

# Wage Theft: The exploitation of workers is widespread and has become a business model

Submission by the Australian Council of Trade Unions to the Senate Economics Committee of the Australian Parliament Inquiry into the Unlawful Underpayment of Employees' Remuneration

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## Definitions and Abbreviations

FW Act: *The Fair Work Act 2009* (Cth)

FWC: The Fair Work Commission

FWO: The Fair Work Ombudsman

RRO: Remuneration Related Obligation

## Executive Summary

Wage theft has reached epidemic proportions. No worker should ever have their wages stolen, yet it is a widespread and increasingly commonplace occurrence.

This submission will show that the circumstances and causes which give rise to wage theft are complex and multi-variate.

The environment in which wage theft has thrived is one where there has been a continuing policy failure to empower the social institution most capable of addressing the crisis – the union movement – to do so. Trade unions need greater powers to enter workplaces, obtain information and, investigate employer compliance, in order to be able to identify and resolve instances of wage theft.

The present system does not lend itself to resolving wage theft where it occurs and is detected. The FWC does not have vested in it the jurisdiction to deal with wage theft, the courts are expensive and inaccessible to ordinary workers and, there is no dedicated Commonwealth industrial court.

The current penalties for wage theft are inadequate and do not have sufficient deterrent effect.

There is no single measure which will fix the wage theft crisis. Accordingly, this submission makes a number of recommendations, all of which are needed to put in place a system of regulation and associated compliance which will help workers and their unions in addressing wage theft, rather than stifling their ability to do so.

The recommendations that the ACTU makes are:

<b>Recommendation 1.</b>	Amend the FW Act to make the notice requirements for right of entry less restrictive, in particular by enabling permit holders to enter a site without being required to provide 24 hours' notice.
<b>Recommendation 2.</b>	<p>Provide trade unions with improved rights of entry, including access to records by:</p> <ul style="list-style-type: none"> <li>• Providing trade unions with the right to inspect the records of former employees;</li> <li>• Removing the restrictions on trade unions accessing “non-member records” directly (i.e. without an FWC application) through right of entry;</li> <li>• Requiring employers to have all employment records at a place of work or head office, both of which are accessible by a union official, including electronically.</li> </ul>
<b>Recommendation 3.</b>	Impose a penalty on a person who provides false or misleading documents to a permit holder exercising right of entry
<b>Recommendation 4.</b>	Extend the ability to issue a compliance notice (currently provided by FW Act s 716 to FWO Inspectors) to permit holders.
<b>Recommendation 5.</b>	Expand the presumption brought about by <i>the FW Act</i> s 557C to apply to trade union right of entry, such that an employer who fails to provide records, or otherwise comply with right of entry provisions will have the burden of disproving allegations of wage theft.
<b>Recommendation 6.</b>	<p>That protections be inserted to sections 340 and 346 of the FW Act. The new provisions would be along the following lines:</p> <ul style="list-style-type: none"> <li>• 340(3) A person must not engage in conduct that has or is likely to result, directly or consequentially in impeding, hindering, preventing or discouraging a person from exercising a workplace right.</li> <li>• 346(2) A person must not engage in conduct that has or is likely to result, directly or consequentially in impeding, hindering, preventing or discouraging a person from engaging in industrial activity.</li> </ul>

<b>Recommendation 7.</b>	Review the taxation treatment of wages repaid to workers following incidences of wage theft, to ensure that they are treated no less favourably than if the wages owing were paid initially as due.
<b>Recommendation 8.</b>	Extend the existing provisions which sanction involvement in a contravention (see FW Act s 550) to capture all individuals and other parties (such as accessories) who participate in or create an environment of wage theft, such as (but not limited to) franchisors, advisors, head contractors and other supply chain participants.
<b>Recommendation 9.</b>	<p>Create the following provisions to regulate supply chains:</p> <ul style="list-style-type: none"> <li>• An obligation for principal contractors to obtain certification from subcontractors that wage theft and other contraventions have not occurred and, are not occurring; and to withhold payments where no certification is received.</li> <li>• Creation of an offence of knowingly giving a false certification.</li> <li>• Extension of liability for wage theft and other contraventions to principal and other contractors in supply chains where certification is not received or, where the principal contractor had reason to believe that the certification provided was false.</li> </ul>
<b>Recommendation 10.</b>	Create a simple, affordable, and accessible means for workers to pursue wage theft claims in a timely manner through the establishment of an Industrial Court co-located with the FWC; vesting such powers in the FWC as are necessary to assist with resolving wage theft matters, and a pathway for a wage-theft claim initiated in the FWC to be resolved in the Industrial Court. Further consider the creation of industry-specific tribunals to deal with wage theft (such as the Victorian Building Industry Disputes Panel).
<b>Recommendation 11.</b>	<p>Increase the penalties which a court can impose in the case of wage theft or other contraventions by:</p> <ul style="list-style-type: none"> <li>• Removing the distinction between a “serious contravention” (see FW Act s 557A) and other RRO related contraventions.</li> <li>• Setting the penalty for RRO related contraventions at the current penalty level for Serious Contraventions.</li> </ul>

	<ul style="list-style-type: none"> <li>Continuing to allow courts to apply discretion, taking into account a range of factors, when deciding on the appropriate penalty.</li> </ul>
<b>Recommendation 12.</b>	<p>Create criminal offences in relation to wage theft that:</p> <ul style="list-style-type: none"> <li>Are on the basis of strict liability, with a maximum penalty of \$1,000,000 for a corporation and \$200,000 for an individual; and</li> <li>Sanction misleading or deceptive conduct in relation to wage theft with a penalty of \$10,000,000 for a corporation and \$2,000,000 and/or up to 5 years' imprisonment for an individual.</li> </ul>
<b>Recommendation 13.</b>	<p>Consult with the states about the operation of any Commonwealth criminalisation of wage theft, and the interaction with existing or proposed state legislation.</p>
<b>Recommendation 14.</b>	<p>Government should require and monitor compliance with core labour, superannuation and taxation standards by:</p> <ul style="list-style-type: none"> <li>Including core standards in tender documents and contract requirements, and ensuring that the standards form a critical component of how tenders are assessed and contracts are managed;</li> <li>requiring suppliers to demonstrate historical and ongoing compliance with core standards;</li> <li>immediately repealing the <i>Code for the Tendering and Performance of Building Work 2016</i> (Cth) and any other similar code which restricts the rights of workers and unions, or acts as a barrier to the investigation of wage theft;</li> <li>introducing a procurement compliance framework which places a positive emphasis on complying with wage and other industrial obligations and (partially through fines arising from that framework) funding a compliance unit to ensure suppliers meet core standards and contract requirements;</li> <li>mandating training of government procurement officers on the compliance framework and standards; and</li> <li>introducing key performance indicators (KPIs) and incentive structures that reward compliance with the standards and improvements in performance.</li> </ul>

<b>Recommendation 15.</b>	Government should be a model employer and work co-operatively with trade unions to ensure that wage theft does not occur within its own workforce.
<b>Recommendation S1.</b>	Unions should be given improved powers to inspect employers' records of superannuation payments.
<b>Recommendation S2.</b>	Superannuation should be paid at the same time as wages, with the date of the payment recorded on pay slips.
<b>Recommendation S3.</b>	Superannuation Guarantee payment provisions should be inserted into the National Employment Standards. The NES provisions should include that Superannuation is payable to all workers (including contractors and those in the "gig economy"), on every dollar earned (including leave loadings, allowances etc.), and on paid and unpaid parental leave.
<b>Recommendation S4.</b>	Wages and superannuation recovery systems should be improved and made more efficient, affording more rights to workers and their unions to initiate recovery action. This should be achieved by vesting the Industrial Court we have called to be established in Recommendation 10 to be vested with jurisdiction to deal with unpaid superannuation claims.

## Introduction

### About the ACTU

Since its formation in 1927, the ACTU has been the peak trade union body in Australia. There is no other national confederation representing unions. For more than 90 years, the ACTU has played the leading role in advocating in the Fair Work Commission, and its statutory predecessors, for the improvement of employment conditions of employees. It has consulted with governments in the development of almost every legislative measure concerning employment conditions and trade union regulation over that period.

The ACTU consists of affiliated unions and State and regional trades and labour councils. There are currently 39 ACTU affiliates. They have approximately 2 million members who are engaged across a broad spectrum of industries and occupations in the public and private sector.

### Why we have a wage theft problem.

Wage theft was not invented recently. However, awareness of wage theft has recently exploded. This has occurred both because wage theft is now more prevalent than ever (as this submission, and the submissions of ACTU affiliates show) as well as because there is now greater reporting of wage theft.



Before we turn to discussion of the nature and extent of the wage theft problem – which this submission does – it is pertinent to consider how this problem arises, which will in turn inform how we might address it.

Wage theft occurs in a regulatory regime which allows for it to flourish. The Fair Work Ombudsman will never have enough resources to take on the full responsibility of ensuring compliance with workplace laws, and the employers who commit wage theft know this. The union movement – whose singular focus is to advance the interests of workers – has the desire to identify and address wage theft, and does so where it can; but, cannot do so effectively without greater rights and powers. The specific ways in which trade unions’ rights to enter workplaces and identify, investigate and address wage theft must change are discussed further under the heading: 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;.

Compounding the problem is that many workers are find themselves in employment situations that are precarious (i.e, such as casual or temporary visa workers, labour hire or sham contracts) and are hesitant to enforce their rights. Furthermore, the protections for workers from adverse action are weak. There are loopholes where employers can avoid liability far too easily (employers just have to show they had some other non-prohibited reason for taking action). The inadequacy of protections for workers who raise complaints of wage theft is discussed further under the heading: Ensuring adequate protections from adverse treatment for those exposing wage/superannuation theft.

If a worker does complain about a breach of workplace law, they face significant costs and risks. Despite popular misconceptions, workers cannot go to the FWC for a binding order for the back payment of unpaid wages. The only authority that can issue a binding order in this respect is a Court. This means an up-front filing fee in the range of \$675 (Federal Circuit Court) to \$1,410 (Federal Court), plus a setting down and daily hearing fee of \$805 (Federal Circuit Court) to \$2,815 (setting down) or \$1,115 (daily) (Federal Court). The fees are even greater where a union makes the application on behalf of workers. Even the considerably lower “small claims” fees (of \$240 or \$390, depending on the size of the claim) would be considered prohibitive to many workers. A further disadvantage of the small claims regime is that this process does not expose employers who engage in wage theft to the sanction of penalties; meaning that the highest consequence is essentially to have to make payments of wages that should have been made in the first place. Post-WorkChoices the large number of workers who previously had access to informal state-based enforcement mechanisms no longer had that option.

