A M W U

6 March, 2020

Senate Standing Committees on Economics
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Parliament House
Canberra ACT 2600
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Dear Secretary,

Re: Unlawful Underpayment of Employees' Remuneration.

The Australian Manufacturing Workers' Union (AMWU) represents over 70,000 workers who create, make and maintain in every city and region across Australia. Many of the workers that we represent have experienced wage theft. Further, the wages and conditions of AMWU members who work for businesses that do properly pay their workers are under threat from the widespread wage theft which puts unfair pressure on their employers to cut employee costs.

The Australian Manufacturing Workers' Union welcomes the opportunity to provide a submission on this important issue. For your information, we have also attached the submission of the AMWU Western Australian Branch to an inquiry undertaken by the WA State Government into wage theft as we believe it will assist the committee in its deliberations.

Background and context

Under federal industrial law, wages can be bargained for in an enterprise agreement, or set by the Fair Work Commission. Unlawful underpayment of employee remuneration could include a failure by an employer to:

a. Comply with the minimum wage; or
b. A minimum rate set in a modern award; or
c. A minimum rate set in an enterprise agreement.

The Fair Work Commission's expert panel sets the minimum wage applicable to permanent employees who are aged 21 and over, either via the minimum wage, or via a modern award.[1] Reduced rates are generally payable to employees who are under 21, apprentices, and employees with a supported wage assessment.[2]

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[1] *Fair Work Act 2009* (Cth) s.284.
[2] See, for example clauses 26, 30, and 31 of the *Manufacturing and Associated Industries and Occupations Award 2010*

Most employees are covered by a modern award, which prescribe rates depending on a worker's qualifications, experiences and duties.

Enterprise agreements also contain minimum wage rates. In May 2018, enterprise agreements covered 37.9 % of Australian employees.[3] The AMWU strives to organise workplaces and represent its members in bargaining for wages that are well above the minimum rates set by the applicable award.

Much of the work of the AMWU includes representing its members to ensure that the enterprise agreements it negotiates are honoured, and that modern awards are complied with. Increasingly, this represents a greater proportion of the work of the AMWU and the service it provides to its members.

Forms and causes of wage theft

There is a great deal of ingenuity and variation in the forms of wage theft. For example, the AMWU regularly observes and pursues underpayments of the following types:

- Payment of an hourly rate or salary that does not reflect the applicable minimum wage rate under the relevant industrial instrument;
- A failure to pay applicable overtime or penalty rates;
- Failure to correctly accrue annual, sick and long service leave;
- Failure to pay annual leave loading, particularly upon termination;
- Late or no payment of superannuation;
- Failure to pay for set up and pack up time;
- Incorrect classification of workers under industrial instruments and incorrect progression through those classifications during an employee's tenure;
- Failure to pay allowances; and
- Payment of a salary or flat hourly rate that is said to incorporate applicable entitlements but fails to do so.

The AMWU is of the view that underpayments generally result from a deliberate effort to save money on the part of employers, or wilful blindness as to the rights of employees. Unlike a failure to pay rent, for example, an employer may reasonably hope that enforcement of the debt will never arise. This context incentivises and encourages underpayment.

The AMWU has represented workers who have had their wages stolen in the ways set out above. As we have seen in recent months, it is not just small "fly by night" operators, but large, established businesses which engage in the unlawful underpayment of workers' wages.

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[3] Attorney-General's Department, *Trends in Federal Enterprise Bargaining Report – June Quarter 2019*, 1.

Competition on labour cost is particularly relevant to underpayments in contract industries. The increasing prevalence of contract labour means that in environments where other costs, such as equipment, are fixed, labour cost remains an area for competitive advantage. This encourages companies to under-quote the cost of labour then strive to meet unrealistic tenders by underpaying workers.
Some employer groups have sheeted home the blame for underpayments to the complexity of the industrial relations system.[4] This however is unlikely, the AMWU has observed underpayments from very small businesses as well as large and sophisticated employers with dedicated human resources management.

Other employer groups have gone as far as to blame workers themselves for underpayments, with the National Retail Association stating that:

> *"the exploitation of workers in any industry is not a failure of the legislation, but a failure of the wider system to educate workers in their rights under the legislation."*

And

> *"If employees are unable to recognise non-compliant behaviour, then that avenue of intelligence gathering is lost to the enforcement agency."*[5]

The AMWU accepts that many workers, particularly vulnerable workers and workers in non-union workplaces are susceptible to being exploited and underpaid. However, the AMWU contends that the emphasis placed on individual worker needing to ensure compliance is precisely why wage theft is occurring at such alarming rates. This is explored further below.

Increasing isolation of workers as union members

The vulnerability and transience of workers in precarious employment presents a further invitation for employers to underpay.

Consider, in particular the case study presented by the AMWU at Annexure B, which concerns an employee with limited English-speaking ability that was engaged by a company to manufacture trailers. This employee was grossly exploited by his employer who required the employee to work 60-hour weeks and invoice the employer for the work performed.

