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Committee Secretary
Senate Standing Committees on Economics
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Committee Secretary,

UNSW LAW SOCIETY SUBMISSION REGARDING THE INQUIRY INTO UNLAWFUL
UNDERPAYMENT OF EMPLOYEES' REMUNERATION

The University of New South Wales Law Society welcomes the opportunity to provide a submission to the Senate Economics References Committee's Inquiry into Unlawful Underpayment of Employees' Remuneration.

The UNSW Law Society is the representative body for all students in the UNSW Faculty of Law. Nationally, we are one of the most respected student-run law organisations, attracting sponsorship from prominent national and international firms. Our primary objective is to develop UNSW Law students academically, professionally and personally.

Our enclosed submission reflects the opinions of member-contributors of the UNSW Law Society Inc.

We thank you for considering our submission. Please do not hesitate to contact us should you require any further assistance.

Yours sincerely,

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WAGE THEFT: UNLAWFUL UNDERPAYMENT OF EMPLOYEES' REMUNERATION

I OVERVIEW

The unlawful underpayment or non-payment of employees' remuneration by employers, commonly referred to as 'wage theft', has been revealed to be a systemic issue in the Australian labour market. Extending beyond mere failures to compensate employees for all of their work, wage theft spans employers' actions of refusing to pay overtime or penalty rates, forcing employees to work 'off-the-clock', making illegal deductions, failing to make superannuation payments, and engaging in false 'independent contractor' arrangements in order to bypass minimum wages under the modern award and the Fair Work Act 2009.¹

In 2019 alone, major retail chains such as Bunnings, Michael Hill, Sunglass Hut and Super Retail Group as well as celebrity chefs such as George Calombaris have admitted to underpayment of employee remuneration.² Wage theft is also an issue that disproportionately impacts temporary migrant workers. The National Temporary Migrant Work Survey found that almost a third of survey participants earned \$12 or less per hour in their lowest paying job.³ These recent examples demonstrate that wage theft often occurs in the franchise and labour-hire industries; an identification that is key to forming and implementing deterrence and recovery strategies.

This submission speaks to Terms of Reference A: the forms of and reasons for wage theft and whether it is regarded by some businesses as 'a cost of doing business', E: whether extension of liability and supply chain measures should be introduced to drive improved compliance with wage and superannuation-related laws, and F: 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. A list of recommendations may be found at the closing of the submission.

II FRANCHISING AND LABOUR HIRE

¹ Louise Thornthwaite, 'Australia's Wage Theft Crisis' (2017) 24 (1) *Advocate: Journal of the National Tertiary Education Union* 28-29, 28.

² Dominic Powell, 'Fair Work Ombudsman lashes Wesfarmers' \$15 Million Underpayment', *The Sydney Morning Herald* (online, 1 October 2019) <<https://www.smh.com.au/business/companies/wesfarmers-underpays-workers-15-million-in-second-incident-in-a-week-20191001-p52wmb.html>>.

³ Bassina Farbenblum and Laurie Berg, 'Wage Theft in Silence: Why Migrant Workers do not Recover their Unpaid Wages in Australia' [2019] 1 *UNSWLRS* 7, 17

A Franchise Business Models

Business-format franchising has permeated almost every sector of the Australian economy.⁴ Business franchising typically operates through the use of a universal format or system, covering business planning, management system, location, appearance and image, and requires the franchisee to follow these systems and give consideration to the franchisor.⁵ This relationship is in favour of the franchisor, who has control over the standards and systems that the franchisee must follow.⁶ As of 2017, franchising accounts for around 4% of Australian businesses, which employ over 460,000 direct employees.⁷ Reported underpayment of employee remuneration has focused on the franchise sector, as noted in the case studies above. Further examples of wage theft in franchises include 7-Eleven, whose 2015 internal audit indicated that 69% of franchisees had payroll issues including fraud.⁸ Similarly, almost 80% of Caltex franchise stations were found in 2016 to have underpaid their staff.⁹

B Wage Theft as a 'Cost of Doing Business'

Wage theft as a 'cost of doing business' can be seen in the franchising business model. Franchises operate by placing a third party employer (the franchisee) between their operations and the performance of work needed to sustain their individual businesses.¹⁰ Thus, under this system, direct employment of workers is undertaken by franchisees, allowing the lead firm to distance themselves from the employees and subsequently, the legal responsibilities associated with direct employment.¹¹ This system alone does not explain the proliferation of wage theft in franchising. However, it must be considered in combination with the conditions placed on franchisees by head firms, which often mandate unrealistic expectations of profit turnover and market conditions.¹² Requirements consist of high fees and royalties that can add up to 10 per cent or more of sales, refurbishment costs and policies that include having to source products from the franchisor at prices that are sometimes more

⁴ 'What is Franchising?', *Franchise Council of Australia* (Web Page) <<https://www.franchise.org.au/what-is-franchising-.html>>.

⁵ Ibid.

⁶ Ibid.

⁷ Louise Thornthwaite, 'The Living Wage Crisis in Australian Industrial Relations' (2018) 27 (4) *Labour & Industry: A Journal of the Social and Economic Relations of Work* 261-269.

⁸ Margaret McKenzie, 'The Erosion of Minimum Wage Policy in Australia and Labour's Shrinking Share of Total Income' (2018) 81 (Winter) *The Journal of Australian Political Economy* 52-77, 57.

⁹ Ibid.

