



6 March 2020

## **SUBMISSION OF THE MIGRANT WORKERS CENTRE**

### **SENATE ECONOMIC REFERENCES COMMITTEE INQUIRY ON UNLAWFUL UNDERPAYMENT OF EMPLOYEES' REMUNERATION**

#### **1. Introduction**

- 1.1. The Migrant Workers Centre ('MWC') makes this submission in response to the Senate Economics References Committee's call for public input about the "unlawful underpayment of employees' remuneration".
- 1.2. The MWC is a non-profit organization located in Carlton, Victoria, helping migrant workers understand their rights and get empowered to enforce them. Its goal is to fix the system of labour exploitation.
- 1.3. Migrant workers in a variety of industries come to the MWC and seek help for defending their workplace rights. As one of the members of the community that witness firsthand the prevalence of wage theft against migrant workers and its impact on migrant communities as well as the broader Australian society, the MWC welcomes the inquiry and call for input. The failure to adequately redress wage theft and protect migrant workers' wages and entitlements remains a significant industrial issue in Australia and a matter of great concern to the MWC.
- 1.4. This submission highlights the following issues that the MWC urges the Committee to take into account:
  - a. Empowering the Fair Work Ombudsman ('FWO') and trade unions to better monitor compliance and creating a wage theft inspectorate to supplement the FWO
  - b. Generating deterrence of wage theft through increasing penalties and extending accessorial accountability to anyone involved in wage theft
  - c. Assisting migrant workers with access to redress without increasing risks of negative implications on their life in Australia

## 2. Definitions and principles

- 2.1. It is our view that a 'worker' should be comprehensively defined to include any person who works under instructions for income in Australia's rapidly changing economy such as labour hire workers, so-called gig economy workers, and pseudo-contract workers. The term 'migrant worker' in this submission refers to such a worker who was born in a country other than Australia. We also acknowledge that many migrant workers are engaged in small businesses or marginal industries where compliance monitoring is inadequate.
- 2.2. We refer any underpayment, withholding, or misappropriation of the wages, entitlements, and superannuation prescribed by the *Fair Work Act 2009* or the *Superannuation Act 1976* as 'wage theft'. This is because most workers and their families rely on wages for living and on superannuation income after retirement. Wages should be paid in full and on time in order not to disrupt or challenge their right to living.
- 2.3. Laws and regulations should serve the purpose of bringing justice for workers and generating deterrence of contraventions. It is in this context that the MWC upholds the principle that sanctions against wage theft should be imposed in proportion to the magnitude of contraventions. Whether there was a deliberate intention to steal wages and entitlements should not determine whether contraventions constitute wage theft or what sanctions should be imposed.
- 2.4. The MWC endorses the submissions made by the Victorian Trades Hall Council and the Australian Council of Trade Unions. Hence, this submission is intended to be read in conjunction with the two aforementioned submissions.

## 3. Forms of and reasons for wage theft

- 3.1. Wage theft takes a variety of forms ranging from underpayment to extortion. Some of the most prevalent forms of wage theft reported to the MWC include:
  - a. Denying workers the right to correct information about their award rates and entitlements
  - b. Paying workers at arbitrarily discounted rates from their award rates with the excuse of their limited work experience, migration status, or limited competence in English
  - c. Making piece-rate agreements or sham contracts with workers with the intention of underpayment
  - d. Not paying workers during trial periods
  - e. Not making contributions to workers' superannuation accounts

- f. Delaying the payment of wages to workers with the intention of avoiding the payment and subsequently going out of contact or going into liquidation
  - g. Forcing workers to pay back money in exchange for employment or costs associated with employment
  - h. Forcing migrant workers to pay back costs of visa sponsorship or nomination or partnering with a migration agent to charge such costs to migrant workers
- 3.2. Whereas most forms of wage theft affect both Australian-born workers and migrant workers, **migrant workers disproportionately experience wage theft.**<sup>1</sup> Below are the five most typical cases reported to the MWC in 2019:

Type 1: Employers taking advantage of workers' information gap

Mary's (pseudonym) first job in Australia was at a café, which to her surprise never balanced the cash register at the end of a business day. Instead, her employer would clear the register any time of the day. Mary later found out that such a practice was not a norm in Australia and that her employer would head straight to a casino whenever he cleared the register.

