



Submission to the inquiry into the unlawful underpayment of employees' remuneration

February 2020

NT Working Women's Centre

The Northern Territory Working Women's Centre Incorporated (NTWWC) is a community based, not-for-profit organisation that provides free and confidential advice and support services on work-related matters to female employees in the NT. Services commenced in 1994, and we operate across the NT, from two offices in Darwin and Alice Springs.

The NTWWC works primarily with women who are not represented by a union, lawyer or other advocate. Women who contact our Centre are often economically disadvantaged and work in precarious areas of employment. On average we provide about 3000 contacts per year. Last year, 15 percent of our contacts were with Aboriginal and Torres Strait Islander women and 27 percent with culturally and linguistically diverse women. The service also provides community education and training around domestic and family violence as a workplace issue, workplace bullying, and general industrial entitlements.

We conduct research and project work on a range of issues that women experience in relation to work. These have included access to childcare, family friendly practices, the needs of Aboriginal and Torres Strait Islander working women, pregnancy and parental status discrimination, work/life balance, pay equity and the impact of domestic violence on women workers and their workplaces. In conjunction with the National Alliance of Working Women's Centres, we provide expert advice to government on legal and policy reform.

We are grateful for the support of the NT Government (Department of Trade, Business and Innovation) and the Federal Government (Fair Work Ombudsman).

Further information about the Centre is available on our website: <https://www.ntwwc.com.au/>

Scope of Submission

Within this submission we have given consideration to the forms of underpayment we see most commonly- underpayment of Award hourly rates, use of 'flat rates' payment, non-payment and underpayment of penalty rates, withheld or underpaid entitlements, unpaid or underpaid overtime, applying the wrong Award and being misclassified under an Award. We have not considered incorrect taxation, unpaid or underpaid superannuation, sham contracting or business 'phoenixing' to avoid payment of debts.

We have addressed the terms of reference in which we have experience and expertise and where possible we have made recommendations. There are case studies throughout. To protect the anonymity of our clients, details are changed and/or omitted but the integrity of the story remains.

Responses 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'

Consistently, around ten percent of enquiries to our service are about employment conditions and another six percent specifically about remuneration. Our clients regularly report non-payment or underpayment of lawful wages as an issue for them and most commonly in the forms of underpayment of Award hourly rates, non-payment and underpayment of penalty rates, withheld or underpaid entitlements, unpaid or underpaid overtime, applying the wrong Award and being misclassified under the Award.

The NTWWC is a women's service and in itself, being a woman is a particular vulnerability when giving consideration to underpayment of lawful wages because of the gender pay gap and higher participation in casualised workforces and part-time employment. The NTWWC targets its services at NT women workers who have extra vulnerabilities in the workplace, for instance

Aboriginal and Torres Strait Islander women, culturally and linguistically diverse women, young women and older women. In regards to non-payment or underpayments of wages, these increased vulnerabilities have a two-fold effect. Firstly, it is more challenging for these women to establish what their rights are and where these rights comes from, due to difficulty interpreting legislation and Modern Awards and difficulty accessing services that can assist in this process. Secondly, it is more challenging for these women to enforce their rights as a result of discrimination, lack of skills or confidence advocating for their rights to their employer and again difficulty accessing services to assist.

There are further themes in the reporting of underpayment of wages to our organisation. The industries where we most commonly see this issue are hospitality and tourism, the hair and beauty industry and in businesses with a low skilled labour force. Often these businesses employ a high number of migrant workers, including many on employer sponsored visas, very commonly operating in the cleaning and care industries.

The volume and regularity of complaints we receive, and the consistency with which these complaints are made by women with extra vulnerabilities, leads us to believe this is a deep rooted issue and that for many industries and businesses these unlawful underpayments are an exploitative business model. In our experience, employees seeking assistance with underpayments through the FWO are encouraged to settle through the mediation process, often for less than their legal entitlements and this may have an impact on the business' readiness to view the practice of systematically underpaying as a risk worth taking.

b) the cost of wage and superannuation theft to the national economy;

The NTWWC collects data on the workplace issues our clients present to us, which includes remuneration, encompassing unpaid wages and underpayment of wages. Since mid-2016 we have also collected data on the total financial entitlements we have assisted clients to recoup from their employers. This information is presented in the table below.

	2017	2018	2019	2020 (to date)
Total client contacts for the year	3286	3109	2977	20 contacts, 5.8% of total contacts
Number of those contacts about remuneration	508 or 6.5%	418 or 5.1% of total contacts	210 or 3.8% of total contacts	20 or 5.8%
Entitlement amount recovered	\$42 272	\$120 878	\$87 252	\$13 000

Our data does not capture the unpaid entitlements we were unable to recoup and as a result had to refer to the Fair Work Ombudsman or the Federal Circuit Court for assistance in resolution. Nor does it capture those clients who, having sought information and advice from us, have gone on to self-manage pursuit of unpaid and underpaid wages.