It is rare for an individual employee to commence recovery proceedings against their current employer. This fact is instructional in considering the assessment that each worker makes about whether the real risks and substantial costs associated with suing their employer are worth the effort.

This submission deals with the difficulties that workers face in seeking justice and proposes a targeted solution to the wage theft epidemic under the heading: Holding Contraveners to account – A simple means of redress

### **The many forms of wage theft**

Wage theft goes beyond paying under-award wages and also includes the following:

- Failing to pay superannuation;
- Failing to pay for breaks;
- Failing to pay overtime;
- The compulsory use of employer-provided staff accommodation to claw back wages;
- Withholding of wages on the basis that it will put visa status at risk;
- Not paying for trial or training periods;
- Misclassifying workers as independent contractors;
- Deliberate employee misclassification;
- Not paying personal, annual or paid leave;
- Not paying appropriately for higher duties;
- Failing to meet basic worker entitlements in family run businesses;
- Phoenixing-type activity, where a firm goes into administration or liquidation to avoid having to pay employee entitlements, then re-emerges under a different legal structure but with the same or related individuals in control;
- Inappropriate deductions from workers' wages such as inflated rent and transport costs;
- Charging employees for PPE;
- Paying 'all-inclusive' flat hourly or daily rates of pay without regard to specific entitlements
- Non-payment of shift allowances or penalty rates;
- Failing to deduct or remit taxation amounts;
- Requiring the employee to pay an 'employment bond';
- Compulsory medicals and drug testing at nominated medical centres with inflated medical fees; and
- Failing to pay for 'on call' periods.

- Annualised wages being set, or falling, below award or agreement minima, and/or not taking into account additional hours.
- Employers choosing not to comply with legal precedent as set by lower courts where these favour workers (including full bench decisions) until the High Court determines the matter;
- Employers not honouring grandfathered agreements with better set of conditions (especially in redundancy context), instead choosing to revert to NES minimums
- Failure to pay allowances;
- Incorrectly asserting all sort of conduct as “serious misconduct” so as to deprive workers of notice pay;
- Small businesses trying to avoid redundancy pay even though many Awards require payment even for small businesses;
- Individual Flexibly Agreements often used to undercut overtime pay as IFAs are oftentimes under-scrutinised;

Whilst the above is not an exhaustive list, much of this much of this deliberate behaviour from employers has become commonplace.

This submission further discusses the nature and extent of the wage theft problem in the section: The Forms of Wage Theft.

### **The normalisation and prevalence of wage theft**

In some sections of the workforce underpayment of wages has become routine. Employers are unashamedly advertising below award rates for vacant positions. This seedy underbelly of exploitation and wage theft has been brought to light through high profile public exposés of worker exploitation. Workers have been threatened in order to discourage complaints, with employers taking advantage of workers who are in vulnerable positions.

A recent audit of job advertisements with particular language criteria conducted by Unions NSW found 78% of businesses advertised rates of pay below the minimum Award wage<sup>1</sup>. The current

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<sup>1</sup> ‘Lighting up the Black Market: enforcing minimum wages’ (Report, Unions NSW)

approach to redressing worker underpayment and Fair Work Act protections is not working. The system relies heavily on individuals reporting underpayments. There is no recognition of how difficult and dangerous it is to take this first step. Many workers are scared to come forward with a complaint.

Some industry and legal structures normalise and perpetuate underpayment. The FWO website points to a convoluted and intimidating process including mediation and “self-help” as the typical response to a report on underpayment.

Entire segments of the labour market have become unregulated ‘local wage markets’, in which legal minima are ignored by employers who instead pay the “going rate” for their local industry.

Unions do not have the necessary rights to properly access these workplaces in order to investigate and rectify underpayments. A new approach to uncovering and investigating underpayment is required. Unions need proper access to workplaces, workers, and records, in order to identify, uncover and investigate wage theft and other contraventions and represent and organise workers to collectively enforce their rights. Penalties for employers found to have underpaid their staff should be significantly increased.

### **The wage theft problem: The exploitation of workers has become a business model**

The ACTU is concerned that the exploitation of workers has become systemic in many sectors of the economy and that non-compliance with workplace laws has become commonplace. Their key drivers include the following;

- market pressure (for cost competitive or windfall profit motives);
- low likelihood of being caught;
- low consequences of being caught.

Successful solutions must address each of these drivers. They must not be piecemeal but rather a comprehensive suite of policies.

Although not confined to sectors of the economy that include low paid workers, many low paid workers are presently in industries with poor levels of compliance, such as: Agriculture, commercial cleaning, meat processing, hospitality, retail and accommodation - all of which have a particularly high reported incidence of wage theft and exploitation.

When workers are cheated out of even a small percentage of their income, it can cause major hardships like being unable to pay for rent, early childhood education, or put food on the table. Wage theft from workers is also detrimental to society, as it contributes to widening income

inequality, wage stagnation, and declining living standards—interrelated problems that drive inequality in our society.

Businesses like 7 Eleven, Caltex, Pizza Hut, Dominos, Bunnings, Woolworths and Commonwealth Bank and others must take responsibility for their flawed business models which allow wage theft and other exploitative practices to flourish. What is clear from these recent wage scandals is that business size is not a guarantee against widespread breaches of workplace laws. Neither is commercial success nor being a common household name or a brand that is present on many high streets. Furthermore, employers that do the right thing and pay their employees the proper level of pay and entitlements should not be placed at a competitive disadvantage relative to employers who regularly partake in these practices.

Wage theft as a business model is further considered in: Whether Wage Theft is a “cost of doing business”.

## Response to the Inquiry Terms of Reference

### The cost of wage and superannuation theft to the national economy;

The costs of wage and superannuation theft to the national economy is significant.

According to estimates from PwC as much as \$1.35bn in wages are underpaid each year. Estimates from accounting firm PwC suggest underpayment affects as much as 21 per cent of employees in high-risk industries such as construction, healthcare, retail, accommodation and food service, and as much as 13 per cent of the total workforce.

Construction is the biggest risk area, with as much as \$320m in annual underpayment of wages, according to the modelling of Fair Work Ombudsman data.

However, this may be an underestimate as for Queensland alone estimates suggest almost \$2.5 billion stripped from workers and the Queensland economy every year. The Inquiry into wage theft in Queensland estimated that over 437,000 Queensland workers are not receiving their full wages, and that a resulting five percent loss in income for these individuals would amount to an aggregate \$1.22 billion loss annually. In terms of superannuation, the annual loss associated with the underpayment or non-payment of superannuation has been estimated at \$1.12 billion for Queensland. Further, annual reductions in consumer spending in Queensland and in federal tax revenue have respectively been estimated at \$100 million and \$60 million. Taken together, these losses could amount to almost \$2.5 billion stripped from the Queensland economy every year.

Given Queensland constitutes around 19% of Australia's labour market in terms of the number of persons employed, if the rate of underpayments is similar in Queensland to the rest of the country, or if we assumed conservatively at half the rate, the costs to the Australian economy could be roughly between \$6 – \$12 billion a year including superannuation and wage theft.

Even this could be an underestimate because as we shall see below ISA forecasts that \$5.9 billion is stolen each year in superannuation alone and this is without compounding the benefits to workers savings over time.

### **Unpaid superannuation**

Each year \$5.9 billion is stolen from 2.98 million workers in superannuation<sup>2</sup>. That is 1 in every 3 workers. Unpaid superannuation compounds over time. After ten years, Australia's stolen super equates to \$102 billion dollars in lost retirement savings. That's an average of \$2,000 per person per year underpaid. Underpayment of super is associated significantly reduced retirement outcomes for workers. This means that people are not just losing occasional payments, they're getting ripped off systemically. The ISA "Super Scandal: Unpaid Super Guarantee in 2016-17" report published in 2019 stated the following;

*'In 2016-17 there was on average, a 50 per cent difference in the super balance of a person underpaid compared to a person of similar age and income who received their correct super entitlements. Across most age and income cohorts the difference adds up to tens of thousands of dollars less in their super nest eggs.'*<sup>3</sup>

When workers' wages are unduly suppressed, then the normal flow of employer contributions into their superannuation accounts is also constrained. They will have smaller superannuation balances when they retire and will consequently experience a lasting reduction in post-retirement incomes. Moreover, governments will share a significant portion of the resulting damage: they

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<sup>2</sup> 'Super Scandal: Unpaid Super Guarantee in 2016-17' (Report, Industry Super Australia, 2019) 3.

<sup>3</sup> Ibid.

will collect less in taxes on superannuation contributions and investment income and, will pay out more in means-tested Age Pension benefits (since workers' superannuation incomes will be smaller). These significant, lasting consequences from wage-suppression strategies should be documented and considered. They provide a powerful motive for all stakeholders to challenge employers' wage-cutting initiatives. They also should be of direct concern to superannuation trustees and administrators<sup>4</sup>

This submission further discusses the problem of unpaid Superannuation under the heading: Superannuation theft.

### **The forms of and reasons for wage theft and whether it is regarded by some businesses as 'a cost of doing business';**

#### **The Forms of Wage Theft**

The reality of wage theft encompasses a spectrum of behaviours which resist being categorised simplistically – for instance as a binary of employers who make mistakes and employers who deliberately exploit their workers.

For example, an employer who does not take reasonable steps to properly inform themselves of their obligations under a modern award might not neatly fit in within the common conception of a person who knows what they should do but chooses not to do it. However, by choosing to remain ignorant, neither could they be said to have made a genuinely unintentional mistake. Ignorance, recklessness, wilful blindness and negligence are among the states of mind and knowledge that need to be within in the contemplation of the compliance and enforcement framework. At present, as a result of the *Vulnerable Workers* amendments, the civil penalty framework in the FW Act makes some effort to distinguish between contraveners on the basis of

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<sup>4</sup> Jim Stanford, 'The Consequences of Wage Suppression for Australia's Superannuation system', Report (Centre for Future Work, 2017)

whether or not they “knowingly contravened”<sup>5</sup> particular provisions. Where that case is made and the “systematic conduct” test is also satisfied<sup>6</sup> there is a ten-fold increase in the *maximum* penalty which can be awarded. However, this creates a binary system rather than accommodating a continuum. Whatever other changes are made to the sanctions applying to wage theft, it is important that the civil penalties are broad enough to be applied to the full range of behaviour that constitutes wage theft. It is highly artificial to confine the highest level of penalty to the worst cases of knowing contravention, when the worst cases of wilful blindness (for example) would clearly lie somewhere above the maximum penalty for an “ordinary” contravention.