¹⁰ Andrew Stewart, Jim Stanford and Tess Hardy, *The Wages Crisis in Australia* (University of Adelaide Press, 2018) 65.

¹¹ Ibid.

¹² Scott Weaven, Lorelle Frazer and Jeff Giddings, 'New Perspectives on the Causes of Franchising Conflict in Australia' (2010) 22(2) *Asia Pacific Journal of Marketing and Logistics* 135-155.

expensive than if bought elsewhere.¹³ In order to satisfy these conditions while still turning over a profit, franchisees often resort to underpayment of wages.¹⁴ This pattern of franchise business models requiring wage theft has been reported in numerous case studies, including 7-Eleven, Caltex and Domino's.¹⁵ Therefore, the franchise business model often relies upon wage theft to operate.¹⁶ The below case studies support this, and point to wage theft being considered a 'cost of doing business'.

C Case Studies of Wage Theft in Franchising

This business model has been observed in numerous wage theft scandals. In the 2015-2016, 7-Eleven underpayment incident, Alan Fels, who administered the first stage of the compensation scheme for affected employees, highlighted the terms of the franchise relationship and noted that '[i]t seems to me that the business model will only work for the franchisee if they underpay or overworked employees'.¹⁷ In Australia, the 7-Eleven head office takes a 57% cut of gross profits, while the franchisee receives a 43% share.¹⁸ Out of the 43% share of gross profits, a franchisee has to pay wages, superannuation, Work Cover, the telephone at the store, cleaning, landscaping, store supplies, bad merchandise, business licences, tax and "miscellaneous store expenses".¹⁹ According to the 7-Eleven head firm, the average wage bill for a 7-Eleven franchisee in 2015-2016 was \$230,000 per annum.²⁰ In the same time period, about 140 7-Eleven stores in Australia generated gross profit of \$300,000 or less per annum.²¹ If underpayment was not to occur, each franchisee would have only \$70,000 per annum to cover all above store expenses, as well as annual franchisee fees. This franchising business model required that employees were underpaid, or else the franchisee would become bankrupt, and in the case of 7-Eleven, resulted in approximately \$150 million in unpaid remuneration.²²

Another case study demonstrating franchising business models as a form of wage theft is the various allegations of underpayment made against the Domino's Pizza franchise since 2016. One store manager was told by a franchisee to ensure that labour costs were kept under 27 percent of sales, thus forcing the manager to manipulate time sheets and underpay employees to satisfy this condition.²³

¹³ Adele Ferguson and Ben Schneiders, 'Underpayment as Business Model: What is Wage Theft?', *The Sydney Morning Herald* (online, 2019) <<https://www.smh.com.au/national/underpayment-as-business-model-what-is-wage-theft-20190509-p51lko.html>>.

¹⁴ Weaven, Frazer and Giddings, above n 12.

¹⁵ Ferguson and Schneiders, above n 13.

¹⁶ Stewart, Stanford and Hardy, above n 10, 65.

¹⁷ Stewart, Stanford and Hardy, above n 10, 65.

¹⁸ Adele Ferguson and Sarah Danckert, 'Revealed: How 7/11 is ripping off its workers', *The Sydney Morning Herald* (online, 2015) <<https://www.smh.com.au/interactive/2015/7-eleven-revealed/>>

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² David Peetz, 'Debt in Paradise: On the Ground with Wage Theft' (2018) 61 *Griffith Review* 185-191, 187

²³ Adele Ferguson and Mario Christadoulou, 'The Domino's Effect', *The Sydney Morning Herald* (online, 2017) <<https://www.smh.com.au/interactive/2017/the-dominos-effect/>>.

Evidently, the franchise business model of turnover and market conditions set by head firms forces franchisees to engage in systemic wage theft.

Similar operations of the franchising business model causing wage theft were noted in the 2018 Parliamentary Inquiry into the Franchising Code of Conduct. The report states that 'wage theft was occurring as a way for franchisees to extract profits or service payments in order to stay afloat in a financially constrained business model... the committee notes that the issue is partly inherent to the business models' structural breakdown of power and the imposition of cost controls'.²⁴

D Labour Hire

Similar to the franchise sector, this submission argues the labour hire industry also relies on a business model that regularly engages in wage theft. Labour hire is a trilateral working agreement that involves a supplier engaging workers and supplying them to a host company, in exchange for a fee.²⁵ Labour hire is legal in Australia, unless the labour hire business is found to act as a mere screen between the employees and the host company. In this sense, the relationship is similar to the business model found in franchising: both models operate by placing a legal distance between the head company's operations and the performance of work by the employees.²⁶ Thus, direct employment of workers is undertaken by the labour hire business (similar actors to franchisees), allowing the head company to distance themselves from both the employees, and subsequently the legal responsibilities associated with direct employment.²⁷ Furthermore, the common use of various subcontractors in one supply chain exacerbates the lack of accountability, and thus increase the difficulty of identifying wage theft when it occurs.²⁸

E Case Study of Wage Theft in Labour Hire

Wage theft is a prevalent issue in the labour hire sector, similarly to franchising. One common example is the underpayment of cleaners, who are often sourced through various subcontractors, meaning that their work conditions and hours are mandated by a different entity to that deciding upon and paying their wages.²⁹ For example, a 2018 Parliamentary inquiry into labour hire of cleaners by Woolworths stated that, by not actively checking to ensure that its principal contractors were

²⁴ Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into the Operation and Effectiveness of the Franchising Code of Conduct* (Final Report, March 2019) xiv.