Unions can offer some protection against wage theft through education (both for workers and employer), empowerment, and enforcement. In the case study cited above, the AMWU represented this employee and was able to obtain a substantial settlement in their favour.

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[4] See for example, Ai Group Media Release "Calm consideration needed in complex workplace compliance debate" 7 November 2019 https://www.aigroup.com.au/policy-and-research/mediacentre/releases/workplace-compliance-7Nov/.
[5] Submission of the National Retail Association to the Inquiry into wage theft in Queensland [114].

However, restrictions placed on unions' ability to undertake inspections of wage and time records has hampered our ability to assist in the regulation of wage theft. It is the experience of the AMWU that underpayments have increased in prevalence since unions' rights were curtailed.

Decline of industrial disputation

Underpayments can be linked to the decline in industrial disputation. Restrictions on protected industrial action during an enterprise agreement, and the limitation on subject matters which can lawfully form the basis of industrial action, serve to individualise underpayment claims. If a worker who is underpaid reduces their work in protest, they may be found to have taken unprotected industrial action.

The definition of industrial action at s 19(1) of the *Fair Work Act 2009* (Cth) includes at subsection (a):

> "*the performance of work by an employee in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by an employee, the result of which is a restriction or limitation on, or a delay in, the performance of the work*".

This means that (for example), a worker who declines to work overtime, because they have not been paid any wages, could face litigation for engaging in unprotected action. Workers could not coordinate to exert pressure on an employer to pay what is owed by withdrawing or limiting their labour.

This can be contrasted with other parties with whom an employer may contract. A business could reasonably anticipate losing their supply of a commodity if they refuse to pay a contracted sum. The same could not be said of employees. Indeed, the worker may be penalised for failing to comply with their obligation to work, even where the employer fails to live up to their side of the wages-labour bargain at the core of the employment relationship.

As such an employer may engage in serial wage theft across their entire workforce, with little threat that their employees may withdraw their labour in protest at this behaviour. Combined with the willingness of the regulator to accept enforceable undertakings and minimal "contrition payments" when an employer has been found to have engaged in wage theft, there are few risks for an employer engaged in this behaviour.

This has created a moral hazard for employers who can clearly see the benefit from engaging in wage theft, while there are few, if any, penalties if they're caught breaking the law. It is easy to see how wage theft as a business model has been allowed to flourish in these conditions.

The cost of wage and superannuation theft to the economy

At a time of stagnating wage growth, underpayments further stymie the ability of workers to participate in the national economy. Driving workers into poverty increases burdens for the welfare system and charity sector. Underpayments also deny payroll tax to government.

Wage theft by one employer also places pressure on other employers to do the same. This makes it even harder for workers at other employers to achieve fair improvements to wages and conditions in bargaining. Good employers are required to compete in a market with other employers who are engaging in wage theft, either directly or by engaging labour hire contractors who are doing it on their behalf. This places further downward pressure on bargaining outcomes and has been an important driver of the supressed wage growth we have seen in recent years.

Identifying and resolving wage theft

The persistence of casual employment, particularly long term, ongoing casual employment, is related to the prevalence of underpayments. Casual employment is inherently less secure given that workers do not have guaranteed hours. Casual employees are less likely to be union members, and therefore are less likely to be aware of their rights, much less have the capacity to enforce such rights.

Unions play a crucial rule in identifying and uncovering wage theft but structural features including; limitations on the rights of unions to enter workplaces, restrictions on inspecting records and the impossibility of swiftly and cost effectively recovering underpayments hinder unions from doing all that they could to assist underpaid workers.

Consider the example in the case study extracted at Annexure A of this submission, where the AMWU was repeatedly denied access to member records by a company, despite the fact that the Union officer was exercising a legal right pursuant to s.482, and despite the fact that the company had an obligation to not hinder or obstruct the union officer.[6]

It is the experience of the AMWU that the vast majority of underpayment claims are resolved by agreement. While offering a quicker outcome, most settlements incorporate confidentiality, which eliminates the general deterrent effect of pursuing a claim. The incentive to resolve matters quickly due to the delays of litigation leads workers to accept confidentiality. The need for expediency also deters workers from seeking or pursuing claims for penalties, interest, and even the full sums due. While helpful from a case management perspective, the emphasis on early and discounted settlements mean that employers may consider that if they underpay, the worst-case scenario is that they will need to pay amounts they owed in the first place.

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[6] *Fair Work Act 2009* (Cth) s.502.

Other obstacles to effective recovery include the time-consuming way underpayment claims must be pursued. Rather than resolving claims through specialist tribunals or courts, Australian workers generally must file detailed claims in already overstretched jurisdictions.

Pursuing the underpayment of superannuation is even more difficult as it can only be recovered by reporting to the Australian Tax Office and trusting that they will pursue the matter. This leaves workers in a vulnerable position where they are not able to themselves take active steps to protect their interests and recover their entitlements.