The employer's negligent business practices soon negatively affected Mary. He started delaying her pay, and Mary had to beg for several times before she could get any partial payments. She survived the Christmas break with empty hands because the employer had promised to pay her in the new year. When she returned to work after the break, the café remained closed, and the employer was out of touch.

*Mary was never given a copy of the Fair Work Information Statement* when she started working in Australia and was paid cash-in-hand without payslips. She trusted her employer had offered her legally entitled rate because as an Australia-born citizen he would have known better than she did. As a matter of fact, she had been paid below the national minimum wage rate, no annual leave, nor superannuation contributions.

Type 2: Employers ripping off workers in exchange of job opportunities

Some rural towns in Australia have nicknames such as "Horror Hill" or "Helltown" among migrant workers. In such towns, exploitation and bullying is rife, underpayment is a norm, and proper accommodations are hard to find. A majority of workers there are Working Holiday Makers trying to meet a certain period of specified work requirement before being able to apply for subsequent Working Holiday visas.

Michael (pseudonym) needed to work in rural areas for at least 88 days if he wanted to extend his Working Holiday visa to a second year. He met a labour-hire provider in "Horror Hill" and got a strawberry-picking job. *To work at the farm, Michael had to rent a bed from the labour-hire provider.* He paid the labour-hire provider \$120 per week to stay with 15 others in a four-bedroom house. He paid him an extra \$5 per day for transportation.

Michael was paid at a rate of \$2 per tray and barely earned what he owed to his labour-hire provider/landlord. He left "Horror Hill" to fill the remainder of his 88 days with a better-paying job. He got a job at an abattoir in "Helltown" from another labour-hire provider, who

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<sup>1</sup> According to the FWO's annual reports, 76 per cent of the FWO's 50 litigations in the 2015-16 financial year involved a visa holder, and more than \$3 million was recovered for all visa-holders. In 2018-19, over 80 per cent of new litigations involved protecting migrant workers.

also charged him \$120 for a bed. At the abattoir, Michael was paid his award rate but still earned little money: his payslip would list all kinds of deductions such as employment commission to the labour-hire provider, training, and Q-fever vaccination.

#### Type 3: Employers phoenixing at the expense of the national economy and migrant workers

Jake (pseudonym) and his colleagues were suddenly dismissed from their building cleaning jobs. Their employer provided no explanation, nor a final pay with their unused annual leave and redundancy pay. Jake made a complaint to the FWO only to find out that the business went into liquidation. The liquidator informed him that the business' remaining assets were barely enough to pay the dismissed workers for their unused annual leave.

In the meantime, it was business as usual for the employer. He opened another building cleaning business and advertised it as a "rebranded" version of the old one. He managed the business at the same place (though official documents listed a different address) and still served all his old clients. Apparently, he illegally "phoenixed" the business to avoid paying his workers.

The *Fair Entitlements Guarantee Act 2012* protects the entitlements of workers in the face of liquidation. The government covers workers' unpaid wages, unpaid annual leave and long service leave, payment in lieu of notice, and redundancy pay when they lose their jobs due to insolvency. Jake and his colleagues, however, could not recover their stolen wages because they are temporary visa holders and barred from making a claim under the Act.

#### Type 4: Employers passing on business expenses to workers

Emily's (pseudonym) employer was a tour operator in Melbourne, VIC that organised daily group tours to popular destinations such as the Great Ocean Road, Puffing Billy, and Sovereign Hill. Her job was to drive a tour bus, narrate stories about the destinations to her passengers while driving the bus, and guide them around at the destinations.

The company primarily catered to Chinese-speaking tourists and hired only Chinese-speaking migrant workers. Emily and her colleagues were paid \$20 flat per hour, which was way below the award rate for casual transportation workers. She was over 60 years old, but her employer didn't mind sending her to far-away destinations that would make her work 12 hours or longer a day. Emily was also asked to work on both weekdays and weekends. The employer, however, never paid her casual loading, overtime or weekend penalty rates. Emily always felt exhausted, but she had to work every day because she was paid so little per hour. As a result, she felt unsafe at work, especially whenever she had to fight off sleep while driving back to the city in the evening.

On top of the underpayment, the employer made Emily pay out of pocket for the tour bus maintenance and fuel. Taking into account the amount she paid for the fuel, she was paid below the national minimum wage. This forced her to opt for the cheapest fuel option and fill the tank only to the bare minimum she needed for her itinerary. On her way back to the city, she was always worried if she might run out of fuel. In addition, the employer issued Emily an invoice amounting to over \$2,000 for repairs of the tour bus.