²⁵ Maria Azzurra Tranfaglia, 'Law allows Myer to Outsource Responsibility for Labour Hire Workers', *The Conversation* (online, 28 October 2015) <<https://theconversation.com/law-allows-myer-to-outsource-responsibility-for-labour-hire-workers-49650>>.

²⁶ Stewart, Stanford and Hardy, above n10, 65.

²⁷ Ibid.

²⁸ Liyan Gao, 'Wage Theft' (2018) 154 *Arena Magazine* 17-20, 18.

²⁹ Tranfaglia, above n 29.

complying with the terms of the service agreements, Woolworths failed to properly manage its labour supply chain at the time.³⁰ This resulted in a failure to account for overtime and penalty rates, leading to underpayment.³¹ Key examples of this form of wage theft occurring in supply chains are cleaners employed by Tasmanian Woolworths' stores, as well as overseas workers employed to clean the Melbourne Cricket Ground.³² These issues often become systematic because the underpayment is usually only enforced against the principal contractor (the direct employer of labourers).³³

Within the franchise and labour hire sectors, it is evident that wage theft is often considered 'a cost of doing business', and is regularly used as a mechanism to reduce labour costs. Wage theft is also proliferated in these industries due to the presence of franchisees and subcontractors as a direct employer between head firms and employees, thereby minimising firms' accountability in relation to this issue.³⁴ To minimise wage theft through this model, this submission makes four recommendations: third party liability legislation; government initiatives to establish wage theft as an anti-competitive business model; the use of self-auditing to drive compliance with Fair Work requirements; and increased funding for non-profit organisations supporting vulnerable franchisee workers.

F Preventing Wage Theft in Franchising and Labour Hire

1 Third Party Liability Legislation

By comparison to other legislations, it is evident that third party liability in subcontracting chains can prevent underpayment and wage theft. In particular, this is seen in the Quebec construction industry, which has legislation holding a general contractor and intermediary subcontractors liable for underpayment of employees hired by a subcontractor.³⁵ This has been effective in practice at reducing wage and superannuation theft.³⁶

Currently, the only Australian third-party accountability legislation is in the form of accessorial liability under s 550 of the *Fair Work Act 2009*. In 2013, the Federal Circuit Court decided that supply

³⁰ Senate Education and Employment Committees, Parliament of Australia, *Wage Theft? What Wage Theft?! Inquiry into the exploitation of general and specialist cleaners working in retail chains for contracting or subcontracting cleaning companies* (Final Report, November 2018) 3.11

³¹ Ibid.

³² Maria Azzurra Tranfaglia, 'Tackling Underpayments in Cleaning Supply Chains', *The University of Melbourne Pursuit* (online, 12 July 2018) <<https://theconversation.com/law-allows-myer-to-outsource-responsibility-for-labour-hire-workers-49650>>.

³³ Ibid.

³⁴ Stewart, Stanford and Hardy, above n10, 65.

³⁵ Kellie Mildren, 'Towards a Model of Third-Party Liability for Wage Theft: Lessons from Other Regulatory Regimes' (2017) 20 (1) *Canadian Labour and Employment Law Journal*, 69-100, 78.

³⁶ Ibid.

chain participants who are not direct employers can be liable under s 550 of the *Fair Work Act 2009*, if they have the requisite knowledge and are associated with the contraventions.³⁷ However, s 550 requires a high threshold for liability; from *FWO V Priority Matters Pty Ltd* [2017], a person cannot be “involved in” conduct for the purposes of s 550 “merely by reason of [their] knowledge of the conduct being pursued”.³⁸ This limits accessory liability of companies at the top of supply chains, particularly given the often undocumented nature of underpayment.³⁹ The failure of the FWO to prosecute companies at the top of supply chains due to this legislation allows these companies to continue using this method of employment by replacing the subcontractor. Expanding the scope of this legislation would allow the prosecution of companies at the top of supply chains, and thus target the source of underpayments.⁴⁰

This submission recommends that s 550 be amended to extend liability to supply chain participants, by lowering the requirement of ‘requisite knowledge’ of the contravention.

2 *Anti-Competitive Business Models*

Preventing the perception that wage theft is an effective cost-cutting mechanism could also be achieved by establishing wage theft as an anti-competitive business model.⁴¹ Wage theft is often described as having an ‘anti-competitive’ effect, as it allows businesses who break the law to gain a competitive advantage over those who do not.⁴² Businesses who do not engage in wage theft may lose customers, tenders and government contracts to those that do.⁴³

In order to disincentivise businesses from perceiving wage theft as a competitive strategy, this submission recommends that the Commonwealth Government consider including underpayment in the scope of anti-competitive conduct under s45 of the *Competition and Consumer Act*.⁴⁴ Anti-competitive conduct under this legislation is punishable by fines and pecuniary penalties.⁴⁵ Current anti-competitive conduct includes exclusive dealing, imposing minimum resale prices and misuse of

³⁷ Janine Webster, ‘Whose trolley now? Workplace liability moves up the supply chain’ (2015) 35 (4) *The Proctor*, 16-18, 17.

³⁸ James Matson, ‘Liability under the Fair Work Act: a very personal concern’, *Mondaq* (Article, 19 September 2018) <<https://www.mondaq.com/australia/Employment-and-HR/737124/Liability-under-the-Fair-Work-Act-a-very-personal-concern>>.

³⁹ Western Community Legal Centre, submission number 2 to Senate Committee for Education and Employment Legislation, *Inquiry into Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* (April 2017) 18.