A further factor for consideration is the approach that employers take to rectifying underpayments. Again, there is a myriad of employer behaviour attending the discovery of wage theft. We suggest that the willingness to voluntarily rectify such a mistake and the extent of rectification may vary depending on how the mistake is identified and by whom. It is not difficult to imagine that an employer’s assessment of how its best interests are served in responding to such a mistake may vary depending on who identifies and raises it with them. A casual employee, or an employee on an employer sponsored visa - both of whom possess minimal capacity to navigate the present enforcement framework and who bear a substantial economic risk from “biting the hand that feeds” - could reasonably be assessed by their employer as

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5 FW Act s 557A. Note: The language of “knowingly contravened” was introduced via a late amendment (replacing “deliberate” in the first reading) and is an attempt to adopt the concept of “knowingly concerned” from the accessorial liability framework. The prediction was that a Court would find that an employer had, for example, “knowingly contravened” obligations regarding hourly wages if the employer had knowledge of the “essential elements” of the contravention such as that an award applied to the relevant work, that it provided an hourly rate of pay of the performance of that work and that the hourly rate was not paid.

6 FW Act s 557A(1)(b). Note: It is also notable that under section 557A(1) there must first be a contravention before there can be a serious contravention. These “source” (for want of a better description) contraventions to which section 557A applies all impact on other persons, rather than being mere administrative requirements. Therefore, where s 557A(1)(b) refers to an “other” person or persons (“the person’s conduct constituting the contravention was part of systematic pattern of conduct relating to one or more other persons”) it is arguably referring to persons other than the person to whom the source contravention relates. In an underpayment scenario, this would preclude an underpayment of single employee ever reaching the threshold of “serious contravention”.



warranting a more defensive response than the more contrite response that may be offered to a union or regulatory agency with statutory compliance enforcement powers. This seems to have been recognised in the Coalition’s 2016 election policy on Protecting Vulnerable Workers, which referred to increased regulatory powers to “...overcome the culture of fear that often prevents vulnerable workers from coming forward...”

Two examples are pertinent here in showing the complexity of attempting to neatly categorise wage theft. The first example involves Woolworths, and the second Spotless. Both show a level of resistance to rectifying wage theft once it is identified by workers or their union.

In late 2019, Woolworths admitted to underpaying thousands of its workers up to a total of \$300 million.<sup>7</sup> The underpayments arose because annualised salaries struck using an employment contract were set at levels below the relevant statutory industrial instrument. In one case, raised on behalf of an individual employee, Woolworths is reported as having:

- Denied liability;
- Only partially remedied the wage theft;
- Attempted to settle the wage theft for less than the true amount owing, and on the condition that the employee do not discuss the wage theft with other workers or the Fair Work Ombudsman;<sup>8</sup>

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7 Peter Ryan and David Chau, ‘Woolworths investigated after admitting it underpaid 5,700 staff up to \$300 million’ *ABC News* (online), 31 October 2019, <<https://www.abc.net.au/news/2019-10-30/woolworths-underpays-5700-staff-up-to-300-million-dollars/11652656>>.

8 Michael Bachelard and Ben Schneiders, ‘Woolworths pay scandal: how the retail giant played hardball’, *The Sydney Morning Herald* (online), 1 November 2019, <<https://www.smh.com.au/business/companies/woolworths-pay-scandal-how-the-retail-giant-played-hardball-20191101-p536lk.html>>.

Woolworths' CEO denied that the non-payment of \$300 million to its workers was wage theft, and instead blamed the "complexity" and lack of flexibility of the industrial relations system.<sup>9</sup> In truth, Woolworths is a large-scale employer with the resources to retain internal HR and IR specialists, as well obtain external legal advice (which they did to defend the claim). While ACTU rejects the Woolworths arguments about complexity and asserts that the correct analysis of the situation is that Woolworths went to significant lengths to minimize its payments to employees without due regard for their legal entitlements, it is understood that Woolworths' engagement with the SDA since the liability was established has been constructive.

In 2018 and 2019 two cases were brought to the Federal Court involving the Spotless group of companies.<sup>10</sup> Both involved the company taking an interpretation of the law such that they did not pay severance pay to workers who were made redundant. The interpretation taken by Spotless Group was described by their National Human Resources Managers as follows:

'The general approach in the Spotless Group is that no redundancy is payable upon a termination of employment due to loss of contract as the longstanding ordinary and customary turnover of labour (OCTL) exception is relied on.'<sup>11</sup>

In both cases, the court rejected the Company's interpretation and held that severance payments should have been made. Both Spotless and Woolworths are well resourced corporate groups (with significant ability to procure legal and other expert advice), who strongly but unsuccessfully resisted initial underpayment claims. Concerningly, in both cases, the conduct which gave rise to the case occurred many years prior to the ultimate decision of the court.

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9 Sue Lannin, 'Woolworths says it has started paying back unpaid wages to workers, rejecting suggestions of 'wage theft'', *ABC News* (online), 16 December 2019, <<https://www.abc.net.au/news/2019-12-16/woolworths-agm-underpaid-staff-backpayments-have-begun/11804692>>; Michael Bachelard and Ben Schneiders, above n 8.

10 *United Voice v Berkeley Challenge Pty Limited* [2018] FCA 224; *Fair Work Ombudsman v Spotless Services Australia Ltd* [2019] FCA 9.

11 *United Voice v Berkeley Challenge Pty Limited* [2018] FCA 224 at [44].

The system is not too complex. If anything, it is easier to consider that the complexity arises from Woolworths' attempt to achieve the minimum level of compliance with industrial legislation and being mistaken as to where that minimum lay. Both of these examples show that the problem of wage theft does not end with identification. In many ways, the problem only begins at that point as well-resourced employers enjoy significant advantages over employees who are seeking to recover their fair legal entitlements.

To assume, from a policy point of view, that there are and only ever will be two "levels" of contraveners of RROs creates a risk that the regulatory output of that policy process will lack the flexibility to deal appropriately with the range of present or emerging contravening conduct.

The pervasiveness of wage theft is best shown through the magnitude and diversity of the employers who engage in it. In 2019 alone, the following major employers were amongst those who engaged in large-scale wage theft:<sup>12</sup>

- Woolworths
- Sunglass Hut
- Commonwealth Bank
- Subway
- Domino's
- The Australian Broadcasting Corporation
- Qantas
- Super Retail Group
- Michael Hill
- Bunnings

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<sup>12</sup> Samantha Dick, 'Shame File: The big businesses that ripped off workers in 2019', *The New Daily* (online), accessed 6 February 2019, <<https://thenewdaily.com.au/news/national/2019/12/29/wage-theft-businesses-2019/>>.

We can see below the extent of wage theft in Australia is not restricted to one industry or small business but in fact is widespread and has become normalised.

Recent examples of wage theft include:

<b>Coles</b>	The retailer announced it has underpaid \$20 million to managers of its supermarkets and liquor division over six years. A review found about 1 per cent of Coles' salaried workforce had been paid less than award rates <sup>13</sup> . An industry-wide payroll audit was initiated by the SDA in November 2019 and this work continues.
<b>Dinner by Heston</b>	A Melbourne restaurant linked to celebrity chef Heston Blumenthal is alleged to have underpaid workers to sum of \$4.5 million. The information was obtained from a leaked administrator's report. Employees of 'Dinner by Heston' were underpaid more than \$4 million in wages and another \$435,000 in entitlements <sup>14</sup> .
<b>Grill'd</b>	Fast food chain Grill'd has been accused of underpaying staff by as much as \$4.23 an hour under the guise of a 'traineeship'. While the traineeships were not compulsory, many workers have reported feeling pressured into the position. Ninety-two per cent of 370 current and former Grill'd workers

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13 'Coles Admits \$20 million in staff underpayments', *The New Daily (online)*, accessed 3 March 2020 <https://thenewdaily.com.au/news/national/2020/02/18/coles-staff-underpayments/>

14 Nicole Asher, 'Dinner by Heston at Melbourne's Crown Casino underpaid staff by more than \$4 million', *ABC News (online)*, 4 February 2020 <<https://www.abc.net.au/news/2020-02-04/dinner-by-heston-underpaid-staff-by-more-than-4-million-dollars/11928746>>.

	surveyed in 2018 by an Australian University Union student group reportedly said the traineeship was not worth it <sup>15</sup> .
<b>The ABC</b>	<p>In January of 2019, the ABC admitted that they may have been underpaying around 2,500 casual staff over the last six years. This was revealed after the ABC admitted that a casual employee in Brisbane was underpaid by \$19,000 in December 2018<sup>16</sup>.</p> <p>In November, the ABC confirmed that of the 2,575 individuals included in the underpayment review announced in January 2019, a total of 1,886 were found to have been underpaid.<sup>17</sup> The ABC's 2018-2019 annual report, released in October 2019, contained a \$22.98 million provision for the repayments.</p>
<b>Commonwealth Bank</b>	In December 2019 the Commonwealth Bank systematically underpaid staff \$53.1 million in unpaid entitlements. By the end of last year they had repaid approximately 41,000 current and former employees with \$13.2 million of back pay plus interest <sup>18</sup> .
<b>Sunglass Hut</b>	The Fair Work Ombudsman demanded that Luxottica Retail Australia, otherwise known as Sunglass Hut, pay back \$2.3 million to current and former

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15 Velvet Winter, 'Here's a running list of Australian businesses that have underpaid staff in 2019', *SBS news*, 5th November 2019 <<https://www.sbs.com.au/news/the-feed/here-s-a-running-list-of-australian-businesses-that-have-underpaid-staff-in-2019>>.

16 Ibid.

17 Stephanie Chalmers, 'ABC to begin repaying nearly 2,000 underpaid staff next month', *ABC*, 18 November 2019 <<https://www.abc.net.au/news/2019-11-18/abc-to-begin-repaying-underpaid-staff-next-month/11713928>>.

18 'Commonwealth Bank coughs up \$53 million in unpaid entitlements to staff', *SBS News* (online), 3th December 2019, <<https://www.sbs.com.au/news/commonwealth-bank-coughs-up-53-million-in-unpaid-entitlements-to-staff>>.