#### Type 5: Employers profiting from employer-driven migration schemes

Eva (pseudonym) worked at a restaurant as head chef, but she was paid cash-in-hand at an annualised rate, no matter how many hours she worked. Eva did between 10 to 20 hours of

unpaid overtime work every week. As a result, she was paid below the national minimum wage rate.

On top of the wage theft, Eva's employer asked her to pay him something in return for his visa sponsorship. Her current visa was expiring soon, and he promised to sponsor her for a skilled visa as long as she covered the sponsorship fee. Eva suspected that he would take the money and not process her visa application at all. Her employer recently initiated a performance management process, and Eva was afraid that he was paving the road to fire her once she paid him the visa sponsorship fee.

If Eva gets fired as she suspected, she is likely to be replaced by yet another temporary migrant worker, for example, John (pseudonym). His migration agent advised him to enter Australia on a tourist visa and apply for permanent residency onshore. The agent introduced him to a restaurant owner who was willing to nominate John for permanent residency under a regional sponsored migration scheme.

John's employer underpaid him to \$20 per hour in cash, although he was entitled to \$26.14 according to the award. John worked at the restaurant for months, during which he paid the migration agent up to \$10,000 in visa processing fees. Later, he found out that his employer and migration agent were friends and that no permanent residency visa was filed for him. John incurred a huge debt and had no option but to return to his homeland.

- 3.3. The narratives above confirm that **wage theft hardly occurs by negligence**. Employers often assert that the complexity of Australia's award system is to blame for their "inadvertent payroll mistakes".<sup>2</sup> The excuse merely reflects the hard truth that businesses do not consider it important to pay their workers correct wages because the system has been simplified in the past decade.<sup>3</sup> In our experience at the MWC, most employers knowingly steal wages from their workers and refuse to pay back when workers demand their stolen wages. Very few willingly correct their wrongdoing.
- 3.4. Wage theft may be motivated by many factors including greed, disrespect for labour, and market pressure, but only **one factor enables employers to commit wage theft: the power imbalance between employers and workers**. Wage theft disproportionately targets migrant workers because the power gap between them and their employers is even greater. This suggests that wage theft is likely to occur as long as there are employers unafraid of the Australian justice system and workers left with limited recourse.
- 3.5. Employers have power over workers when the job market is weak, and their power is strengthened when **the protection for workers' workplace rights is weak**. When a worker reports breaches such as wage theft to the FWO, which is responsible for promoting

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<sup>2</sup> The Sydney Morning Herald, "Woolworths executive bonuses cut after workers underpaid up to \$300m" (30 Oct 2019), <https://www.smh.com.au/business/companies/woolworths-underpays-workers-by-up-to-300-million-20191030-p53515.html>.

<sup>3</sup> Anthony Forsyth, "No, a 'complex' system is not to blame for corporate wage theft", *The Conversation* (11 Nov 2019), <https://theconversation.com/no-a-complex-system-is-not-to-blame-for-corporate-wage-theft-126279>.

compliance with workplace laws, its response in most cases is merely inviting the employer and the worker to participate in mediation. The mediation is a voluntary process, and some employers nonchalantly refuse to participate in it. Even when the mediation takes place, it could fail to produce any conclusion, in which case the FWO advises the worker to take the complaint to court. Most workers find court procedures (including small claims tribunals) too complex, costly, and time consuming and reluctantly give up pursuing justice. Even when the FWO investigates the worker's allegation and finds the employer implicated in breaches, the penalties for breaches issued to the employer tend to be smaller than the profits expected from the breaches. As the Australian Consumer Law Review pointed out, non-compliant employers perceive the risk of getting caught and issued penalties as "a cost of doing business".<sup>4</sup>