⁴⁰ *Ibid.*

⁴¹ The McKell Institute Victoria, *Ending Wage Theft: Eradicating underpayment in the Australian workforce* (Report, March 2019) 24 <<https://mckellinstitute.org.au/app/uploads/McKell-Ending-Wage-Theft.pdf>>

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ Australian Competition and Consumer Commission, ‘Anti-competitive conduct’, *ACCC* (Web Page) <<https://www.accc.gov.au/business/anti-competitive-behaviour/anti-competitive-conduct>>

⁴⁵ *Ibid.*

market power. Including wage theft under the legal definition of anti-competitive conduct would allow businesses to be prosecuted for implicitly encouraging wage theft through franchising business models, and would thus further discourage the perception of wage theft as a 'cost of doing business'.⁴⁶ Furthermore, including wage theft in the legal definition of anti-competitive conduct would increase accountability of head firms, due to the legislation targeting businesses rather than direct employers.⁴⁷

Alongside this legislative change, this submission recommends that the Fair Work Ombudsman (FWO) implement initiatives such as public advertising campaigns and mandatory corporate training to discourage the perception of wage theft as a competitive business model, and to discourage the perception amongst franchisees that wage theft is a 'cost of doing business'.

3 Self-auditing

Agreements made between the FWO and head firms requiring the self-auditing of employee wages has also proved effective in detecting and preventing wage theft.⁴⁸ For instance, the 'proactive compliance deed' struck between the FWO and McDonalds requires the company to conduct a self-audit to confirm that employee payments are in order. The enrolment of the head franchisor has permitted significant monitoring costs to be shifted to a company which is not only well-resourced, but also in a powerful position of influence within the franchise industry.⁴⁹ Extending this model of self-auditing agreements to various other large franchises could not only prevent immediate wage theft, but also instigate responsible practices within these companies and their future corporate leaders. This submission recommends extending this model of self-auditing agreements to all franchise and labour hire companies, as a mandatory government requirement under the Fair Work Act 2009.

4 Non-profit Organisations

Another method of preventing and identifying wage theft, particularly in the franchise sector, is funding and supporting non-profit organisations that unite employees (particularly vulnerable employees such as young people) and provide them with avenues for identifying and reporting wage theft. This includes groups such as United Voice Victoria's Hospo Voice project, which use traditional campaigning tactics to engage with young workers who are unlikely to be involved in trade unions, and thus be at a disadvantage in relation to collective bargaining.⁵⁰ These tactics are successful

⁴⁶ The McKell Institute Victoria, above n 45.

⁴⁷ Australian Competition and Consumer Commission, n 48.

⁴⁸ Tess Hardy, 'Enrolling Non-state Actors to Improve Compliance with Minimum Employment Standards' (2012) 22 (3) *Economic and Labour Relations Review* 129.

⁴⁹ *Ibid.*

⁵⁰ Stewart, Stanford and Hardy, above n 10, 183.

in gaining media coverage about wage theft and growing community support for affected workers.⁵¹ The 2017 Education and Employment References Committee report on Corporate Avoidance of the Fair Work Act 2009 also made recommendations on engaging workers in identifying wage theft, including allowing unions greater access to workplaces for monitoring and compliance purposes; requiring employers to provide employees with a written statement before they start work that sets out their pay and conditions; requiring employers to display infringement notices issued by the Fair Work Ombudsman; and introducing a program in secondary schools to educate young adults about workplace rights and responsibilities.⁵² This submission recommends that the recommendations of this report be implemented. This submission also recommends that engaging vulnerable workers in discourse and awareness around wage theft be prioritised, as well as increased FWO funding for non-profit organisations that do so.

III THE MODERN AWARD

The Modern Award came into effect in 2010, replacing the previous Award system in an attempt to streamline the 4000 existing federal and state awards into 122 industry awards. Awards are legal regulations that outline the minimum pay rates and conditions of employment for an industry, including breaks, penalty rates and overtime.⁵³

A 'Complexity' of the Modern Award

While the process of moving from the Award to the Modern Award was intended to reduce unnecessary overlap and create a simpler system, the generalisation of industries and their operation under the Modern Award has created some complications in employee remuneration.⁵⁴ In particular, the complexity of the Modern Award has commonly been used as a scapegoat for employers accused of wage theft, as it requires continuous auditing of timesheets against each award entitlement, including various overlapping penalty rates and bonuses.⁵⁵ If these award entitlements are misclassified, underpayments may accumulate over time, as occurred with the George Calombaris MaDE Establishment's \$7.8 million underpayment in July 2019.⁵⁶ Many corporate owners of

⁵¹ Ibid.

⁵² Education and Employment References Committee, Senate, *Inquiry into Corporate Avoidance of the Fair Work Act 2009* (Final Report, September 2007) viix.

⁵³ 'Modern Awards', *Fair Work Ombudsman* (Web Page) <<https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/minimum-workplace-entitlements/modern-awards>>.

⁵⁴ Judith Sloan, 'Evaluating the Fair Work Act' (2011) 26 (4) *Policy: A Journal of Public Policy and Ideas* 19, 20.

⁵⁵ Peter Richards, 'Wage Theft is a Costly Punishment for Innocent Businesses', *Australian Financial Review* (online, 12 November 2019) <<https://www.afr.com/work-and-careers/management/wage-theft-is-a-costly-punishment-for-innocent-business-20191111-p539dg>>.

