

Submission: Unlawful underpayment of Employees' Remuneration Inquiry

Submission Prepared by the Australasian Centre for Corporate Responsibility (ACCR) and LUCRF Super.

About Australasian Centre for Corporate Responsibility (ACCR)

The Australasian Centre for Corporate Responsibility (ACCR) is a not-for-profit association focused on evaluating and improving the performance of Australian listed companies on environmental, social and governance (ESG) issues, including climate change, human rights, and labour rights. ACCR frequently engages with Australian listed companies, their shareholders, and their investors on these issues. ACCR is a shareholder in many companies that make up the ASX100 index. ACCR regularly meets with ASX-listed companies about environmental, social and governance (ESG) issues, and regularly briefs investors about the ESG performance of ASX-listed companies.

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About LUCRF Super

In 1978, LUCRF Super was established to lay the foundation for the Australian superannuation system as we know it today. We currently manage over \$6.4 billion in assets for over 162,000 hard-working Australians. We partner with over 23,000 employers who contribute on our members' behalf. Our members are employed in a range of industries, including warehousing, food processing, market research, poultry, dairy, supply chain and labour hire. We're an industry super fund run only to benefit members. Our aim is to provide consistently competitive returns and excellent service at minimal cost to our members. We exist to help our members achieve financial dignity, now and in retirement.

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ACCR and LUCRF Super are grateful for the opportunity to provide input into the Inquiry on the Unlawful Underpayment of Employee's Remuneration.

ACCR and LUCRF Super have collaborated on the issue of modern slavery and unlawful underpayments in horticultural supply chains since 2017, and more specifically, have promoted the role of multi-stakeholder initiatives in mitigating modern slavery, underpayment, and other labour risks.

The role of super funds is to maximise the retirement benefits of superannuation fund members. Unlawful underpayments impact on fund member benefits in numerous ways including:

1. **Direct loss of income and superannuation payments:** LUCRF Super members have been directly affected by unlawful underpayments and non-payment of superannuation. For example, a survey of LUCRF members working on Australian farms found that farm workers were paid approximately \$14/hr on average, with some reporting payments of as little as \$4/hr. This is well below the legal minimum of \$24 - 28/hr. Beyond the immediate financial harm, this can have long term impacts on their superannuation accumulation.
2. **Damage to long-term performance of companies:**
 - a. Public exposure of wage theft can lead to significant reputational damage, with severe and occasionally devastating impacts on company performance.¹

¹ See for example: Christine Lacy, "Chef George Calombaris's Greek Tragedy Leaves Bitter Taste for His Creditors," *The Australian*, February 14, 2020, <https://www.theaustralian.com.au/business/chef-george-calombaris-greek-tragedy-leaves-bitter-taste-for-his-creditors/news-story/221900012af26167f35f2832c5b4ec04>.

- b. Wage underpayments can cause a breakdown in the trust and confidence of staff, with subsequent impacts on staff morale, productivity and performance.²

In responding to this inquiry on the “causes, extent and effects of unlawful non-payment or underpayment of employees’ remuneration by employers”, ACCR and LUCRF Super responded to the following 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’.
- B. The cost of wage and superannuation theft to the national economy.
- C. 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.
- E. Whether extension of liability and supply chain measures should be introduced to drive improved compliance with wage and superannuation-related laws.

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

ACCR and LUCRF Super support analysis by Deloitte that:

A root cause appears to be that inadequate attention has been directed towards ensuring that payroll and time and attendance systems do what they are assumed to do – that is, record employees’ hours of work and pay them their entitlements for each and every one of those hours.³

In a number of cases, including the unprecedented underpayments by Woolworth Ltd. (WOW) in 2019, companies have failed to monitor employee overtime and ensure that workers’ salaries are sufficient to cover all of the hours that they work. We have repeatedly seen payroll systems and procedures that fail to ensure legal compliance, and which may be proxies for broader corporate governance failures.