However, it does show that our Centre, with just four part time caseworkers across the NT, see hundreds of NT women each year who have been underpaid and with our limited resources is capable of recouping significant amounts of money. We are a drop in the ocean (we would say small but mighty) but this gives scale to the extent of the issue and the impact it is having on our economy.

The short term impacts upon our clients are financial stress and the associated effects this has on health. A lack of financial independence is also one of the primary contributing factors to women's inability to leave violent relationships. Lower incomes obviously slow contributions to the national and regional economy, and the Northern Territory experienced a reduction in resident population in 2019. There are also long term impacts as a result of underpayments on the future living standards of our clients too. There has been considerable media these last weeks on increased homelessness of women over 45 years of age and older women's low levels of superannuation. These are issues women report to us also.

- 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;**

Recommendations:

1. Boost public resources to tackle underpayment of wages, improving government enforcement activities;
2. Increase accessibility to private enforcement options for employees through Working Women's Centre, Community Legal Centres and Legal Aid;
3. Simplify the Small Claims process.

We are aware the Fair Work Ombudsman targets certain industries and has the power to audit businesses and enforce payment of underpaid wages. We are supportive of this practice and would like to see this more widespread as per our first recommendation.

With regard to individual complaints of underpayment, the Fair Work Ombudsman recommends individuals try to settle underpayment matters with their employers directly before making a complaint to them. We assist as many women as we can in this process, either by providing clear instructions about how to write to their employer and ask that their wages are paid or through direct negotiation ourselves. We receive large numbers of referrals from community legal centres to assist women with these matters due to our expertise in the area. These cases require significant input of NTWWC resources because of the time it takes to analyse and interpret Awards and calculate underpayments. Addressing the limited accessibility and resource intensity of private enforcement would assist with the identification and uncovering of wage theft, see recommendation 2.

If the issue cannot be settled between the parties directly, individuals can complain to the Ombudsman. Standard practice at the Ombudsman after a complaint is made is to organise a mediation between the parties to try and settle the matter. The effect of this process for our clients is that they are left with the choice of either negotiating away their legal entitlements or not settling and having to go to the Federal Circuit Court to make a Small Claim. As per recommendation 1, a boost in public funding may assist the Ombudsman to investigate and enforce individual cases of underpayment.

The Small Claims process in the NT is not simple. It involves the submission of numerous documents to the Federal Circuit Court using an online portal. To date, this is not a task any of our clients have managed to successfully undertake alone and it takes considerable NTWWC resources to assist. After making a claim, our clients then need to consider legal representation and it is challenging to find affordable representation in the NT. To date, we have been unable to find any representation for clients using this process so they have all self-represented. The current Small Claims process is a barrier to the identification and uncovering of wage theft, see recommendation 3.

Case study 1: Julia is over 55 years of age and had been working for a cleaning company, part time, for more than five years. She was terminated from her employment without proper process and no notice was paid. She had been paid a flat rate of around \$19 an hour for the entirety of her employment and was not paid any superannuation. Julia speaks English as her first language but has limited skills in reading and writing in formal English. Julia was owed payment of notice, and for the underpayment of wages amounting to more than \$18 500 plus superannuation.

NTWWC was able to assist Julia to be paid notice. Her employer did not apply any taxation to this amount so Julia got a tax bill. The employer refused to pay the underpaid wages and would not mediate at the Fair Work Ombudsman, so NTWWC assisted Julia to make a Small Claim at the Federal Circuit Court. As NTWWC is not a legal service, we were unable to represent Julia and could not acquire legal representation for Julia from a community legal service or legal aid. As a result, she had to self-represent. The Court recommended mediation and the result was an agreement that the employer would make payment of the money owed. However, the employer never signed the agreement and then disappeared so Julia never received her money.

Case study 2: Jane had been working as a casual tour guide for just under six months when she contacted the NTWWC for assistance resolving a pay dispute. She was receiving a set payment for each tour conducted, and had contacted the Fair Work Ombudsman and been advised which Award she would most likely fall under. When NTWWC assisted Jane to interpret and apply the Award, and the rates paid and actual hours Jane worked during each tour were compared, the set fee per tour constituted a considerable underpayment.

Jane had raised this with her employer, along with her safety concerns: tour guides were required to work alone and be the last asleep and first awake, and therefore to drive long distances on very little sleep, with the lives of many in their hands. As a result of raising these concerns, Jane had been told 'this is how it is, we can't afford to pay guides more' and threatened with removal from the roster if she wasn't prepared to accept the situation.