	<p>employees. Over 620 staff across Australia were underpaid, with reimbursements from failing to pay overtime rates ranging from \$4 to \$42,912. As of September 2019, Sunglass Hut has repaid \$1.5 million to 457 staff. Between 2010 and 2016, Sunglass Hut failed to agree in writing with its part-time workers on a regular pattern of working hours and days, in breach of the General Retail Industry Award. The company therefore failed to pay overtime rates for work performed outside regular hours<sup>19</sup>.</p>
<b>Bunnings</b>	<p>The homeware company issued a statement in September 2019 explaining the part-time workers had been underpaid superannuation. Bunnings refused to reveal how much the payments amounted to, although it is understood that a majority of affected workers are owed less than \$200 in unpaid super.</p>
<b>Chatime</b>	<p>\$731,648 in unpaid wages for 780 workers after a national investigation into emerging fast food, restaurant and café franchises. The Fair Work Ombudsman audited franchises that have recently commenced operations in Australia – Chatime, GongCha, Hot Star Chicken, PappaRich, Sushi Izu, Nene Chicken and The Sushi 79. Almost 80 per cent of the stores they were investigated breached at least one workplace law. More than 50 per cent of all businesses audited had underpaid staff. The most common workplace law breaches related to pay slip obligations, penalty rates and other minimum hourly rates of pay, and record-keeping<sup>20</sup>.</p>

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19 Fair Work Ombudsman, (Media Release, 'Sunglass Hut to back-pay 620 workers', 24 September 2019) <<https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/september-2019/20190924-sunglass-hut-eu-media-release>>

20 Fair Work Ombudsman, (Media Release, '\$730,000 recovered from popular food franchises', 18 December 2019) <<https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/december-2019/20191218-emerging-franchises-compliance-activity>>

<b>Woolworths</b>	Woolworths underpaid thousands of its workers as much as \$300 million over the past decade. However, the number of underpaid workers could be more significant depending on the outcome of its internal review – which will also cover its other brands Big W and Endeavour Drinks (which includes Dan Murphy's, BWS, Cellarmasters and Langton's). Woolworths estimated the one-off impact of the underpayment could be in the range of \$200 million to \$300 million before tax, given that the issue goes back as far as 2010 <sup>21</sup> .
<b>Subway</b>	\$81,638.82 in unpaid wages for 167 current and previous employees, following investigations into 22 Subway franchisees in October 2019. The FWO determined that 18 of the 22 Subway franchisees were not compliant with Australia's workplace laws <sup>22</sup> .
<b>Rebel Sport</b>	In February 2019 the umbrella group Super Retail Group that owns Rebel Sport, Supercheap Auto, BCF and more, admitted to underpaying managers by \$32 million. Underpayments took place over six years and affected around 3,000 current and former employees.
<b>7-Eleven</b>	Caught systematically underpaying thousands of workers and then, once caught, pretending to pay workers full wages but committing wage theft through requiring employees to pay back a portion of their wages in cash. 7-Eleven brought large scale non-compliance to national attention with a Fair

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21Peter Ryan and David Chau 'Woolworths investigated after admitting it underpaid 5,700 staff up to \$300 million', *ABC News (online)*, 30 October 2019 <<https://www.abc.net.au/news/2019-10-30/woolworths-underpays-5700-staff-up-to-300-million-dollars/11652656>>

22 Fair Work Ombudsman, (Media Release, 'Unpaid wages recovered for Subway employees', 1 October 2019) <<https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/october-2019/20191001-subway-sica-media-release>>

	<p>Work Ombudsman investigation that started in 2014. Not only was there evidence of underpayments but fraudulent records were kept by the franchisees. A franchise system meant that individual stores were the employers and liable for any sanctions for breaching workplace laws. The corporate brand as a franchisor was immune from prosecution as 7-Eleven was not the employer. The conciliatory approach that was adopted by the Fair Work Ombudsman in this case failed due to 7-Eleven failing to co-operate with any program intended to bring about a culture of compliance. A large number of employees on working visas also hampered the investigation as employees were too scared to speak for fear of deportation.<sup>23</sup></p>
<p><b>Pizza Hut and Dominos:</b></p>	<p>Recently the Fair Work Ombudsman activity in relation to Pizza Hut has been made public. Widespread non-compliance, including sham contracting, was attributed to the franchisees of this national brand. The Fair Work Ombudsman has issued compliance notices to recover wages for underpayments, infringement notices and formal letters of caution to Pizza Hut franchisees, ninety-two percent of whom were said to be non-compliant<sup>24</sup>.</p>
<p><b>MaDE Establishment Group</b></p>	<p>MaDE was recently caught underpaying staff by almost \$8 million, including unpaid overtime. The restaurant group were putting employees on low salaries and then pressuring them to work long hours with no overtime. The restaurant group also failed to pay superannuation to workers. The company was</p>

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23 Joshua Healy, "The Australian labour market in 2015" 2016, *Journal of Industrial Relations*, 58 (3)

24 'Remove franchises' incentive to "turn a blind eye", says Maurice Blackburn', *Workplace Express*, 27 April 2016



	required to make a \$200,000 “contrition payment” which was manifestly inadequate given the scale of underpayments. <sup>25</sup>
<b>Guara Nitai Pty Ltd:</b>	Guara Nitai operated a Coffee Club café in Brisbane and used the workers’ fear of deportation to undertake what was described as “gross exploitation” by Judge Jarrett of the Federal Circuit Court. The guest worker, a cook, was paid an amount owing for underpayment of wages and then required to withdraw the same amount and pay it back to the company director. Judge Jarrett imposed \$180,000 in fines against Guara Nitai Pty Ltd and its director <sup>26</sup> .
<b>Caltex</b>	In 2018, an audit of Caltex outlets found that 76 per cent of them were not compliant with providing employees with their proper entitlements. The audit found evidence of underpayment, failure to pay overtime and penalty rates and poor record keeping, with even some examples of falsification of records. Typically, it was young workers and workers from non-English speaking backgrounds who were most likely to be underpaid by the Caltex franchisees <sup>27</sup> . As a result of this audit Caltex have reportedly taken the decision to bring all of its service stations under direct control rather than use a franchise system. Franchising appears to be synonymous with wage theft for major brands in Australia. By using a franchise system, it appears that major brands have distanced themselves from actual payment of workers and therefore any level of responsibility for compliance.

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25 ‘George Calombaris’ MAdE Establishment underpaid workers \$7.8 million’, *ABC news (online)*, 19 July 2019, <<https://www.abc.net.au/news/2019-07-18/george-calombaris-made-establishment-backpays-underpaid-workers/11320274>>

26 ‘Café fined \$180,000 for "grotesque exploitation" of visa worker’, *Workplace Express*, 19 June 2017

27 Fair Work Ombudsman, ‘*Caltex Compliance Activity Report*’, March 2018

<b>Baiada</b>	Baiada owns the Steggles brand and had previously publicised supplying its product to KFC, Red Rooster, Woolworths and Coles. Baiada, therefore has certainly been associated with some high-profile national brands. Baiada had a practice of engaging labour hire companies that were far from reputable. FWO reports state that Baiada and its suppliers of labour were uncooperative with investigations. Exploitation was rife amongst a workforce that included overseas workers on working holiday visas. Record keeping was described by FWO as “inadequate, inaccurate and fabricated”. Baiada’s use of sham contractors was prolific amongst a production workforce where an objective assessment of the work performed would rule out any suggestion of such workers being independent contractors <sup>28</sup> .
<b>Touchpoint Media Pty Ltd</b>	Touchpoint Media is the subject of legal action by the Fair Work Ombudsman. It is claimed that Touchpoint Media Pty Ltd and its company director, Laurence Bernard Ward, are responsible for underpaying 23 young journalists by more than \$300,000. The highest amount owed to one journalist was almost \$50,000 <sup>29</sup> .
<b>Uber:<sup>30</sup></b>	A recent study by Jim Stanford at the Centre for Future Work entitled ‘ <i>Subsidising Billionaires: Simulating the Net Incomes of UberX Drivers in Australia</i> ’ found that, after taking into account all costs, but before paying income tax and superannuation contributions, the average Australian Uber driver is paid \$14.62 an hour, with many drivers receiving less. This is over \$4 an hour below Australia’s statutory minimum wage of \$18.93 per hour. That’s a loss of \$163.78 a week for a driver working 38 hours a week (it is clear that many Uber drivers work well in excess of that figure to make ends meet). It is

28 ‘Baiada required to engage HR specialist to report back to regulator’, *Workplace Express*, 26 October 2015

29 Mitchell-Whittington, A (2017) Queensland journalists allegedly underpaid more than\$300,000 Sydney Morning Herald, 4 August 2017

30 Jim Stanford, ‘*Subsidising Billionaires: Simulating the Net Incomes of UberX Drivers in Australia*’, (Report, Centre for Future Work, 2018)

<[https://www.futurework.org.au/innovation\\_or\\_exploitation\\_simulating\\_net\\_hourly\\_incomes\\_of\\_uberx\\_drivers](https://www.futurework.org.au/innovation_or_exploitation_simulating_net_hourly_incomes_of_uberx_drivers)>

also \$6 an hour below the base rate payable to drivers under the Passenger Vehicle Transportation Award 2010, and potentially equates to less than half the payments due to drivers under that Award once casual loading and penalty rates are taken into account (though Uber disputes these workers are employees at all). In defending against these claims Uber has pointed to the existence of surge charging. However, as Economist and Director of the Centre for Future Work Dr Jim Stanford points out:

'This 'surge' income cannot be relied on, since drivers have no control or knowledge when (or even if) this system will be activated. Moreover, as Uber drivers increasingly organise their work schedules around peak periods, and as the general population of drivers increases, then the likelihood that demand for drivers will exceed supply (hence triggering surge pricing) is further reduced... supplemental income from surge pricing is shrinking as a result of the growing supply of Uber drivers - many of whom concentrate their working hours in peak periods in often-unfulfilled hope of attracting surge price revenue.'<sup>31</sup>

Wage theft is not confined to isolated examples of single employers and instead permeates entire industries, sectors and groups of workers:

**25 per cent of all international students**

There is significant empirical evidence that particular cohorts of the labour force routinely face wage theft and exploitation: In a recent study UNSW study a quarter (25%) of all international students earned \$12 per hour or less and 43% earned \$15 or less in their lowest paid job.

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31 Ibid.