- 3.6. The power gap between employers and workers is widened by their information gap. **Where there is no or little union representation, workers have limited information about their workplace rights.** One of the reasons for the disproportional impact of wage theft on migrant workers is the increasing number of employers who adopt it as a business model to profit from migrant workers' unfamiliarity with Australian workplace rights, industrial relations systems and law enforcement. Employers know that migrant workers are given little information about their rights or have little understanding of the implications of piece-rate agreements or sham contracts. For example, over 150,000 young workers come to Australia on their first-year Working Holiday Maker visas every year. When they apply for a visa, these workers are required to demonstrate their physical health, criminal history, and financial capacity to fund their stay in Australia, but are not asked if they understand their rights in Australia. There is no proper channel through which Working Holiday Makers can learn about their workplace rights after arriving in Australia, either. Consequently, they have no other option but to trust their employers. Employers take advantage of this information gap and get away with underpaying their workers. Some employers only hire Working Holiday Makers with limited English, who are likely to have little information about their workplace rights, to maximise their profits through wage theft.
- 3.7. Lastly, **temporary visas and the restrictions attached to them make the power gap between employers and migrant workers insurmountably wide.** This is not to say that temporary migration, in itself, necessarily leads to the exploitation of migrant workers.

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<sup>4</sup> Consumer Affairs Australian and New Zealand, *Australian Consumer Law Review: Final Report* (March 2017).

Rather, the current practices of the temporary migration program—specifically, the prioritisation of employer demand and the exercise of cancellation powers by the Department of Home Affairs—create an atmosphere in which migrant workers are left open to exploitation. The limited time temporary visas allow to their holders to access Australia's wage justice system significantly limits migrant workers' chance to seek remedies if they get their wages stolen. Employers know that migrant workers have no alternative but to comply with the terms set by the employers, many migrant workers simply endure exploitative work conditions. Practically, there are more reasons for employers to exploit migrant workers on temporary visas than to abide by the laws.

#### **4. Cost of wage theft to the national economy**

- 4.1. It is much in evidence that wage theft is a way for businesses to avoid taxation and superannuation obligations. The Black Economy Taskforce estimates that the cost of wage theft is as much as \$50 billion, approximately 3% of the nation's GDP.<sup>5</sup> As shown in Type 1, many employers steal from their workers by paying their workers cash-in-hand below the national minimum wage rate and steal from the government by not withholding PAYG taxes. These employers do not make the required superannuation contributions, either.
- 4.2. More importantly, wage theft undermines industrial relations and fundamentally distorts the structure of the national economy. The example of Type 2 suggests that some employers normalise wage theft by exclusively recruiting migrant workers in vulnerable situations such as Working Holiday Makers who have no option but to take underpaying jobs. These employers not only underpay their workers but also extort various fees in exchange for job opportunities. Such a practice has already created a dual labour market where some industries such as aged care and horticulture are almost exclusively dependent on the migrant workforce. The dual labour market has an effect on deterring native-born workers from getting trained for the affected industries, eventually leading to chronic domestic skill shortages in real terms.
- 4.3. Wage theft associated with illegal 'phoenixing' costs more than any other types of wage theft. Some employers as depicted in Type 3 deliberately bring their businesses into insolvency with the intention of not paying their workers. Workers cannot recover their stolen wages from their employers even when they "phoenix" the bankrupt businesses under

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<sup>5</sup> The Australian Government the Treasury, *Black Economy Taskforce Final Report* (October 2017).

new registered names. In such cases, workers are protected by the *Fair Entitlements Guarantee Act 2012*, and the government is responsible for paying them up to 13 weeks of unpaid wages and entitlements as well as redundancy payments. Although temporary migrant workers are excluded from this protection scheme, illegal phoenixing unnecessarily increases the public burden for wage theft. The government estimated illegal phoenix activity costs the economy \$2.85 billion to \$5.13 billion a year.<sup>6</sup>

- 4.4. In addition to the direct costs mentioned above, wage theft incurs indirect costs such as public health and safety. The impact of workplace accidents is not confined to workplaces. Type 4 well illustrates how wage theft takes place against transportation workers, not only putting the workers at serious occupational health risks but also jeopardising road safety. When employers refuse to pay penalty rates for overtime, weekends, and holidays, which are designed to deter exploiting workers and help workers recuperate from work, workers are forced to overwork to make ends meet. Wage theft allows non-compliant employers to make a profit at the expense of the national economy.
- 4.5. Type 5 reveals that wage theft also costs the national economy dearly by distorting its migration schemes. Australia's labour migration schemes are designed to attract skills and talents to the country. Unscrupulous employers, however, turn it to their advantage and exploit workers on the premise of skilled visa sponsorship or permanent residency nomination. Such business practices result in losing skills and talents the national economy needs and the rights to work and residency migrant workers deserve.
- 4.6. Lastly, continued mass-scale wage theft against migrant workers costs Australia's national economy by harming the country's reputation among migrant workers' countries of origin and the wider global community. The MWC has met with a number of migrant workers who run YouTube channels and regularly broadcast about their experience of exploitation and Australia's racist treatment of migrant workers. There is an impending risk of harming the prospects of industries significantly dependent on international reputation, such as the education and tourism industries, and diplomatic and trade relations indispensable for Australia.

