commonwealth Attorney General's discussion Paper "Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance" Australian government September 2019, pp7-8.