<p><b>earned \$12 per hour or less<sup>32</sup>;</b></p>	
<p><b>79 per cent of hospitality employers in Victoria did not comply with the national award wage system from 2013 to 2016;</b></p>	<p>The Report into Corporate Avoidance of the Fair Work Act <sup>33</sup> made the following observations:</p> <p style="padding-left: 40px;">‘Underpayment is so prevalent in some sectors that it can no longer be considered an aberration; it is becoming the norm. Figures cited below are alarming. In Victoria alone, it is estimated that 79 per cent of hospitality employers did not comply with the national award wage system from 2013 to 2016. The national average for noncompliance is brought lower by findings from other states but is still hardly a figure engendering pride. Nationwide, it is estimated that one in two hospitality workers are being illegally paid, with similar figures available for the retail, beauty and fast food sectors<sup>34</sup>’</p>
<p><b>Non-compliance in the hospitality Industry, Fortitude Valley</b></p>	<p>A FWO audit that was undertaken in 2017 restaurants, bars and cafes in Fortitude Valley found non-compliance at 60 per cent<sup>35</sup>. If one was to extrapolate the 60 per cent non-compliance rate that was found in one audit in 2017 to the number of employees employed in the Accommodation and Food Services industry, in the order of 94,000 employees within that industry alone would not be in receipt of their proper entitlements.</p>
<p><b>Exploitation of Housekeepers by Four and</b></p>	<p>In 2016 the Fair Work Ombudsman completed an inquiry into the procurement and working arrangements of housekeepers at the following four and five-star hotel groups; (Hotel Groups), Starwood Hotels and Resorts Worldwide Inc, The Accor Group and Oaks Hotels &amp; Resorts Limited. The</p>

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32 Berg, L. and Farbenblum, B. (2017) Wage Theft in Australia: Findings of the National Temporary Migrant Worker Survey <<http://apo.org.au/system/files/120406/apo-nid120406-483146.pdf>>.

33 Parliament of Australia, Senate EERC, *Corporate Avoidance of the Fair Work Act 2009*, September 2017.

34 Ibid.

35 Australian Government, FWO, *Food Precincts Activity Report*, July 2018.

<b>Five-Star Hotel Groups;</b>	<p>Inquiry revealed numerous alleged contraventions of the Fair Work Act in various labour supply chains involving housekeepers, including the failure of employers to:</p> <ul style="list-style-type: none"> <li>• classify workers correctly as employees;</li> <li>• pay applicable penalty rates;</li> <li>• reimburse employees the cost of specialist clothing;</li> <li>• provide a regular pattern of work for part-time employees;</li> <li>• apply accrual of leave entitlements.</li> </ul>
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In addition to wage theft not being a problem confined to large or small employers, neither is it confined to particular industries or sectors (as the above examples show). The public and community sectors are certainly not immune from the problem of wage theft, examples include the following:

<b>Department of Home Affairs</b>	<p>In the Department of Home Affairs, a policy decision to implement allowance provisions in a particular way (to the detriment of employees), which fell foul of the relevant employment instrument, was only rectified – despite repeated attempts at resolution by the union – following a court application.<sup>36</sup></p>
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<sup>36</sup> Sally Whyte, 'Home Affairs in court over alleged underpayment', *Canberra Times (online)*, April 22 2019, <<https://www.canberratimes.com.au/story/6080220/home-affairs-in-court-over-alleged-underpayment/>>.

<b>NSW Health</b>	NSW health has been reported as one of the latest employers to engage in wage theft through the systematic underpayment of junior medical staff who worked excessive hours. <sup>37</sup>
<b>NDIS workers<sup>38</sup></b>	A new academic article by researchers at RMIT investigated the paid and unpaid work time of disability support workers under Australia’s new National Disability Insurance Scheme. The research takes a novel approach combining analysis of working day diaries and qualitative interviews with employees to expose how jobs are being fragmented and work is being organised into periods of paid and unpaid time, leaving employees paid below their minimum entitlement. They have found some NDIS workers were losing between 12% and 21% of total work time. The estimated cost in unpaid wages for three days was between \$25 and \$182. These are significant amounts for workers whose earnings for the three days ranged from around \$150 to \$600. Similarly underpayment for travel and overtime was experienced by employees of nine of the ten different employers in this study.

It is readily apparent that the employers who have engaged in wage theft are both large and small, and come from a range of different industries and sectors. This is apparent even by looking at the known universe of wage theft. The extent and depth of the

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37 Kate Aubusson ‘Junior doctors urged to take class action against government’, *Sydney Morning Herald (online)*, August 28 2019, <<https://www.smh.com.au/national/nsw/junior-doctors-urged-to-take-class-action-against-government-20190828-p52lmn.html>>.

38 Fiona MacDonald, Eleanor Bentham and Jenny Malone, ‘Wage theft, underpayment and unpaid work in marketised social care’ (2018) 29(1) *The Economic and Labour Relations Review* 80– 96.

problem no doubt runs much deeper than the examples which have been uncovered, particularly when the “black economy” is taken into account.

*Case Study: Underpayments on the Harvest Trail - both severe and widespread*

A recent article in the Journal of Australian Political Economy, published just this year, entitled ‘Harvest labour markets in Australia: Alleged labour shortages and employer demand for temporary migrant workers’, by Iain Campbell has revealed the extensive level of underpayments on the Harvest Trail<sup>39</sup>. Campbell notes:

‘Harvest labour, as lower-skilled work conducted under casual conditions, has long been associated with labour insecurity and low wages.<sup>40</sup> But what is startling about recent studies and media reports is the mounting evidence of employer non-compliance with minimum labour standards, centring on illegal underpayments.’

Campbell goes on to note that it is clear that underpayments for seasonal workers in horticulture have become both ‘severe and widespread’. He assesses the recent empirical evidence:

‘the National TMW Survey suggest that fruit and vegetable picking and packing stands out from other TMW jobs for the severity of underpayments<sup>41</sup>. With respect to incidence, most studies conclude that underpayments in horticulture are ‘endemic’ or ‘rife’.<sup>42</sup> The

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39 Iain Campbell, ‘Harvest labour markets in Australia: Alleged labour shortages and employer demand for temporary migrant workers’ (2019) 84, *Journal of Australian Political Economy*

40 Harvest work is commonly described as ‘precarious work’ in the sense that it often combines several dimensions of labour insecurity. This section concentrates just on income insecurity, putting aside the many other dimensions of labour insecurity that affect seasonal workers, such as casual status, poor working-time conditions, poor health and safety protection, risks of summary dismissal, discrimination and issues of bullying and sexual harassment. This is not to say that all harvest jobs are precarious and that all harvest workers have negative experiences; some working holiday-makers, for example, report positive experiences of harvest work.

41 Berg, L. and Farbenblum, B. (2017) Wage Theft in Australia: Findings of the National Temporary Migrant Worker Survey <<http://apo.org.au/system/files/120406/apo-nid120406-483146.pdf>>

42 Howes, S. and Curtain, R. (2019) Horticultural labour and the SWP: a new report, *Devpolicyblog*, 31 May, <<https://www.devpolicy.org/horticultural-labour-swp-20190531/>> accessed 31 July; Migrant Workers’ Taskforce (2019)

most compelling data come from an online survey of harvest workers, where effective hourly wage rates were estimated and disaggregated according to the channel of recruitment (direct employment or contracting) and mechanism of payment (piece rates or hourly pay)<sup>43</sup> The survey was conducted at a time when the minimum wage rate under the Horticulture Industry Award 2010 was \$21.09 for casual employees. Data for 233 TMWs suggest a wide range of levels of payment, including even some cases of hourly rates above the award minimum (Table below). At the bottom end, however, wage rates were very low, especially in cases of payment by piece rates, whether by a farmer or a contractor.<sup>44</sup>

Average hourly earnings (AUD\$) for harvest workers

	Median	Minimum	Maximum
Paid by the hour			
Employed by farmer (96)	19.0	7.0	28.85
Employed by contractor (35)	15.0	5.0	22.20

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*Report of the Migrant Workers' Taskforce*, Canberra, Commonwealth of Australia.; Fair Work Ombudsman (Report, Harvest Trail Inquiry: A Report on workplace arrangements along the harvest trail, 2018); Senate (2017) *Corporate Avoidance of the Fair Work Act 2009*, Education and Employment References Committee, Canberra, Commonwealth of Australia; Note: The most reliable evidence on underpayment comes from surveys of workers or from enforcement investigations, since employers are understandably reluctant to admit to unsavoury practices. Nevertheless, the 2016 survey of vegetable growers produced interesting results. Only 5% directly admitted to ever paying below the award rate, but the size of the minority that cited below-award hourly wage rates tripled to around 16% when growers were asked more indirectly about the wages they paid their pickers, packers and graders

43 Underhill, E. and Rimmer, M. 'Layered vulnerability: Temporary migrants in Australian horticulture' (2016) 58(5) *Journal of Industrial Relations* 608-626; Underhill, E. and Rimmer, M. (2017) 'Private Governance, State Regulation and Employment Standards: How Political Factors Shape their Nexus in Australian Horticulture' (2017) 72(1) *Relations Industrielles/ Industrial Relations* 33-55

44 Campbell I 'Harvest labour markets in Australia: Alleged labour shortages and employer demand for temporary migrant workers' (2019) 84 *Journal of Australian Political Economy*



Paid by output (piece rates)			
Employed by farmer (72)	12.0	3.30	30.0
Employed by contractor (30)	8.0	2.0	17.0

*Underhill et al. 2018: 685.*

Note: The data here refer just to TMW harvest workers. The survey also attracted responses from a small number of Australian harvest workers, whose wage rates did not vary significantly from those reported by the TMW workers (personal communication 12 July 2019).

All four categories of employment distinguished in the Table above have median hourly wages that are well below the minimum hourly rate of \$21.09. This indicates that, though some workers might receive the legal rate (or more), the majority of harvest workers in the survey was underpaid. It further suggests, consistent with results of recent FWO investigations of employer non-compliance), that the majority of growers and contractors was engaged in underpayment. Though all workforce groups are at risk of underpayment, it seems that underpayment is almost universal for undocumented

workers,<sup>45</sup> widespread for working holiday-makers,<sup>46</sup> and increasingly common for participants in the SWP.<sup>47</sup>

It is clear from the above review of the empirical evidence that there are endemic levels of wage theft across the Harvest trail amongst various visa types. This is not a few unscrupulous employers that have made mistakes but rather a business model that become common place and normalised. There is an underclass of agriculture workers in Australia who are regularly exploited.

### *Superannuation theft*

A report from Industry Super Australia (ISA) has found that 2.94 million workers lose \$5.94 billion each year in unpaid superannuation.<sup>48</sup> The submission goes through the impact that Superannuation theft has on the national economy under the heading: Unpaid superannuation.