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<sup>6</sup> PricewaterhouseCoopers (PwC), *The Economic Impacts of Potential Illegal Phoenix Activity* (July 2018).

## 5. Means of identifying and uncovering wage theft and of protecting whistle blowers from adverse treatment

- 5.1. Wage theft can be established by employers' failure to produce employment and payment records in compliance with workplace laws. As long as workplaces are regularly monitored, regulating compliance cannot be a challenge.
- 5.2. However, the FWO, which is currently the only entity responsible for monitoring compliance, is challenged by a shortage of resources to ensure compliance and undertake litigation. Funding of the FWO has been decreasing in real terms when calculated on a per employee basis.<sup>7</sup> As a result, the FWO responded to most complaints by offering mediation, and the number of litigations it was able to commence every year has been very low, as small as between 23 and 55.<sup>8</sup>
- 5.3. Many workers express their frustration about the FWO after witnessing the organisation's failure to adequately respond to complaints. A majority of migrant workers who came to the MWC in 2019 testify that they were only offered mediation with their employers, who view the FWO unthreatening and simply refused to participate. In one episode the MWC heard from an underpaid worker, a Fair Work Inspector visited the worker at his workplace after receiving his anonymous report of wage theft and asked him "Does your boss underpay you?" in the face of his employer. As the worker could not answer the question, the inspector wrapped up the investigation. In another underpaid worker's case narrated to the MWC, her employer prepared her for a Fair Work Inspector's visit in advance and fabricated all her payslips. The inspector asked the worker the same questions that appeared on the script she was given by her employer and did not question the fabricated payslips.
- 5.4. There is much to be done to augment the FWO's effective response to wage theft and protection of workers. For a start, **increasing funding of the FWO and ensuring regular monitoring of compliance will contribute to better identifying and uncovering wage theft.**
- 5.5. Other organisations well equipped with the knowledge and skills necessary for identifying and uncovering wage theft are trade unions. In the last couple of decades, however, significant restrictions were introduced onto unions' right of entry and their access to employers' records in relation to wages. Unions are now required to demonstrate that there is

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<sup>7</sup> Stephen Clibborn, "Submission to the Attorney-General's Department in response to the September 2019 Discussion Paper titled: Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance", *Attorney-General's Department* (October 2019), 3.

<sup>8</sup> Stephen Clibborn, 4.

a reasonable basis to suspect a contravention having been made at a workplace to gain entry. In addition, they can request access to documents limited to those directly relevant to the suspected contravention. It is telling that the increasing restrictions on union activities such as detailed above have been witnessed together with the growing occurrence of wage theft.

**Removing the restrictions on unions' right of entry to workplaces and allowing them stronger powers of inspection can significantly facilitate identifying and uncovering**

**wage theft.** Workers with union representation are better paid on average than those without and much less likely to have their wages stolen.<sup>9</sup>

- 5.6. Empowering workers to speak up against wage theft is as important as monitoring compliance. As wage theft disproportionately affects migrant workers, educating them about their workplace rights and removing the barriers they face against reporting wage theft can help curtail the dodgy business practice of maximising profits by exclusively employing migrant workers and underpaying them.
- 5.7. There are many barriers to migrant workers seeking remedies to wage theft. One of them is visa-specific work and residency restrictions. For example, temporary skilled visas are directly linked with employer sponsorship and can be cancelled after their holders lose jobs unless they find another sponsor in 60 days. This condition does not exempt circumstances where workers lose jobs due to employers' abuse, making it difficult for workers on these visas to fight against wage theft for fear they lose not only their jobs but also their livelihood and right to residency. On the other hand, Working Holiday visa holders must complete a prescribed minimum period of government-specified work to be eligible to apply for extensions on their visas. Some employers take advantage of the condition and commit wage theft against Working Holiday Makers as they have little alternative but to endure exploitation.
- 5.8. In addition, there is no mechanism for temporary visa holders to maintain their lawful status in Australia while they pursue employment-related proceedings which often take longer than the validity of most temporary visas. Another barrier is the fear of harming their chances to continue living in Australia by reporting wage theft. Migrant workers often do not have clear information about their entitlements or Australian migration schemes and worry that any records of legal procedures might ruin their prospects of acquiring permanent residency. Although the FWO assures that a breached temporary visa with work rights will not be