⁵⁶ Ibid.

businesses accused of wage theft, such as Woolworths chief executive officer Brad Banducci, have also blamed the inflexibility of the Modern Award for their underpayments.⁵⁷

However, it is important to note that the many businesses that blame the Modern Award's complexity for their underpayment of employees, such as Woolworths, have the resources to employ professional auditors and interpret the Modern Award correctly. Woolworths CEO Banducci afforded a \$2.6 million bonus cut from his annual pay in 2019 to assist in compensating underpaid workers, demonstrating that locating funds to provide franchisees with auditors would not be unachievable.⁵⁸ Moreover, in comparison to the complexity of tax laws and lease agreements managed by these businesses, the streamlined Modern Award system has been considered by legal and business professionals as unlikely to cause genuine confusion.⁵⁹

B Annualised Salaries

Much of the complexity of remuneration under the Modern Award is created by businesses themselves through their choice to use annualised salaries. Under 'normal' payment of the Modern Award, wages paid can fluctuate depending on overtime, penalty rates, allowances and other award obligations.⁶⁰ In order to circumvent the complexity of calculating a varying wage for every pay cycle, employers may use an annualised salary. An annualised salary consists of an 'all-inclusive' annualised rate of pay which is intended to compensate or 'set-off' modern award monetary entitlements, including overtime rates, penalty rates, allowances and other award obligations.⁶¹ Under an annualised salary, employees receive a rate of pay that is equal, or superior, to the rate required by the modern award, but without the shift-to-shift or week-to-week variations that can arise normally.⁶² 'Set-off' clauses are agreed upon by the employer and employee, which state the award obligations that are intended to be compensated for in the annualised salary. Any award obligation that is not detailed in the 'set-off' clause must still be paid normally on a shift-by-shift basis. This is typically used for convenience, as opposed to employers paying wages and entitlements separately as they occur.⁶³

⁵⁷ Anna Patty, "Beyond Hopeless": Complaints About Award System 'Excuse' for Underpayments', *The Sydney Morning Herald* (online, 31 October 2019) <<https://www.smh.com.au/business/workplace/beyond-hopless-complaints-about-award-system-excuse-for-underpayments-20191031-p53630.html>>

⁵⁸ Dominic Powell, "'Right thing to do': Woolies CEO takes \$2.6m pay cut for wages scandal", *The Sydney Morning Herald* (online, 27 November 2019) <<https://www.smh.com.au/business/companies/right-thing-to-do-woolies-ceo-takes-2-6m-pay-cut-for-wages-scandal-20191127-p53ej5.html>>

⁵⁹ Ibid.

⁶⁰ Nicholas Ellery and Jack de Flamingh, 'Annualised salaries and set-off clauses: are they worth the trouble?', *Corrs Chambers Westgarth* (Blog Post, 9 September 2019) <<https://corrs.com.au/insights/annualised-salaries-and-set-off-clauses-are-they-worth-the-trouble>>

⁶¹ Natasha Jones, 'Key Changes to Modern Award Annualised Salaries', *Holding Redlich* (Blog Post, 28 August 2019) <<https://www.holdingredlich.com/key-changes-to-modern-award-annualised-salaries>>.

⁶² Ellery and de Flamingh, above n 64.

⁶³ Ibid.

The Woolworths employees that were victims of wage theft in 2019 were placed on annualised salaries, and a failure to audit these against the Modern Award resulted in underpayment.⁶⁴ In this case, the underpayment was due to a failure of Woolworths to audit their annualised salaries against the amount employees would have been paid on a shift-by-shift wage with award obligations; the annualised salary was not equal or superior to the modern award wages.⁶⁵ Annualised salaries can also contribute to underpayment if an award obligation that is not specified in the 'set-off' clauses is not paid alongside the annualised salary.⁶⁶ This often becomes problematic when the modern award is amended and new award obligations are created, but the 'set-off' clauses of an employee's annualised salary are not altered.⁶⁷

Considering these factors, this submission argues that it is unlikely that the Modern Awards' complexity or inflexibility is a contributing factor to underpayment; if such complexity exists, it can easily be remedied by professional auditors and avoiding annualised salaries. This submission recommends that franchisors provide franchisees with funding to employ professional auditors, or franchisors employ professional auditors directly, to avoid the misinterpretation of the Modern Award leading to wage theft. This submission also recommends that companies are prevented from placing employees on annualised salaries, unless the company employs professional auditors to monitor these against the Modern Award.

IV Enterprise Agreements

Enterprise Agreements, or Enterprise Bargaining Agreements, are an alternative to the Modern Award, being collective agreements made at an enterprise level between employers and employees in good faith about terms and conditions of employment.⁶⁸ An agreement must leave an employee 'better off overall' (Fair Work Ombudsman) when compared to the relevant award or awards, but otherwise may be tailored to meet the needs of particular enterprises.⁶⁹ Enterprise agreements have become increasingly common after the Modern Award came into effect in 2010 due to their perceived flexibility, particularly in the form of single-enterprise agreements involving a single employer or one or more employers (such as franchisees) co-operating in what is essentially a single enterprise.⁷⁰

⁶⁴ Anthony Forsyth, 'No, a 'Complex System' is Not to Blame For Corporate Wage Theft', *The Conversation* (online, 11 November 2019) <<https://theconversation.com/no-a-complex-system-is-not-to-blame-for-corporate-wage-theft-126279>>.

⁶⁵ Patty, above n 61.

⁶⁶ Ellery and de Flamingh, above n 64

⁶⁷ Ibid.