Unpaid super is one of the easiest form of wage theft to get away with and one of the most prevalent. Workers miss out on billions each year to unscrupulous employers either deliberately stealing super or not paying super and, because the ATO does not adequately enforce the law, employers increasingly get away with it. Further, when payment of superannuation is effected through the ATO, workers have to wait considerable periods (sometimes from 6 to 12 months') before that money is ultimately transferred to their superannuation accounts. We need laws to make super simpler for workers and their bosses so super theft reduces and workers get their money back sooner.

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45 Segrave, M. (2017) *Exploited and Illegal: Unlawful Migrant Workers in Australia*, Monash University, Melbourne.

46 Berg, L. and Farbenblum, B. (2017) Wage Theft in Australia: Findings of the National Temporary Migrant Worker Survey, available online: <<http://apo.org.au/system/files/120406/apo-nid120406-483146.pdf>>; Tan, Y. and Lester, L., 'Labour Market and Economic Impacts of International Working Holiday Temporary Migrants to Australia', (2012) 18 *Population, Space and Place* 359-383; Fair Work Ombudsman (Report, Inquiry into the Wages and Conditions of People Working under the 417 Working Holiday Visa Program, 2016).

47 Forsyth A. (2016) Victorian Inquiry into the Labour Hire Industry and Insecure Work, Final Report, Melbourne, Industrial Relations Victoria, 31 August; Petrou, K. and Connell, J., "We don't feel free at all': temporary ni-Vanuatu workers in the Riverina, Australia' (2018) 27(1) *Rural Society* 66-79; JSCFADT [Joint Standing Committee on Foreign Affairs, Defence and Trade] (2017) *Hidden in Plain Sight: An inquiry into establishing a Modern Slavery Act in Australia*, Canberra, Commonwealth of Australia.

48 Industry Super Australia, (Report, 'Super Scandal: Unpaid Super Guarantee 2016-17', 2019) 3.

Since ISA started reporting on the state of unpaid super in Australia, the problem keeps getting bigger. As more employers use unpaid super to pad their margins, more workers are missing out on crucial retirement savings. Since 2013, the number of workers missing out on their super has increased by more than 90,000 or more than \$300m in stolen super.

Machinery operators and drivers, labourers, technicians and trade workers make up more than 1 million workers underpaid their superannuation. Just under one in three community and personal service workers have their super stolen, amounting to more than \$468m.

While unpaid superannuation affects every income decile, lower paid workers are stolen from the most. Young workers are also more likely to miss out, reflecting their relative vulnerability to exploitation as the figures below show. The impact of superannuation theft on retirement outcomes is dramatic.

On average workers aged 60-64, who were victims of superannuation theft, had \$41,184 less in superannuation than those who were not underpaid.

A study by Industry Super Australia shows the high likelihood that a worker will have their superannuation stolen by an employer throughout their working career:

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*Previous employer pretended to be paying the workers their super, showed on the payslips but was not being paid into our funds. Complained to the owners who had set themselves up in a family trust (their daughter did the accounts and books). They assured it was an oversight & would be paid. They didn't and workers complained to the ATO about the wage theft. Received a letter from ATO saying they had decided not to take any action. This dodgy family owned business ripped off their workers and other contractors, set themselves up in a trust to protect themselves and their own interests at the expense of their workers and legal obligations and pretty much got away with it.*

*No consequences for super theft whatsoever. Where is the justice in that? Unpaid super or wage theft affects workers for years and decades to come, much more than the initial amount stolen due to the compounding and growth effect of the super fund.*

*— [Name withheld], ETU Member, ACTU Survey of Union Members*

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## Chance of superannuation theft



Source: Industry Super Australia, 2019 • Created with Datawrapper

Figure: Chance of superannuation theft by age<sup>49</sup>

## Chance of superannuation theft by income



Source: Industry Super Australia, 2019 • Created with Datawrapper

Figure: Chance of superannuation theft by income<sup>50</sup>

In order to ensure that the superannuation system is operating efficiently and effectively, superannuation entitlements must be properly enforced. Current methods of enforcing superannuation are opaque and slow. The Morrison Government has refused to act on unpaid super, only proposing an amnesty from charges or penalties associated with unpaid super for bosses who promise to pay it back.<sup>51</sup>

If a worker is not paid their superannuation under superannuation guarantee legislation, then they need to submit their claim to the ATO. The ATO is slow to deal with claims, and workers have no

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49 Ibid 13.

50 Ibid 13.

51 Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2009 (Cth).

visibility as to where their claim is up to as it is being assessed. Workers have no right to initiate action against their employer to recover super in this instance. Some workers have an entitlement capable of being enforced through an industrial instrument, but only if they're employed under an award or a union-negotiated enterprise agreement.

Superannuation entitlements should be replicated in the National Employment Standards (NES). This would give workers the right to pursue unpaid super in the same fashion as wages. Workers should be entitled to take action rather than rely on the slow, opaque process of the ATO. Replicating superannuation in the NES would give workers and their unions the capacity to pursue superannuation claims at the same time as wages claims. This would also provide a greater ability for superannuation funds to act in their members' best interests by pursuing (or assisting in the pursuit of) unpaid superannuation.

By increasing the avenues to recovering unpaid superannuation, the incidence of unpaid superannuation would decrease, and the likelihood of recovery would increase. Workers would be presenting with their superannuation entitlement as a fundamental right of employment upon commencement and could more easily represent themselves.

To make this effective, however, unions and workers should have the right, at any time, to inspect records of payment for superannuation and wages.

Superannuation is currently required to be paid every quarter under existing legislation. This can result in a three-month lag between earning your super and being paid. The time-lag between wages and super makes it hard for workers to know if they've been paid super on time and in full. In order to rectify this, all superannuation payments should be made at the same as wages.

At present, wages and superannuation recovery processes are difficult and lengthy. A specialised Industrial Court should be established (See Recommendation 10), connected to the FWC, to deal with wages and superannuation theft claims. This Industrial Court should be low-cost and accessible for workers seeking to enforce their rights.

*Recommendations:*

<b>Recommendation S1.</b>	Unions should be given improved powers to inspect employers' records of superannuation payments.
<b>Recommendation S2.</b>	Superannuation should be paid at the same time as wages, with the date of the payment recorded on pay slips.
<b>Recommendation S3.</b>	Superannuation Guarantee payment provisions should be inserted into the National Employment Standards. The NES provisions should include that

	Superannuation is payable to all workers (including contractors and those in the “gig economy”), on every dollar earned (including leave loadings, allowances etc.), and on paid and unpaid parental leave.
<b>Recommendation S4.</b>	Wages and superannuation recovery systems should be improved and made more efficient, affording more rights to workers and their unions to initiate recovery action. This should be achieved by vesting the Industrial Court we have called to be established in Recommendation 10 to be vested with jurisdiction to deal with unpaid superannuation claims.

### **The Reasons for Wage Theft**

Wage Theft is pervasive, and it arises from a policy failure. Australian policy makers have created the conditions for widespread non-compliance with remuneration related obligations in employment instruments. This has occurred through numerous channels including excessively high numbers of people trapped in insecure work, quasi-bonded labour through the migration system, poor supervision of the franchising industry, zero regulation of the labour hire industry, a “hands off” approach to the “gig economy”, and incremental restrictions on union organising activity and collective bargaining.

This form of noncompliance has now permeated virtually all sectors of the economy and has become a matter of public importance and a priority industrial and economic issue. Federal industrial relations regulation in this country has transitioned from genuine tripartism to an unbalanced system favouring corporate power, intent on denying organised labour the necessary rights and capacity to expand into new areas while implementing new strategies to frustrate union activity in traditional areas.

It is unsurprising that the regulatory framework which permits the widespread incidence of wage theft arises from an ideologically charged policy environment in which the role and work of unions is under constant attack. If we as a country are to begin to address the wage theft crisis, it is necessary to abandon the ideologically tinged conceptions of the role of unions in ensuring that workers’ rights are respected and adhered to in the current industrial relations framework.

Wage Theft arises, somewhat predictably, from a regulatory environment that:

- Fails to adequately prevent it, including by denying workers and their unions the tools that they need to combat wage theft;
- Fails to adequately sanction it, including by failing to criminalise wage theft and by making the current set of financial penalties remote and inadequate.

Employers who engage in the myriad forms of wage theft – whether intentional, reckless, “accidental” etc. – instead regard wage theft as an operating model where the acceptance of risk is made easier by the relatively low harm that befalls those who are caught. Put simply, an employer who, if detected, has to do little more than pay the wages it ought to have originally paid had it not engaged in wage theft, is scantily discouraged from stealing those wages in the first place.

An oft repeated justification of wage theft is the “complexity” purportedly inherent in the industrial relations system. The reality is that the federal award system is less complex now than it ever has been. Today’s 122 “modern awards” are the product of the consolidation and simplification over 1500 State and Federal instruments, and have almost universal application in the private sector. It ought not be forgotten that Award Modernisation in itself came on the back of over two decades of award restructuring, simplification and review within the federal system under which award classifications and wage relativities were aligned, awards were reduced in size and complexity and (from 1986) awards were transitioned from paid rates instruments to a safety net. Some of these processes were initiated by the parties through the Conciliation and Arbitration Commission and Australian Industrial Relations Commission<sup>52</sup> and some were of legislative origin.<sup>53</sup> Thanks to technological developments, today’s modern awards are available to anyone who has internet access,<sup>54</sup> as are a range of free services including tools to identify which award or awards are relevant to particular work<sup>55</sup>, tools which display the pay rates which

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52 For example, Restructuring and Efficiency.

53 For example the Award Simplification Process mandated by the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth).

54 See Fair Work Commission, ‘*Modern awards list*’ <<https://www.fwc.gov.au/awards-and-agreements/awards/modern-awards/modern-awards-list>>.

55 See Fair Work Ombudsman ‘*Find my award*’ <<http://www.fairwork.gov.au/awards-and-agreements/awards/find-my-award>>.

apply at what times to each type of work performed under that award<sup>56</sup> and tools which notify you when an award has been varied or if a variation is under consideration.<sup>57</sup>

Comparison may be made with the obligations in modern awards, their predecessors and legislation to make superannuation contributions on behalf of employees. The definition of the earnings base of “ordinary time earnings” for the calculation of contributions has been simple, stable and universal since amendments made over a decade ago.<sup>58</sup> Despite this, estimates of the amount of unpaid superannuation vary between \$2.85 billion<sup>59</sup> and \$5.6 billion.<sup>60</sup> A lack of complexity is no guarantee against non-compliance.