LUCRF Super and ACCR also note that in some sectors, unlawful underpayments are more severe and point to larger structural and endemic issues. These sectors include cleaning, horticulture, security and meat processing. In these sectors, unlawful underpayments are due to a combination of factors including:

- low barriers of entry for labour hire providers
- supply chains involving complex contracting and subcontracting arrangements
- a workforce largely made up of migrant workers.⁴

B. The cost of wage and superannuation theft to the national economy

Most directly, wage theft means financial losses and hardship for millions of workers. Payroll firm Ascender estimates that one in five Australian workers has been underpaid, representing an estimated cumulative total of \$1.8 billion in lost wages annually.⁵ Industry Super Australia (ISA) has estimated that in 2016-17, 2.85 million Australian workers (or 31.3% of employees eligible to receive the Super Guarantee) were underpaid in superannuation by their employers.⁶

² AICD, “Director Banning Orders for Wage Underpayments Floated,” 2019, <https://aicd.companydirectors.com.au/membership/membership-update/director-banning-orders-wage-underpayments-floated>.

³ Natalie James, “Government Flags Tougher Laws to Stamp out Underpayment of Workers” (Deloitte, 2019), <https://www2.deloitte.com/content/dam/Deloitte/au/Documents/audit/deloitte-au-audit-workplace-integrity-240419-01.pdf>.

⁴ Commonwealth of Australia, “Report of the Migrant Workers Taskforce” (Commonwealth of Australia, 2019), <https://www.ag.gov.au/industrial-relations/industrial-relations-publications/Pages/report-migrant-workers-taskforce.aspx>.

⁵ Killian Plastow and Euan Black, “Wage Theft: Employers Are Underpaying Workers \$1.8 Billion a Year,” *The New Daily*, September 27, 2019, <https://thenewdaily.com.au/finance/work/2019/09/27/wage-theft/>.

⁶ ISA, “Super Scandal: Unpaid Super Guarantee 2016-17” (Industry Super Australia, 2018), <https://www.industrysuper.com/assets/FileDownloadCTA/d62c256bec/Super-Scandal-Unpaid-super-guarantee-in-2016-17-formatted-ver-sio-for-final-compliance-tick-V5.pdf>.

These losses are cumulative, and compound over time. This is particularly the case given the interaction between wages and the superannuation system. As economists at *The Australia Institute* have noted, for workers, the problem of wage suppression “is amplified by the corresponding loss of investment income on those (reduced) superannuation balances over workers’ remaining careers”.⁷

LUCRF Super has a significant number of members in two industries that have been identified as being at highest risk of modern slavery: horticulture and meat processing. In these industries, wage theft is often endemic and structural. As such, LUCRF Super - and its members - are acutely affected by wage theft.

More generally, the non-payment of wages and superannuation has consequences for governments and the economy. Governments are confronted with lower tax revenues collected from superannuation contributions and investment income, and lower superannuation balances can lead to increased pressure on the aged pension system.

C. 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.

ACCR and LUCRF Super support measures to increase penalties for companies and individuals who engage in unlawful underpayments. We also support measures to extend liability and responsibility to the top of the supply chain (see next section). However, we remain concerned that increased penalties and liabilities will have only limited effectiveness if workers are not given a formal role in compliance measures, and are sufficiently protected from adverse treatment when raising allegations of underpayments.

ACCR and LUCRF Super are particularly concerned about companies’ reliance on whistleblower hotlines, 3rd party audits, and other voluntary compliance initiatives to mitigate labour risks in their direct operations, and in their broader supply chains.

Decades of research into workplace compliance initiatives in global supply chains have found that voluntary self-regulation and “private compliance initiatives” (codes of conduct, auditing, etc.) are insufficient to effectively manage business and operational risks from labour violations in supply chains.⁸

Specifically, as 3rd party audits only “represent a snapshot of a given point in time” they do not give a full picture of “normalised working conditions”, and have been shown to be unlikely to pick up the worst forms of labour violations (child labour, modern slavery, etc.).⁹ They are also insufficient for understanding workplace issues such as harassment, wage theft, excessive overtime, and freedom of association violations, and “distort[ing] the realities of a workplace”.¹⁰

By contrast, worker-driven social responsibility (WSR) initiatives, which put workers and their representatives at the centre of due diligence processes, are effective in addressing labour risks and ensuring compliance. These schemes recognise that “the best auditors are the workers themselves since they are continually present at the production site”.¹¹ WSR initiatives support workers to raise workplace issues early, allowing businesses to resolve them “before they escalate into more lengthy and complex disputes that may come at a high cost”.¹²

⁷ Jim Stanford, “The Consequences of Wage Suppression for Australia’s Superannuation System” (Centre for Future Work, 2017), 10.