⁶⁸ 'Enterprise Bargaining', *Fair Work Ombudsman* (Web Page) <<https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/rights-and-obligations/enterprise-bargaining#enterpriseagreement>>.

⁶⁹ Ibid.

⁷⁰ Ibid.

A Case Study: Grill'd

The Grill'd fast food franchise provides a case study of enterprise agreements leading to underpayment and wage theft. The company's 2015 enterprise agreement was recently criticised for using a traineeship scheme to underpay young workers.⁷¹ Under the enterprise agreement, a full or part-time employee aged 21 or over would be paid \$21.75 an hour. However, an employee on a hospitality traineeship would be paid \$18.50 an hour, and would not be not paid penalty rates for evenings or weekends. In comparison, the Fast Food Award that was superseded by the Grill'd enterprise agreement requires employees to be paid \$21.40 an hour.⁷² Employees on this traineeship stated that there were no additional skills or resources provided, and in a 2018 survey of 370 employees on the traineeship, 92.4% said it had not been worthwhile.⁷³ In this situation, the enterprise agreement was used by Grill'd to reduce labour costs under the Modern Award, resulting in 'legal' wage theft.

B Limiting access to Enterprise Agreements

This submission recommends that access to enterprise agreements is limited for businesses with a history of wage theft or remuneration non-compliance, in order to prevent manipulation of this system. While the 'better off overall' test has been effective in identifying and disallowing enterprise agreements that would result in wage theft, adherence to the Modern Award may provide more accountability and ease for employees attempting to track their remuneration.⁷⁴ Adherence to the Modern Award would also provide greater consistency of wages within an industry, improving employees' ability to compare remuneration and identify underpayment.

C Collective Bargaining

In theory, collective bargaining through enterprise agreements is a mechanism for removing employer-employee power imbalances.⁷⁵ Collective bargaining is viewed as a fundamental human

⁷¹ Jemma Costa, 'Grill'd Burger Chain Accused of Keeping Young Workers in Underpaid Roles Through Traineeships', *Australian Broadcasting Corporation* (online, 7 December 2019) <<https://www.abc.net.au/news/2019-12-07/grilld-burger-chain-accused-of-using-traineeships-to-underpay/11776696>>.

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ Anna Patty, 'Domino's Abandons Enterprise Agreement with Shoppie's Union', *The Sydney Morning Herald* (online, 26 March 2018) <<https://www.smh.com.au/business/workplace/domino-s-abandons-enterprise-agreement-with-shoppies-union-20180326-p4z69v.html>>.

⁷⁵ Chris Briggs, Rae Cooper and Bradon Ellem, 'What About Collective Bargaining?', *Evatt Foundation* (Web Page) <<https://evatt.org.au/books/what-about-collective-bargaining.html>>.

right under international law by the United Nations and the International Labour Organisation.⁷⁶ However, in franchising and supply contractor chains, collective bargaining is unlikely to occur effectively due to there being barriers preventing employees from communicating with the corporate headquarters that are setting wages and employment conditions; the roles played by third parties and market conditions appear to exacerbate power imbalances and employee dissatisfaction with wage agreements.⁷⁷ Under enterprise bargaining, when employees exist in smaller franchises or dependent supply chains, a large proportion of the workforce cannot bargain with the 'real employer' who is actually making decisions about pay. They are, instead, expected to 'negotiate' with an intermediate representative of the corporation, usually the franchisee manager or the labour-hire company.⁷⁸ This results in a failure to protect employees from enterprise agreements that may proliferate wage theft. Since Enterprise Agreements vitiate the applicability of the Modern Award, if collective bargaining is unbalanced there is no 'safety net' to protect employee wages from underpayment. This vulnerability to underpayment is furthered as enterprise agreements often have the effect of differentiating wages and conditions for workers doing the same job, preventing employees from identifying wage theft through financial comparison within an industry.⁷⁹

D Legislating for Collective Bargaining

The undermining of collective bargaining by employers using enterprise agreements was also commented on by the Education and Employment References Committee in their 2017 report on the Inquiry into Corporate Avoidance of the Fair Work Act.⁸⁰ Such corporate practices used to undermine collective bargaining included transferring employees to enterprise agreements before said agreements had been negotiated, using large numbers of casual employees to gain support for enterprise agreements, and recruiting foreign workers on the condition that they vote in support of an enterprise agreement.⁸¹ Evidently, the requirement that enterprise agreements leave an employee 'better off' than the Modern Award is being sidestepped by corporate bodies, meaning there are no safeguards against underpayment. This submission recommends that the operation of single-enterprise agreements under s182 of the *Fair Work Act 2009* be amended in order to take into account labour hire workers in triangular employment relationships, and specific provisions be included in the award or collective agreement to meet their needs for fair remuneration and employment conditions that are comparable with regular full-time workers in the industry.⁸²

⁷⁶ Ibid.

⁷⁷ Weaven, Frazer and Giddings, above n 12.

⁷⁸ Stewart, Stanford and Hardy, above n10, 235.

⁷⁹ Helen Masterman-Smith and Jude Elton, 'Cheap Labour: the Australian Way' (Research Paper, Centre for Work and Life, University of South Australia, 2007) 4

⁸⁰ Jack de Flamingh and Chris Bell, "Corporate Avoidance' of the Fair Work Act' (2017) 39 *LSJ: Law Society of NSW Journal*, 74, 74.

⁸¹ Ibid.

⁸² Stewart, Stanford and Hardy, above n10, 236.