Shortly after that meeting, Jane was indeed removed from the roster, and with NTWWC assistance she lodged a general protections dismissal with the Fair Work Commission, which was not resolved due to the employer's unwillingness to offer a reasonable compensation sum. She then elected to pursue the underpayment and lodged a complaint with the Fair Work Ombudsman, which resulted in a mediation, where Jane eventually settled for far less than her calculated entitlements.

- 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**

Recommendations:

1. Take a zero tolerance approach to underpayment of wages, with an increase in penalties and consideration of criminalisation in the most egregious cases;
2. Make compliance more straight forward for employers;
3. Boost public resources to tackle underpayment of wages, improving government enforcement activities;
4. More accessible private enforcement opportunities for employees through the increased funding of Working Women's Centres, Community Legal Centres and Legal Aid;

5. Simplify the Small Claims process.

The extent of underpayment of wages suggests that the current enforcement system is not a deterrent to underpaying wages. We would like to see the Federal Government take the position of zero tolerance and consider criminalisation in some cases. An employee who steals from their employer faces criminal action as should employers who engage in the deliberate, widespread underpayment of wages. See recommendation 1.

We have submitted at term of reference c) that the analysis, interpretation and application of Awards and legislation can be heavy on our resources and we have expertise in this area. We can therefore appreciate that this will also be the case for some employers, particularly small businesses. Simplifying compliance will assist with this issue. See recommendation 2.

At term of reference c) we explain at length the process our clients must use to seek resolution of their underpayment. Considering this process, we would recommend the Fair Work Ombudsman has increased capacity to target certain industries to audit businesses as an effective means to resolve underpayment of wages. We would also like to see the Fair Work Ombudsman become involved in the investigation of underpayments and enforcement of their repayment in individual complaints as a means of resolving the issue and ensuring lawful payment of wages, rather than the standard practice of mediation. This requires a boost to public resources. See recommendation 3.

Again at term of reference c), we explain the demand for our services and the stress on our resources in assisting with the private enforcement of underpayments. Increased funding to Working Women Centres, community legal centres and legal aid would be an effective means of increasing capacity to recover unpaid entitlements. See recommendation 4.

The Small Claims process in the NT is not simple. It involves the submission of numerous documents to the Federal Circuit Court using an online portal. To date, this is not a task any of our clients have managed alone and it takes considerable NTWWC resources to assist. After making a claim, our clients then need to consider legal representation and it is challenging to find affordable representation in the NT. To date, we have been unable to find any representation for clients using this process so they have all self-represented. The current Small Claims process is a barrier to the identification and uncovering of wage theft, see recommendation 3.

Finally, the Small Claims process in its current form in the NT is a huge barrier to enforcement and recovery of underpayments. In its current form it is barely accessible for individual complainants and requires a considerable commitment of time and resources from organisations such as ours in order to be able to assist. Only the most tenacious or aggrieved clients we encounter are able to summon the time and energy required to make a complaint and then see the process through. Simplifying this process would have a significant impact on recovering entitlements.

Case Study: An* is a CALD women on a working holiday visa. An could not write in English and had limited spoken English. She had worked in a café in a small NT town for several months, seven days most weeks and was paid a flat hourly rate. She was owed wages when she resigned, around \$7000 based on this flat rate, which she managed to claim from her former employer herself but contacted NTWWC when someone told her about penalty rates. An asked for assistance to establish her entitlements under the correct Modern Award, calculate the extent of the underpayment and strategise how she could be paid the money owed. NTWWC and An established she was owed about \$6000 in underpaid wages. NTWWC wrote to the former employer and asked that payment be made. This did not occur so NTWWC supported An to prepare the paperwork and

submit it the Federal Circuit Court, under the small claims jurisdiction. This is an online process, challenging even for our organisation to navigate. An could not have done this herself- she did not write in English and had limited spoken English. The court made arrangements for an interpreter to be present at the proceedings. The Court found An was owed the money she claimed however the employer then declared bankruptcy so she never received her money.

- g) whether Federal Government procurement practices can be modified to ensure that public contracts are only awarded to those businesses that do not engage in wage and superannuation theft;**

It is the position of the NTWWC that the Federal government should consider the lawful payment of wages and superannuation to be of the highest priority in public contracting and procurement practices should reflect this. Businesses who commit wage and superannuation theft should not be awarded Federal government contracts as part of a zero tolerance approach to the issue. This would require consideration of an appropriate method of recording and making this information accessible, as in the first instance wages and conditions complaints will remain anonymous, unless they proceed to litigation.