⁸ Richard Locke, *The Promise and Limits of Private Power: Promoting Labor Standards in a Global Economy* (New York: Cambridge University Press, 2013).Lock

⁹ ETI, “Audits and Beyond,” The Ethical Trading Initiative, 2018, <https://www.ethicaltrade.org/audits-and-beyond>.

¹⁰ ILO, “Workplace Compliance in Global Supply Chains” (Geneva: ILO, 2017), 10–15, https://www.ilo.org/sector/Resources/publications/WCMS_540914/lang-en/index.htm.

¹¹ Clean Clothes Campaign, “Looking for a Quick Fix: How Weak Social Auditing Is Keeping Workers in Sweatshops” (London: Clean Clothes Campaign, 2005), 79, <https://cleanclothes.org/resources/publications/05-quick-fix.pdf/view>.

¹² L Curtze and S Gibbons, “Access to Remedy - Operational Grievance Mechanisms. An Issues Paper for ETI” (London: ETI, 2017), 7, https://www.ethicaltrade.org/sites/default/files/shared_resources/ergon_-_issues_paper_on_access_to_remedy_and_operational_grievance_mechanisms_-_revised_draft.pdf.

Significantly, before workers can adequately participate in monitoring their own workplaces, studies show that they must be provided with in-depth education on their rights by their representative organisations. These organisations must also have formal involvement in any grievance procedures. Together, this allows workers' to trust in the process and raise issues without fearing repercussions.¹³

Worker driven social responsibility initiatives are increasingly being adopted by companies globally to conduct effective due diligence and manage ongoing compliance and operational risk in supply chains. WSR initiatives include:

- Cleaning Accountability Framework (CAF): Spotless, Woolworths
- Milk with Dignity: Ben and Jerry's
- Fair Foods Standards Council (FFSC): Ahold USA, Aramark, Bon Appetit Management Company, Burger King, Chipotle Mexican Grill, Compass Group, The Fresh Market, McDonald's, Sodexo, Subway, Trader Joe's, Walmart, Whole Foods Market, Yum Brands
- Bangladesh Accord (selected): Aldi, Carrefour, Country Road Group, Sainsbury's, Target - Australia, Tesco, Woolworths

This trend indicates that worker-driven social responsibility initiatives are feasible, and raise the bar for supply chain management globally.

WSR models have widespread support from Australian academics. For example, in August 2019, Associate Professor Justine Nolan, Dr Martijn Boersma, authors *Addressing Modern Slavery*, together with Dr Laurie Berg, initiated an open letter calling on Coles Ltd. and Woolworths Ltd. to do more to address modern slavery in their Australian fresh food supply chains, including adopting a multi-stakeholder approach to supplier certification involving workers and their representatives.¹⁴ The letter was signed by 59 Australian industrial relations, labour law and supply chain experts.¹⁵

This indicates that reforms that focus simply on increasing penalties or strengthening regulatory powers will have limited impact in curtailing unlawful underpayments, if they do not also address the issue of workers' role in workplace and supply chain compliance. In particular, legislation that weakens trade union access will undermine workplace and supply chain compliance, and broader reforms to address unlawful underpayments.

ACCR and LUCRF Super support regulatory changes that would facilitate the uptake of multi-stakeholder arrangements involving suppliers, lead companies, workers and worker representatives, in overseeing underpayment and other labour exploitation risks in supply chains.

The Cleaning Accountability Framework (CAF)

The Cleaning Accountability Framework (CAF) is one model of worker-driven social responsibility, which is already working in Australia and has the support of investors - particularly super funds - regulators, industry associations, property owners, suppliers and unions.¹⁶ (CAF 2020).

CAF is a certification body that actively involves all parties in the supply chain - from workers to building owners - in the monitoring and enforcement of employment standards (Kaine & Rawling 2019, p.309).

Stakeholders from across the cleaning supply chain are represented on the CAF Advisory Group and have actively participated in the development of the program and in implementing the initial pilot. The Advisory

¹³ Ethical Trading Initiative, "ETI Annual Report 2003/04: Putting Ethics to Work" (London: Ethical Trading Initiative, 2004), <http://www.ethicaltrade.org/Z/lib/annrep/2004/en/index.shtml>.