### **Whether Wage Theft is a “cost of doing business”**

Industries and supply chains where lack of compliance with legal minimum employment standards is widespread will in their own way become self-fulfilling prophecies of wage theft, as existing and new participants see only competitive disadvantage from breaking the cycle. Competitive pressures emanating from the very top of supply chains serve only to hasten a race-to-the-bottom.

The normalisation of underpayments can lead to a downward spiral of unfair’ wage competition by employers and the situation can intensify. Academic Iain Campbell<sup>61</sup> explains below:

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56 See Fair Work Ombudsman, ‘*Pay guides*’ <<https://www.fairwork.gov.au/pay/minimum-wages/pay-guides>>.

57 See Fair Work Commission, ‘*Subscribe to updates*’ <<https://www.fwc.gov.au/about-us/reports-publications/subscribe-updates>>.

58 Superannuation Legislation Amendment (Choice of Superannuation Fund) Act 2005 (Cth).

59 Australian Taxation Office, ‘*ATO releases Super Guarantee gap estimate*’ <<https://www.ato.gov.au/Media-centre/Media-releases/ATO-releases-Super-Guarantee-gap-estimate/>>.

60 Industry Super Australia estimate, cited in Senate Economics References Committee (2017), “Superbad – Wage theft and non-compliance of the Superannuation Guarantee” at [3.7]

61 Campbell I ‘Harvest labour markets in Australia: Alleged labour shortages and employer demand for temporary migrant workers’, *Journal of Australian Political Economy*, No84, 2019



'If...economic restructuring intensifies and enforcement of minimum wage (and related) laws weakens, an expansive field for labour-cost reduction opens up, and employers may begin to experiment with the many different types and levels of underpayment. Once a sufficient number of employers within a specific region or product market starts down the path of illegal underpayment, a powerful and ongoing dynamic of 'unfair' wage competition is likely to result, accelerating the spread of underpayments, bringing even reluctant employers into line and 'creating new industry conventions that normalize sub-standard jobs'<sup>62</sup>. The data on the extent of varied forms of underpayment suggest that this tipping point has been reached in many harvest labour markets<sup>6364</sup>'

While the cost pressures that drive wage theft need to be addressed, they do not justify or excuse wage theft. Although the underlying factors can be complex, a framework of accountability and consequence would assist in driving labour standards compliance across industries and supply chains.

Eradicating wage theft from highly competitive business environments requires no more or less than allowing efficient and effective means for workers and their unions to access justice, and for employers who engage in wage theft, or supply-participants who create structures which promote wage theft, to be faced with penalties which outweigh any perceived advantages from engaging in wage theft. This is discussed further in under the heading: Whether extension of liability and supply chain measures should be introduced to drive improved compliance with wage and superannuation-related laws;

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62 Bernhardt, A., Spiller, M. and Theodore, N. (2013) 'Employers gone rogue: Explaining industry variation in violations of workplace laws', *Industrial and Labor Relations Review* 66(4), 808-832.

63 Underhill, E. and Rimmer, M. (2016) 'Layered vulnerability: Temporary migrants in Australian horticulture', *Journal of Industrial Relations* 58 (5), 608-626.

64 Underhill, E. and Rimmer, M. (2017) 'Private Governance, State Regulation and Employment Standards: How Political Factors Shape their Nexus in Australian Horticulture', *Relations Industrielles/ Industrial Relations* 72 (1), 33-55

## Recommendations

See Recommendations 8 and 9, which are relevant to this section.

**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;**

### **The best means of identifying and uncovering wage and superannuation theft: Unions**

The rise in systemic and opportunistic wage theft follows a sustained period in which the rights of unions have been diminished. Adding to the root causes of Australia's wage theft epidemic is an environment in which the single most driven and incentivised regulator – the union movement – is not afforded the rights necessary to combat wage theft.

A further factor compounding the reduced lack of ability for trade unions to adequately detect and address wage theft is the increasing regulatory and compliance burden that is being placed on trade unions. In addition to a series of changes that have been made, the *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019*, if passed, would serve to further divert scarce union resources away from their core purpose of protecting and advancing the interests of working Australians by ensuring that they have fair conditions of employment which are adhered to.

We do not cavil with the proposition that the Government should have a capable labour inspectorate (nor do we suggest that the Fair Work Ombudsman is not a capable Labour Inspectorate) and we welcome the acknowledgement that “the Government recognises the benefit of a capable and resourced regulator”. However, any consideration of reform options to promote compliance – that is, to deter non-compliance – cannot sensibly proceed without looking to options to increase the risk of being caught. That both penalty and detection factors are at play seems to have been recognised in the Coalition's 2016 Election Policy on Protecting Vulnerable Workers, which stated that:

‘In many cases there is no perceived risk of being caught. If there is such a risk, the cost of any penalty imposed under the Fair Work Act is seen as an acceptable cost of doing business’

Employers will not abandon illegal business models until they believe there is a significant risk of being caught and facing substantial penalties, which must form part of the solution

The level of financial penalty that is available for contravening conduct does play a very important part in the degree of deterrence, but only if a clear message is sent that contraveners *will* be detected and exposed to those penalties.

The FWO is unable to deal with the scale of wage theft occurring in this country. The introduction of anti-union legislation since 1996 has meant that unions are no longer able to enter workplaces and inspect pay records. This crisis is the result of the erosion of those rights.

Our affiliated unions can play a more significant role in ensuring that the risk of exposure to a penalty is high, if they are given the sufficient tools to do so. However, as the labour inspectorate has increased in resources and scale, unions have been stripped of the necessary rights to monitor and enforce compliance. If it was assumed by policy makers that these changes would meet community expectations of ensuring employer compliance, then it is apparent that the policy makers were wrong in making that assumption. Registered organisations remain among the groups of actors who have standing in the Courts to prosecute contraventions of RROs, however the FW Act places them at a considerable disadvantage compared to the FWO in terms of their rights to properly investigate such contraventions. The following table shows the comparative lack of investigative and other rights that registered organisations have in comparison to the FWO.

Permit Holders in a registered organisation	FWO Inspectors
Must give advance notice in a prescribed form of their entry to premises, unless an exemption certificate has been issued by the FWC. <sup>65</sup> An exemption certificate cannot be issued unless	Not required to give any notice before entering premises and exercising compliance powers on those premises. <sup>67</sup>

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<sup>65</sup> FW Act ss 487, 519.

<sup>67</sup> FW Act ss 703, 706-709.

Permit Holders in a registered organisation	FWO Inspectors
<p>the union can prove to the FWC that there is a reasonable basis for believing the advance notice of the entry might result in the destruction, concealment or alternation of relevant evidence – which has been described by the FWC as a high bar and unlikely to be met without evidence that the employer concerned has any propensity to engage in such conduct.<sup>66</sup> .</p>	
<p>Many workers our affiliates encounter only wish to pursue an underpayment matter after they have first secured alternative employment (which in itself is instructive). However, permit holders in a Registered Organisation have no statutory rights to request any relevant documents in respect of employees who no longer work at a particular workplace or to enter premises to investigate compliance with respect to those former employees.</p>	<p>FWO inspectors may enter premises and exercise compliance powers on those premises without that restriction<sup>68</sup></p>
<p>Permit holders in registered organisations have no right to enter premises to investigate or request documents from employers unless</p>	<p>FWO inspectors needs only to have a reasonable belief that the Act applies to work that is being performed (or applied to work that</p>

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66 FW Act s 519; *TWU v. Bogle* [2012] FWA 8247.

68 FW Act s, 708.

Permit Holders in a registered organisation	FWO Inspectors
they are first capable of proving that they have a reasonable suspicion that a contravention has occurred, or is occurring. <sup>69</sup>	has been performed) on the premises in order to enter premises and request that documents be provided. <sup>70</sup>
The power of permit holders in registered organisations to request access to documents is limited to documents that are directly relevant to the suspected contravention which they are already capable of proving they have a reasonable suspicion about. <sup>71</sup>	FWO inspectors are not confined in the documents they request. <sup>72</sup>
Where permit holders in registered organisations are permitted to enter premises for investigative purposes, they have no right to interview any person on the premises other than an employee who is eligible to be a member who agrees to be interviewed. <sup>73</sup>	FWO inspectors may interview any person on the premises, including the employer. <sup>74</sup>
Upon entry, a permit holder in a registered organisation is only able to request documents that are kept on the premises they enter or are	An FWO inspector can, by comparison, interview any person on the premises, require that person to tell the inspector <i>who</i> has

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69 FW Act ss 481(1), 481(3).

70 FW Act ss. 708, 709.

71 FW Act ss 482(1)(c).

72 FW Act ss 709(c)-(e).

73 FW Act ss 482(1)(b).

74 FW Act ss 709(b).

Permit Holders in a registered organisation	FWO Inspectors
<p>accessible from a computer that is kept on the premises.<sup>75</sup> The permit holder may provide written notice (either while on the premises or within 5 days thereafter) to the employer requiring that employer to produce or provide access to other documents (i.e. those not kept on or accessible from the premises), provided again that they relate to the suspected contravention. However, owing to the limitations regarding interviews, the permit holder is “flying blind” in relation to what documents they should request access to.</p>	<p>custody of or access to a document and, thereafter, issue a notice to produce to that other person for access to those documents.<sup>76</sup></p>
<p>In addition to the restriction that a permit holder must be capable of proving that they have a reasonable suspicion that a contravention has occurred before exercising any investigative powers, and the restriction that the documents that the permit holder seeks must relate to <i>that</i> suspected contravention, a permit holder is restricted to accessing documents relating to the union’s members or employees who have provided</p>	<p>None of these restrictions apply to FWO inspectors.<sup>78</sup></p>

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75 FW Act s.482(1)(c).

76 FW Act ss 709(b)-(d), 712.

78 FW Act ss 708, 709.

Permit Holders in a registered organisation	FWO Inspectors
written consent <sup>77</sup> (unless the Fair Work Commission otherwise orders).	
There is no penalty for providing false or misleading documents to a permit holder in a registered organisation.	Providing false or misleading documents to an FWO Inspector attracts a civil penalty. <sup>79</sup>
A permit holder has no capacity to issue a compliance notice <sup>80</sup> .	Such notices direct a person whom an FWO inspector “reasonably believes” to have contravened a provision of a modern award (for example), to take specified action to rectify the contravention/and or provide evidence of having done so. Compliance notices are enforceable, subject to a review or a reasonable excuse. <sup>81</sup>

Clearly, there is much that can be done to improve the capacity of registered organisations to detect and deter contravention of RROs, irrespective of the level or type of penalty that might ultimately be adopted as the maximum for non-compliance with RROs. It is essential that these gaps in the investigative rights of permit holders in registered organisations be filled, through revisions to the current “right of entry” framework. Such revisions should ideally be recast as not purely a right of entry but also a right of access, to reflect technological change in the way many documents (such as cloud-based payroll documents) are stored and retrieved. Critically, such revisions should also place unions in a position to monitor compliance (and discover non-

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77 FW Act ss 482(1), 482(2A), 483AA.