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<sup>9</sup> Daehoon Nahm, Michael Dobbie, and Craig MacMillan, "Union Wage Effects in Australia: An Endogenous Switching Approach," *Applied Economics* 49, no. 39 (2017): 3927–42.

cancelled where workers request the FWO's assistance, the assurance protocol does not guarantee that there be no adverse action in assessing the workers' subsequent visa applications.

- 5.9. **A clear and strong firewall between the Fair Work Ombudsman and the Department of Home Affairs can encourage migrant workers to speak up.** Where there is evidence that temporary visa holders have become non-compliant with their visa conditions due to exploitation at workplaces, a revision to the Department of Home Affairs' visa cancellation policy is necessary to reduce the risk workers bear when reporting wage theft. In addition, **introducing a bridging visa to enable temporary migrant workers with pending workplace claims to extend their stay can help them report wage theft.** Ultimately, a comprehensive revision to the temporary migration program is required to protect migrant workers' workplace rights.

## 6. Effective means of recovering unpaid entitlements and deterring wage theft

### 6.1. Monitoring of compliance

- a. The certainty of being caught and getting punished is a powerful deterrent. Studies show that frequent monitoring and regulation of compliance is the most effective way to increase the perceived certainty of being caught.<sup>10</sup> Non-compliance with workplace laws becomes a cost-saving option for employers only when there is no one to monitor their compliance.
- b. **The FWO should be able to investigate wage theft allegations instead of offering mediation and undertake more litigations against non-compliant employers.** The FWO should be provided with the same information gathering powers as other business regulators such as the Australian Competition and Consumer Commission.<sup>11</sup> Funding of the FWO should be substantially increased to ensure frequent monitoring and regulation of compliance.
- c. The efficiency of the FWO's operation can be enhanced when communities cooperate with the FWO and provide it with intelligence. Trade unions that represent workers and defend workplace rights are the best equipped to survey workplaces and detect the signs of wage theft. **The power for inspection of workplace laws compliance should be restored to trade unions within their industrial coverage.** Trade unions' entry power will not only

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<sup>10</sup> Daniel S. Nagin, "Deterrence in the Twenty-First Century," *Crime and Justice* 42, no. 1 (2013): 199–263.

<sup>11</sup> Migrant Workers' Taskforce, *Report of the Migrant Workers' Taskforce* (2019), 92.

facilitate the FWO's operation but also help ensure that employers remain updated and reminded of their workplace responsibilities.

## 6.2. Advantage to compliance

- a. The federal government, state governments, and local councils are responsible for promoting the rule of law and improving the quality of life in local communities. It is essential that governments and councils demonstrate their commitment to fairness by not engaging with non-compliant businesses.
- b. When governments and councils enter into contracts for a range of goods, services and works needed to deliver services and infrastructure to communities, **procurement practices can be modified to ensure that public contracts are only awarded to those businesses that do not engage in wage theft**. When engaging with governments and councils, non-public sector businesses with 100 or more employees in Australia should supply with their tender submission a letter of compliance, which can be issued by the FWO.

## 6.3. Penalties for non-compliance

- a. Increasing the cost of non-compliance can demonstrate the government's will to curb wage theft and subsequently deter contraventions. As employers perceive the risk of getting caught as 'a cost of doing business', increasing the cost with higher penalties can also work as deterrence.
- b. **Criminal sanctions should be introduced against serious forms of wage theft** as recommended by the Migrant Workers' Taskforce.<sup>12</sup> The onus of proof should be reversed when employers have breached payslip and record-keeping obligations. Falsifying or failing to keep employee records should also be criminalised.
- c. The penalties for wage theft should include both fines and imprisonment and be proportionally applied in reference to the number of instances of each contravention made, number of workers affected, and the length of period over which contraventions are made. In accordance with the increased maximum penalties as suggested in the Treasury Laws Amendment Bill 2018, monetary penalties should be calculated as three times the value of the benefit obtained from contraventions when the value can be determined or 10 per cent of annual turnover when it cannot be determined.
- d. **Accessorial accountability should be extended to anyone who causes wage theft to occur or assists in the commitment of wage theft across supply chains and beyond.**

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<sup>12</sup> Migrant Workers' Taskforce, 88.