¹⁴ <http://www.martijnboersma.com/>

¹⁵ Martijn Boersma, Justine Nolan, and Laurie Berg, "Message to Coles, Woolworths: Act Now to End Modern Slavery," *The New Daily*, September 7, 2019, <https://thenewdaily.com.au/news/national/2019/09/07/coles-woolworths-modern-slavery/>.

¹⁶ CAF, "Cleaning Accountability Framework - About," Cleaning Accountability Framework Inc., 2020, <https://www.cleaningaccountability.org.au/about-us/>.

Group includes: AustralianSuper, United Workers Union (UWU), ISPT Super Property, AMP Capital, JLL, CBRE Group, BIC, ISS Facility Services, Property Council of Australia (PCA).

The Fair Work Ombudsman is a key member of the CAF Advisory Committee. The FWO has been actively involved in the development and promotion of the program as promoting “best practice” for improving accountability in the cleaning supply chain.¹⁷

In selected cases of significant and widespread exploitation, the FWO made participation in CAF a requirement of their legally-binding proactive compliance agreements. For example, in August 2018, FWO entered into a legally binding, proactive compliance agreement with Woolworths regarding the cleaning supply chains of their whole group.¹⁸ In addition to commitments regarding the regular audits of cleaning contractors, and strengthened contracting requirements, under the agreement Woolworth committed to back-paying underpaying cleaners if these underpayments were not rectified by the relevant contractor.

There are two elements which distinguish CAF from most other compliance initiatives:

1. Cleaners have a formal role in certification and ongoing compliance. Cleaners attend at least one meeting per annum where they are able to raise issues with CAF without their employers (or the property owners) present. Issues raised by cleaners are an integral component of the CAF audit model, and are investigated and remediated by relevant stakeholders in the supply chain at the building.
2. Benchmarking of productivity and wage rates: CAF has determined benchmarks for productivity rates and on-costs to assess whether the contract is sufficient to enable cleaners (including employees of any subcontractors) to work within safe productivity levels and receive at least minimum wages and entitlements.

ACCR and LUCRF Super support regulatory changes that would facilitate the uptake of multi-stakeholder arrangements involving suppliers, lead companies, workers and worker representatives, in overseeing underpayment and other labour exploitation risks in supply chains.

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

Many LUCRF Super members employed by labour hire agencies and subcontractors, often in complex supply chain arrangements, LUCRF Super therefore has a particular interest in the role and responsibility of lead buyers and host companies for underpayments in their broader supply chains.

A number of legal and other compliance initiatives have emerged in recent years, in order to address modern slavery and labour exploitation risks in supply chains, and to prevent lead companies from “outsourc[ing] their non-compliance”.¹⁹ These include:

- The Modern Slavery Act
- The Fair Work Ombudsman (FWO) using accessorial liability provisions and proactive compliance agreements to hold the top of the chain accountable
- Labour hire licensing schemes, in different state jurisdictions
- Multi-stakeholder agreements that include lead companies, suppliers, workers and worker representatives

¹⁷ “Woolworths Signs up to Protect Cleaners,” Fair Work Ombudsman, 2018, <https://www.fairwork.gov.au/>.

¹⁸ “Woolworths Signs up to Protect Cleaners,” Fair Work Ombudsman, 2018, <https://www.fairwork.gov.au/>.

¹⁹ Sarah Kaime and Michael Rawling, “Strategic ‘Co-Enforcement’ in Supply Chains: The Case of the Cleaning Accountability Framework,” *Australian Journal of Labour Law*, no. 30 (2019): 329.

Accessorial Liability and Proactive Compliance Agreements

ACCR and LUCRF Super note that since 2014, the Fair Work Ombudsman (FWO) has paid increasing attention to the responsibility of lead companies in a supply chain for labour rights violations by their suppliers and labour hire providers, and have utilised both accessorial provisions under the Fair Work Act and proactive compliance agreements. However, we note that these provisions are still limited in their ability to compel lead actors in the supply chain to take responsibility for underpayments by their suppliers and subcontractors, even in cases where the lead actor exerts significant power over suppliers and/or contractors, and has a significant degree of oversight over their supply chain.