Wage theft in labour hire arrangements has also been considered in the 2017 Education and Employment References Committee report on Corporate Avoidance of the Fair Work Act 2009.⁸³ The Labour Hire section of this report recommended that labour hire workers be given the right to be covered by and participate in bargaining directly with the host employer, and the host employer be given the responsibility for ensuring all employee entitlements are provided to the labour hire workers it engages.⁸⁴ The Committee recommended adopting the legislative definition of a 'Person in Control of a Business or Undertaking' from s5 of the *Work, Health and Safety Act* as a means of expanding a host company's responsibility.⁸⁵ This submission recommends that the Committee's recommendations be adopted, and further legislation giving greater collective bargaining rights to labour hire workers in enterprise agreements be pursued.

V Temporary Migrant Workers

Temporary migrant workers constitute one of the groups most vulnerable to wage theft, according to the Unions NSW's audit, due to a combination of a failure to understand their rights and fear of potential consequences for their visa or residency status.⁸⁶ A 2017 study that surveyed 4322 temporary migrants in Australia found that 30% earned A\$12 per hour or less, and 46% of participants earned A\$15 per hour or less (excluding 457 visa holders), compared to the 2016-17 hourly adult minimum wage of A\$17.70.⁸⁷

A Identifying Wage Theft

It is often assumed that migrant workers are unaware of underpayment and uninterested in attempting to recover wages, thus explaining their vulnerability to wage theft. However, in the 2018 Wage Theft in Silence Report, well over half of the survey participants indicated that they were open to trying to recover their wages.⁸⁸ Among those earning \$15 per hour or less, three quarters of international students (73%) and Working Holiday Makers (78%) knew that the minimum wage was higher.⁸⁹ This research suggests that the true barrier to identifying wage theft amongst temporary migrant workers is not lack of knowledge or awareness of wage theft, but rather a lack of available avenues for pursuing justice. In fact, the Report found that of the small number who tried to recover wages, two in three workers recovered nothing.⁹⁰ This submission recommends the government establish a new

⁸³ Education and Employment References Committee, Senate, *Inquiry into Corporate Avoidance of the Fair Work Act 2009* (Final Report, September 2007) viix.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ Gao, above n 32.

⁸⁷ Stewart, Stanford and Hardy, above n10, 177.

⁸⁸ Farbenblum and Berg, above n 3, 7.

⁸⁹ *Ibid* 17.

⁹⁰ *Ibid* 30.

specialised forum for wage recovery by migrant workers which provides well-resourced individualised assistance and delivers remedies swiftly, with presumptions in the worker's favour if they have no payslips or if there is a widespread pattern of fraudulent recording of wages or hours worked.⁹¹

VI Criminalisation of Wage Theft

A Civil Remedies

Currently, unlawful underpayment of employee remuneration is dealt with through civil remedy provision; Fair Work Inspectors may seek civil penalties in court or impose alternative sanctions, such as injunctions, penalty infringement notices or 'enforceable undertakings' - legally enforceable agreements that generally commit a firm to remedy past contraventions and take steps to ensure future compliance.⁹² Evident from above, however, these current civil penalties appear inadequate in preventing large companies from continuously committing wage theft under the franchise and labour hire business models.

B Proposals for Criminalisation

Criminalisation of wage theft has been proposed by various state governments recently, including the Queensland government, who supported an inquiry recommendation to make wage theft a criminal offence 'in principle'.⁹³ The inquiry, led by the Queensland Education, Employment and Small Business Committee, found that in relation to wage theft, a tiered system of penalties would be most appropriate, with employers who make an inadvertent mistake remaining subject to civil penalties.⁹⁴ The Victorian government also proposed wage theft criminalisation in 2018.⁹⁵ This proposal included that in addition to a sentence, a conviction would carry automatic disqualification from managing corporations for five years in accordance with section 206B of the Corporations Act 2001.⁹⁶ This was intended to address the "phoenixing" tactic used by some employers to place their company into administration to avoid paying wages owed to workers, and later creating a new company with a different name.⁹⁷ In late 2019, the federal government also considered criminalisation of wage theft,

⁹¹ Farbenblum and Berg, above n 3, 10.

⁹² Hardy, above n 52, 126.

⁹³ Minister for Education and Minister for Industrial Relations (Qld), Grace Grace MP, 'Government Supports Making Wage Theft a Criminal Offence' (Media Statement, 15 February 2019).

⁹⁴ Queensland Education, Employment and Small Business Committee, Parliament of Queensland, *Inquiry into Wage Theft in Queensland* (Final Report, November 2018).

⁹⁵ Stewart, Stanford and Hardy, above n10, 181.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

proposing further increases to civil penalties under the Fair Work Act 2009 and the implementation of criminal sanctions of up to 10 years jail.⁹⁸

C Consequences of Criminalisation

Criminalisation may provide an additional measure of deterrence, particularly in persuading corporate headquarters that wage theft is no longer 'a cost of doing business' but rather a legitimate harm to industry. A survey of 643 Australian businesses found that employers who were more aware of FWO enforcement activities were more than twice as likely to believe that the FWO would not uncover instances of wage theft and other forms of non-compliance.⁹⁹ Research undertaken to explore the deterrence effects of the FWO's enforcement activities, including civil remedy litigation, also suggests that the relationship between higher civil penalties and perceptions of deterrence is not clear-cut; businesses often failed to remember or realise the monetary penalty.¹⁰⁰ Criminalisation may cause employers who are aware of FWO activities to consider wage theft a more risky activity, as criminalisation carries the risk of deprivation of liberty and serious reputational damage for business and individuals.¹⁰¹ Further, convicted individuals are generally prohibited from holding directorships of corporations, and are personally liable for fines.¹⁰²