Those responsible for the corporate decisions or recklessness that facilitate the occurrence of wage theft throughout supply chains should be held accountable through the introduction of a positive duty of lead companies in complex supply chains to ensure compliance with workplace laws. Increased liabilities should be introduced for franchisors and holding companies, not only those who “knew or could reasonably be expected to have known that the contravention [by the franchisee entity or the subsidiary] would occur”<sup>13</sup> but also those who did not actively promote and monitor compliance among franchisees or subsidiary companies. In addition, penalties should be extended to both business owners and managers who are in control of decisions that lead to wage theft as well as labour hire users (i.e. hosts of labour hire workers).<sup>14</sup>

- e. Noting that wage theft is frequently facilitated by accounting and migration services, penalties should also be applied to accountants that fail to make inquiries into circumstances suspected of wage theft and to migration agents that knowingly facilitate employers to make fraudulent employment arrangements with migrant workers.
- f. There should be additional penalties for contraventions made disproportionately against migrant workers. Although the *Protecting Vulnerable Workers Act 2017* created some measures of protection for them by, for example, increasing penalties for serious contraventions and prohibiting employers from making unreasonable requirements to workers, they are only applicable to contraventions made “knowingly” and “systematically”.<sup>15</sup> Narrowly defined measures are likely to be inadequate and beyond the reach of many migrant workers who are engaged in small businesses or areas of industries where it is hard to prove contraventions.
- g. In addition, there is an urgent need to regulate and sanction employers knowingly influencing or coercing temporary migrant workers into breaching their visa conditions.<sup>16</sup> Some employers deliberately encourage migrant workers to breach their visa-specific work conditions (e.g. having their student visa-holding employees work longer than the allowed 40 hours per fortnight) and subsequently underpay the workers with threats of having them deported for visa condition breaches.

#### 6.4. Criminal prosecution of wage theft

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<sup>13</sup> *Protecting Vulnerable Workers Act 2017*, s.558B(1)(d) and s.558B(2)(c).

<sup>14</sup> Migrant Workers Centre, *Report of the National Conference on Labour Hire Reform* (2019), 15.

<sup>15</sup> Stephen Clibborn and Chris F. Wright, “Employer theft of temporary migrant workers’ wages in Australia: Why has the state failed to act?,” *Economic and Labour Relations Review* 29, no. 2 (2018): 207-227, 218.

<sup>16</sup> Migrant Workers’ Taskforce, 124.

- a. Given the prevalence of wage theft, in order to supplement the FWO, **a wage theft inspectorate should be established that holds the authority to (a) inspect businesses' employment and payment records, (b) investigate any potential wage theft, and (c) press criminal charges.**
- b. The inspectorate should comprehensively define wage theft to extend the protection of wages to all workers who are engaged to be remunerated in exchange for their labour, regardless of their 'employee' status or migration status. It should take into account contraventions caused by recklessness, negligence, or omission as well as those deliberately made in order to rectify the wrongful benefits employers gain from contraventions and to encourage better business practices and diligent compliance.
- c. The inspectorate should commence criminal proceedings when civil recovery through the FWO fails. It should allow trade unions to have recognised standing to bring wage theft matters to court, represent workers, including temporary migrant workers who have left Australia, and file representative proceedings.

#### 6.5. Additional remedies for migrant workers

- a. There are many barriers to migrant workers seeking remedies to address wage theft. One of the primary barriers is the fear of harming their chances to continue living in Australia by reporting wage theft. Migrant workers often do not have clear information about their entitlements or Australian migration schemes and worry that any records of legal procedures might ruin their prospects of acquiring permanent residency.
- b. **A clear and strong firewall between the Fair Work Ombudsman and the Department of Home Affairs should be created** by making comprehensive improvements to the existing Assurance Protocol to protect wage theft victims and whistle-blowers. When a migrant worker files claims for wage theft, any breaches of visa-specific work conditions suspected or identified should not provide a ground for cancelling the worker's current visa or denying a subsequent visa.
- c. **A bridging visa should be established to authorise temporary migrant workers who have workplace claims pending to stay in the country until the claims are resolved.** Ultimately, a comprehensive revision to the temporary migration program is required to protect the workplace rights of workers on temporary visas.
- d. **The FWO and the proposed wage theft inspectorate should be readily accessible to temporary migrant workers and non-English-speaking workers** who are likely to experience wage theft at a higher rate. The police should not be involved in the investigations or prosecutions of wage theft against migrant workers. Police presence is

likely to be intimidating and could defeat the purpose of obtaining justice for migrant workers.