Given this, **ACCR and LUCRF Super support recommendations by the Migrant Worker Taskforce to extend ...accessorial liability provisions of the Fair Work Act 2009** to also cover situations where businesses contract out services to persons, building on existing provisions relating to franchisors and holding companies.²⁰

Accessorial liability provisions under the Fair Work Act have already been increased via the Fair Work Amendment (Protecting Vulnerable Workers) Act 2017. The Protecting Vulnerable Workers Act changes ensured that where franchisors and holding companies that exercise significant control over their franchisees and subsidiaries, they are “held responsible where they do not take reasonable steps to try to prevent breaches of workplace laws”.²¹ The MWT amendment would simply extend these provisions to lead companies in supply chains.

ACCR and LUCRF Super also support FWO’s use of proactive compliance agreements in those situations where they are unable to meet the threshold for accessorial liability. Proactive Compliance Deeds are a legally binding enforcement mechanism between the FWO and a company or companies accused of non-compliance with the Fair Work Act. In many cases, it is the direct employer who is the partner to the deed. However, there have been a significant number of high profile cases where the FWO has entered into a compliance agreement with either the host company or company at the top of the supply chain. This has occurred in cases where the FWO believes the lead company has an ethical responsibility to promote compliance due to either their significant power over suppliers and/or contractors, and some degree of oversight over their supply chain.²²

For example, Woolworths has been subject to penalties and FWO proactive compliance orders due to accessorial liability in their supply chain in relation to their cleaning contracts in Tasmania and trolley collection contracts nationally. In the case of trolley collection, the FWO found that Woolworths had “legal, moral and ethical responsibility” for its supply chain arrangements.²³ Their proactive compliance agreement required Woolworths to establish a \$1 million fund to cover payments to trolley collectors where their direct employer failed to back-pay workers.

National Labour Hire Licensing

ACCR and LUCRF Super have done extensive work in the Australian horticulture industry, where workers are at high risk of modern slavery. The issues present in the horticultural value chains including:

- severe underpayments and withholding of wages
- excessive overtime

²⁰ Commonwealth of Australia, “Report of the Migrant Workers Taskforce,” 10.

²¹ Commonwealth of Australia, 47.

²² Fair Work Ombudsman, “Inquiries into Supply Chain Networks,” 2018, <https://www.fairwork.gov.au/>.

²³ Fair Work Ombudsman, “Woolworths Trolley Collection Services,” 2016,

<https://www.fairwork.gov.au/about-us/news-and-media-releases/2016-media-releases/june-2016/20160625-woolworths-trolley-mr.Wool>

- retention of identity documents
- threats of and actual physical and sexual violence
- coercive payments for transport and housing well above market norms.²⁴

The presence of endemic and severe labour exploitation in Australian horticultural supply chains is due to the proliferation of unscrupulous labour hire providers and subcontractors, and high levels of concentration at the top end of the supply chain, leading to significant downward pressure on wages. There are limited to no barriers to entry for labour hire providers entering the industry, and many non-compliant providers were found to “not be operating under a registered business or corporate entity”.²⁵

For this reason, **ACCR and LUCRF Super support the recommendations by the Migrant Worker Taskforce that the Government establish a National Labour Hire Registration Scheme** that requires - at a minimum - labour hire operators four high risk industry sectors (horticulture, meat processing, cleaning and security) to register with the scheme, and for host companies in those industry sectors to be required to use registered labour hire operators.

Recommendations

ACCR and LUCRF Super:

- support regulatory changes that would facilitate the uptake of multi-stakeholder arrangements involving suppliers, lead companies, workers and worker representatives, in overseeing underpayment and other labour exploitation risks in supply chains.
- support recommendations by the Migrant Worker Taskforce to extend accessorial liability provisions to cover situations where businesses contract out services to persons.
- support the FWO’s use of proactive compliance agreements in those situations where they are unable to meet the threshold for accessorial liability.
- support the recommendations by the Migrant Worker Taskforce that the Government establish a National Labour Hire Registration Scheme.

²⁴ Joanna Howes et al., “Towards a Durable Future: Tackling Labour Challenges in the Australian Horticultural Industry” (Adelaide: University of Adelaide, 2019), <https://sydney.edu.au/content/dam/corporate/documents/business-school/research/work-and-organisational-studies/towards-a-durable-future-report.pdf>; FWO, “Harvest Train Inquiry: A Report on Workplace Arrangements along the Harvest Trail,” 2018.

²⁵ Howes et al., “Towards a Durable Future: Tackling Labour Challenges in the Australian Horticultural Industry,” 32.