The AWMU believes that workers, and their representatives, should be given standing to recover superannuation. This will give workers the certainty that their interests are being looked after, rather than relying on a large, distance government agency to act on their behalf. The most effective way to achieve that would be to place an entitlement to be paid superannuation into the National Employment Standards. This simple change would being superannuation into the established system where workers and their representatives protect and pursue their rights at work.

Given the different payment arrangements for superannuation, it remains difficult for employees to track the payment of their superannuation. While it may appear on a payslip, many workers do not have the time or inclination to log in to their superannuation account to ensure that payments are actually being made.

Extension of liability and supply chain measures

The increasing complexity of corporate structures and the increasing use of sub-contractors present challenges in uncovering and pursuing underpayments. The imposition of a duty on head contractors to ensure that workers were not underpaid would assist in deterring underpayments.

The AMWU has also observed underpayments in a labour hire context, where workers' employment is precarious. We submit that similar duties should be placed on companies that engage labour hire firms to provide labour to ensure that the workers are being paid correctly for the work that is being undertaken.

Conclusion

The underpayment of workers' wages is a serious threat to all workers in Australia. In addition to the thousands of workers who have had their wages stolen, thousands more are likely affected and remain unaware. On top of that, the epidemic of wage theft has played a crucial role in supressing wage growth across the economy for the past decade.

It is well past time that the government stepped in and changed the laws to increase the likelihood of detection, increased the penalties and empowered unions to crack down on wage theft. Without meaningful action on all three fronts, there will be little change to the wage theft business model which is prevalent in all industries across Australia.

Yours sincerely,

PAUL BASTIAN
NATIONAL SECRETARY

ANNEXURE A

Case Study 1: Difficulties in obtaining records

An employee of a Heating, Ventilation and Air-Conditioning **(HVAC)**, and member of the AMWU, sought the AMWU's assistance in a claim to be paid for carers' leave and annual leave that they'd taken. The company was a small operation with field technicians and a small number of administrative staff. The Director of the company was not based on site.

The member had been working for the HVAC company for about six months, after it had bought out the business of his previous employer.

In its letter of offer to our member, the HVAC company undertook to recognise his previous annual leave and personal/carers leave entitlements. The HVAC company had made a similar agreement with our member's previous employer as part of the sale of the business. Crucially for our member, this commitment was then included in the member's contract of employment.

Despite this contractual right, the HVAC company disputed that it owed any payment to our member and maintained that the only paid leave he was entitled to was leave he had accrued while working for the new company. Further, the HVAC company noted that it was in dispute with the previous owner and that no payment would be made until that dispute was resolved.

On at least two occasions the AMWU exercised its Right of Entry under s.481 to seek to obtain leave records for our members on site to ensure that their leave entitlements (including the transferred balances) were being properly recorded.

On both occasions the business did not make any records available and the administrative staff who were there informed the AMWU organiser that as the Director of the company was not there, they did not have anything and could not answer any questions. The AMWU also issued a notice under s.483 requiring the production of leave records directly to the union office.

As the HVAC company was legally represented, the AMWU also stressed to that lawyer the obligation that its client had to comply with the Right of Entry notice. The company eventually produced the AMWU members' leave records and employment contracts to the union, some two weeks after the date specified in the notice to produce records.

Following the production of those records, our member was paid for his leave entitlements, however the HVAC company stated it was "in advance of the settlement with the previous employer" and not as a recognition of his legal entitlement to the paid leave.

ANNEXURE B

Case Study 2: Wage Theft of vulnerable worker

The AMWU represented a member with limited English, whose first language was Mandarin.

He was a welder who had been trained and worked in China before emigrating to Australia. He found work with a company owned and operated by former Chinese nationals that were a part of a larger industrial manufacturing group.

The AMWU member was largely responsible for the manufacture of trailers and was paid in relation to each trailer constructed.

Although directly and permanently employed he was required to provide invoices outlining the cost of work performed on the trailer. He was generally paid about a third less than the submitted invoice with no explanation as to the amount paid.

The AMWU member was expected to work until the job was done. As such he worked 60-hour weeks Monday to Friday and many weekends. Public holidays were often worked, and our member rarely took holidays. Overtime and penalty rates were never paid, nor was he given time off in lieu.

After about ten years working for his employer, the member took leave to visit family in China. On his return his boss told him his work wasn't good enough and dismissed him. Our member was not paid notice or any outstanding entitlements for annual leave or long service leave.

We learned of this when our member came to us to try and obtain his unpaid entitlements on termination – which were approximately $25,000. Given the amount of money owed and the way he was dismissed, questions were asked of the member to ascertain the extent of the underpayment and exploitation by the employer.

The AMWU served the company with a notice to provide pay records, however they sought and obtained legal advice and we began a long process of negotiating a settlement for the member. Eventually the AMWU obtained a significant amount of money that covered both the termination entitlements and some of the underpayment.