However, there are also various arguments against criminalisation. Particularly in a corporate environment, criminal punishments are of lesser value given that a jail term cannot be imposed against corporations.¹⁰³ Furthermore, criminalisation may cause practical difficulties due to overlap with the FWO activities, which would undermine the civil regulators objective and result in less effective regulation.¹⁰⁴ It could also be noted that criminalisation is avoided in similar legal situations where victims are vulnerable and intimidated by court proceedings, such as Apprehended Domestic Violence Orders (ADVOs). In NSW, ADVOs are initiated by victims of domestic violence through a civil procedure; however, the breaking of an ADVO is considered a criminal offence.¹⁰⁵ This is kept a civil procedure to reduce the difficulty associated with criminal proceedings, including reliance on law enforcement to charge the perpetrator and requirements for evidence and witnesses. Victims of

⁹⁸ Karli Evans and Matthew Davis, 'Federal Government eyes the criminalisation of 'wage theft'' *Maddocks* (online, 31 October 2019) <<https://www.maddocks.com.au/federal-government-eyes-the-criminalisation-of-wage-theft/>>.

⁹⁹ Tess Hardy and J Howe, 'Creating ripples, making waves? Assessing the general deterrence effects of enforcement activities of the Fair Work Ombudsman' (2017) *Sydney Law Review* 39 (4), 471-500.

¹⁰⁰ Tess Hardy and Melissa Kennedy, Submission to Western Australia Department of Mines, Industry Regulation and Safety, Parliament of Western Australia, *Inquiry into Wage Theft in Western Australia* (April 29 2019) 6.

¹⁰¹ Hardy and Kennedy, above n 114, 13.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Hardy and Howe, above n 113.

¹⁰⁵ 'Apprehended Violence Orders (AVOs)', *NSW Local Courts* (Web Page, 2019) <http://www.localcourt.justice.nsw.gov.au/Pages/cases/avo_procedures.aspx>

wage theft are similarly vulnerable, and thus there is a paralleled argument against criminalisation of wage theft.

Regardless of this parallel, criminalisation of wage theft may reduce the number of cases brought to court by victims, due to the criminal justice system being generally less accessible, with the need to rely on law enforcement to charge the perpetrator and for the Director of Public Prosecutions to undertake the matter. It is also worth noting here that without the inclusion of expansive third-party liability laws alongside wage theft criminalisation, the criminal punishment will be given to direct employers rather than head firms, thus not acting as an effective deterrence mechanism.

The common use of ‘wage *theft*’ demonstrates how the activity already carries much of the social stigma associated with criminalisation and larceny. Canadian attempts to criminalise wage theft demonstrated that the invocation of the symbolic image of criminal law is more powerful than its actual application against employers, implying that perhaps criminalisation is an unnecessary step to deterring employers.¹⁰⁶

Considering these consequences, greater penalties are needed than are currently available. However, since criminalisation often makes remuneration less accessible for victims, it should be limited in application to avoid obstruction. By limiting the scope of criminalisation, cases of wage theft brought by individuals attempting to obtain remuneration may remain civil procedures, to ensure this procedure remains accessible. However, this submission recommends that class actions brought against corporate entities (rather than actions brought by individuals against direct employers) should result in criminal punishments. One potential recommendation that could achieve this is including wage theft in the legislative definition of anti-competitive conduct under s45 of the *Competition and Consumer Act* (see above), and thus creating an alternative avenue of criminal proceedings while ensuring the accessibility of civil proceedings under the *Fair Work Act 2009*. This submission also recommends that, alongside criminalisation, the FWO dedicates funding to increased portrayal of wage theft as a criminal activity, in order to increase the severity with businesses view the practice.

VII Summary of Recommendations

1. This submission recommends that s 550 of the *Fair Work Act* be amended to extend liability to supply chain participants, by lowering the requirement of ‘requisite knowledge’ of the contravention.
2. This submission recommends that the Commonwealth Government consider including underpayment and wage theft in the scope of anti-competitive conduct under s 45 of the *Competition and Consumer Act*.

¹⁰⁶ Eric Tucker, ‘When Wage Theft Was a Crime in Canada, 1935-1955: The Challenge of Using the Master’s Tools Against the Master’ (2017) 54 (3) *Osgoode Hall Law Journal* 957.

3. This submission recommends extending FWO self-auditing agreements to all franchise and labour hire companies, as a mandatory government requirement under the Fair Work Act 2009.
4. This submission recommends that the recommendations of the 2017 Education and Employment References Committee report on Corporate Avoidance of the Fair Work Act 2009 are implemented.
5. This submission recommends that franchisors provide franchisees with funding to employ professional auditors, and that employment of professional auditors is made mandatory under the Fair Work Act 2009 if a franchisee uses annualised salaries.
6. This submission recommends that access to enterprise agreements under s182 of the *Fair Work Act 2009* is limited for businesses with a history of wage theft or remuneration non-compliance.
7. This submission recommends the government establish a new specialised forum for wage recovery by migrant workers which provides well-resourced individualised assistance.
8. This submission recommends the FWO dedicate funding to increased portrayal of wage theft as a criminal activity, in order to increase the severity with businesses view the practice.