- e. **The Fair Entitlement Guarantee should be redesigned to function as a workplace rights protection rather than a social security measure.**<sup>17</sup> The instrument protects employees when their companies file for bankruptcy by paying them up to 13 weeks of unpaid wages and entitlements as well as redundancy payments, but the *Fair Entitlements Guarantee Act 2012* currently limits the protection to Australian citizens and permanent residents. In other words, temporary migrant workers who have already contributed to the national economy and the cost of operating the scheme have no recourse at all if their employer files for insolvency. Many migrant workers express their loss of hope over the Australian justice systems when they find their employers continue to have thriving businesses through illegal phoenix activities.<sup>18</sup> The Fair Entitlements Guarantee should be extended to all workers including migrant workers on temporary visas.
- f. **Civil society organisations including trade unions, migrant community organisations, and community legal centres should be assisted with adequate funding to be able to extend their services to migrant workers.** Many migrant workers stay away from government authorities for fear of any potentially negative impact on their residency. A community-based response is likely to be more effective in identifying cases of wage theft and educating migrant workers of their rights.

## 7. Conclusion

- 7.1. Unlawful underpayment of workers' wages and entitlements is a growing concern and incurs significant costs to the Australian Government and the general public.
- 7.2. The MWC supports the Government's view that there is a special need to improve protections for migrant workers. The prevalence and disproportionate impact of wage theft against migrant workers is now at the extent of distorting Australia's job market and harming its reputation globally. The MWC reiterates the point that eradicating the unjust and discriminatory practice of exploiting migrant workers requires a comprehensive revision to the temporary migration schemes.

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<sup>17</sup> Migrant Workers' Taskforce, 98.

<sup>18</sup> The Guardian, "Legal loophole leaves migrant workers with thousands of dollars in unpaid wages" (30 September 2019), <https://www.theguardian.com/australia-news/2019/sep/30/legal-loophole-leaves-migrant-workers-with-thousands-of-dollars-in-unpaid-wages>.

7.3. The MWC has sought to focus this submission on a particular issue of wage theft as requested and summarized its recommendations as presented in the box below. It would be pleased to provide the Senate Economics References Committee with further assistance in relation to protecting migrant workers.

**Summary of recommendations:**

1. Wage theft should be comprehensively defined to include any underpayment, withholding, or misappropriation of the wages and entitlements.
2. Compliance monitoring and regulation should be strengthened through increasing funding of the FWO and restoring trade unions' entry powers for inspection.
3. Public contracts should not be awarded to businesses that engage in wage theft.
4. Penalties for wage theft should be proportionally applied in reference to the number of instances of each contravention made, number of workers affected, length of period over which contraventions are made. Criminal sanctions should be introduced against serious forms of wage theft conducted in systemic manners.
5. Accessorial accountability should be extended to anyone who causes wage theft to occur or assists in the commitment of wage theft across supply chains and through the provision of accounting and migration services.
6. A wage theft inspectorate should be established that holds the authority to (a) inspect businesses' employment and payment records, (b) investigate any potential wage theft, and (c) press criminal charges.
7. Additional penalties should be applied for contraventions made disproportionately against migrant workers and for practices of knowingly unduly influencing, pressuring, or coercing temporary migrant workers in breach of their visa conditions.
8. The Fair Entitlement Guarantee should be extended to workers on temporary visas.
9. A clear and strong firewall between the Fair Work Ombudsman and the Department of Home Affairs should be created by making comprehensive improvements to the existing Assurance Protocol.
10. A bridging visa should be established to regularise stay of migrant workers who have workplace claims pending. Any breaches of visa-specific work conditions by a migrant worker filing claims for wage theft should not provide a ground for cancelling the worker's current visa or denying a subsequent visa.