79 FW Act ss 718A.

80 FW Act ss 716

81 FW Act ss 716(5), 717.

compliance) with RRO's rather than merely obtain documentary corroboration of breaches in relation to which they can already mount a *prima facie* case.

Some key changes that need to be made to return unions to their position of being able to identify and combat wage theft are:

- The ability to inspect the records of former employees. This right – which unions presently do not have – is crucial to effectively combatting wage theft, given the number of cases which, for fear of victimisation, are not raised until after the employee has already left the workplace.
- Removing the restrictions on accessing non-member records. These restrictions often serve only to cause confusion, whereby employers are unsure of what they can release, or mistakenly interpret the provisions too broadly and seek to deny access to documents which do substantially relate to a member of the union. In many cases, this restriction creates difficulties in assessing and finding evidence of widespread and systematic wage theft.
- Requiring employers to have all employment records at a place of work or head office, both of which are accessible by a union official, including electronically.
- Expanding the presumption brought about by the FW Act s 557C to cases involving union right of entry. Presently, where an employer fails to keep records as required, or make those records available to an employee, it falls to the employer to then disprove any allegations of wage theft which are made.<sup>82</sup> This reverse onus is important, as it aims to ensure that workers are not disadvantaged by their employer's failure to keep adequate records as required by law. However, the reverse onus only arises when it is the worker who requests their own records and, should also similarly arise in situations where a union has requested documents under right of entry.
- Providing false or misleading documents to a union official exercising right of entry should attract a penalty.
- The legislation should enable persons exercising right of entry to interview any person who may be able to assist the investigation of a suspected contravention.

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82 FW Act s 557C



- The notice requirements – which oftentimes thwart the ability to investigate matters quickly and efficiently - should be far less restrictive. The current requirements provide too much opportunity to employers to destroy or conceal documents or ensure that persons who could assist an investigation are not present.

Whilst this would mark a substantial departure from the present statutory framework, it would not be without precedent. Indeed, for over two decades the statutory provisions (as opposed to award-based provisions) dealing with right of entry were cast as rights being for the purpose of “ensuring the observance of the award”<sup>83</sup>. Additionally, the union officials permitted to exercise such rights under those provisions were those so authorised in writing by the Secretary of the relevant union. Much as is the case today concerning the appointment of FWO Inspectors<sup>84</sup>, there was no permit or licensing system that existed outside of the investigative body itself under those provisions.

### *Recommendations*

<b>Recommendation 1.</b>	Amend the FW Act to make the notice requirements for right of entry less restrictive, in particular by enabling permit holders to enter a site without being required to provide 24 hours’ notice.
<b>Recommendation 2.</b>	Provide trade unions with improved rights of entry, including access to records by: <ul style="list-style-type: none"> <li>• Providing trade unions with the right to inspect the records of former employees;</li> <li>• Removing the restrictions on trade unions accessing “non-member records” directly (i.e. without an FWC application) through right of entry;</li> </ul>

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<sup>83</sup> *The Conciliation and Arbitration Act 1904* (Cth) (as amended by Act No. 138 of 1973) s 42A, substantially re-enacted as section 286 of the *Industrial Relations Act 1988*

<sup>84</sup> FW Act s 700.

	<ul style="list-style-type: none"> <li>Requiring employers to have all employment records at a place of work or head office, both of which are accessible by a union official, including electronically.</li> </ul>
<b>Recommendation 3.</b>	Impose a penalty on a person who provides false or misleading documents to a permit holder exercising right of entry
<b>Recommendation 4.</b>	Extend the ability to issue a compliance notice (currently provided by FW Act s 716 to FWO Inspectors) to permit holders.
<b>Recommendation 5.</b>	Expand the presumption brought about by <i>the FW Act</i> s 557C to apply to trade union right of entry, such that an employer who fails to provide records, or otherwise comply with right of entry provisions will have the burden of disproving allegations of wage theft.

### **Ensuring adequate protections from adverse treatment for those exposing wage/superannuation theft**

The FW Act Part 3-1 provides “General Protections” for employees against *inter alia* adverse action by their employers, where such action is taken for prohibited reasons – such as the raising of a complaint against wage theft.

The “General Protections” provisions of the FW Act are well intentioned:

‘Part 3-1 sets out a range of workplace protections. This is a key part of this Bill that ensures fairness and representation at the workplace by recognising the right to freedom of association and preventing discrimination and other unfair treatment.’<sup>85</sup>

However, they fail to adequately protect workers who raise legitimate complaints from being victimised as a result. The case of *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* [2012] HCA 32 marked a turning point between the expectations of the the “General Protections” and their reality. In *Barclay*, the High Court, not accepting the Minister for Employment’s submissions as to the importance of analysing the objective circumstances,<sup>86</sup> held that a worker who: was a union delegate; communicated to staff via email about a workplace issue as their union delegate; and, was then dismissed for sending that email, was not protected by the “General Protections” on the basis of their employer’s testimony that they had not dismissed the worker for their union activities.<sup>87</sup>

Following *Barclay*, it appears that the reverse onus provided by the FW Act s 361, presents a low bar to employers seeking to defeat a “General Protections” claim. This is troubling, given the centrality of the “reverse onus” – which arises out of an acknowledgement that only a respondent is suitably placed to provide evidence as to their own intentions, and should therefore be required to disprove a well-founded allegation<sup>88</sup> - to the fair treatment of “General Protections” and other victimisation claims.

Post *Barclay*, the fundamental weakness in the “General Protections” concerns the nexus between an act of adverse action, and a prohibited reason (i.e. did A do B *because of* C?).

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85 Explanatory Memorandum, the Fair Work Bill 2009 (Cth) 1333

86 *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* [2012] HCA 32 at [120-1, 129]

87 *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* [2012] HCA 32 at [63,65]

88 Explanatory Memorandum, the Fair Work Bill 2009 (Cth) 1461; Anna Chapman, Kathleen Love and Beth Gaze, ‘The Reverse Onus of Proof Then and Now: the Barclay Case and the History of the Fair Work Act’s Union Victimisation and Freedom of Association Provisions’ (2014) 37(2) *University of New South Wales Law Journal* 471,472.

Chapman et. al. identify two streams of jurisprudence: The first, the “*Barclay* Approach”, where the case has rested on the evidence of the decision-maker; and, the second, the “Broader Approach”, where courts have done more than merely assess the ‘respondent’s characterisation of their reasons’ and have instead applied a ‘wider lens’ and taken a more objective than subjective view of the situation.<sup>89</sup>

The “General Protections” should be broad and powerful, and should not be confined to an assessment of the minutiae of isolated conduct or subjective intentions. In order to function adequately, the protections should instead require a court to consider the whole of the circumstances of the case, including evidence of the surrounding circumstances of a claim, in order to reach an objectively based conclusion as to whether or not a person has been victimised.

Workers who raise complaints of wage theft need to be protected from reprisals and victimisation. Equally, workplace representatives, such as union delegates, who play a pivotal role in helping workers identify and combat wage theft need adequate protections. The current provisions of the FW Act, particularly following the decision in *Barclay*, do not achieve this.

The current test has been interpreted as a subjective test; an employer must not take adverse action against an employee ‘because’ they have exercised a workplace right, engaged in industrial activity or because they have an attribute that is mentioned in the anti-discrimination provision. The ‘because’ test is easily subverted by an employer saying their action was not because of the right, activity, or attribute but was for some other reason.

For workers to be protected, and therefore willing and able to address wage theft, requires changes to the General Protections to ensure that a court is required to assess the surrounding circumstances of a contravention objectively in coming to a decision. The legislation should include protections based on an objective test.

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<sup>89</sup> Chapman et. al. above n 97, 489-490, 498, 504, 505-6; Note, Chapman et. al. adopt this binary for convenience of explanation but suggest that these categories represent two end points in a spectrum of jurisprudence (see 489).

## Recommendations

<b>Recommendation 6.</b>	That protections be inserted to sections 340 and 346 of the FW Act. The new provisions would be along the following lines: <ul style="list-style-type: none"><li>• 340(3) A person must not engage in conduct that has or is likely to result, directly or consequentially in impeding, hindering, preventing or discouraging a person from exercising a workplace right.</li><li>• 346(2) A person must not engage in conduct that has or is likely to result, directly or consequentially in impeding, hindering, preventing or discouraging a person from engaging in industrial activity.</li></ul>
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### The taxation treatment of people whose stolen wages are later repaid to them;

The taxation treatment of workers whose wages are later repaid to them should be based on the principle that ‘no one should be any worse off’ than if the remuneration payments had been correctly applied. The process should also be as easy and as simple as possible for the workers involved.

## Recommendations

<b>Recommendation 7.</b>	Review the taxation treatment of wages repaid to workers following incidences of wage theft, to ensure that they are treated no less favourably than if the wages owing were paid initially as due.
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### Whether extension of liability and supply chain measures should be introduced to drive improved compliance with wage and superannuation-related laws;

Extension of liability and supply chain measures should be introduced to address wage theft.

The main way in which the FW Act current extends liability in some cases is “accessorial liability”. However, accessorial liability is only one way of extending liability for a contravention. There are

other mechanisms, such as presumed liability<sup>90</sup> or chain of contract liability<sup>91</sup>, which could be explored. The form or forms of extended liability imposed should be suited to the nature of the harm and benefit likely to result from the contravention they relate to.

Whilst it is conceivable that the accessorial liability provisions in section 550 would apply in some supply chain contexts, the requirement to prove knowledge is a less effective deterrent than a positive duty by head contractors to satisfy themselves that the employees of their sub-contractors have been paid.

Longstanding provisions of this nature exist in section 127 of the *Industrial Relations Act 1996* (NSW). Specifically, those provisions:

- Make the principal contractor liable for the unpaid wages of the subcontractor's employees, except where the subcontractor has certified to the principal that the employees have been paid for the work performed under the contract for the relevant period;
- Require the retention of certifications for 6 years;
- Create a right in the principal contractor to withhold payment to the subcontractor in the absence of such certification;
- Make the principal contractor liable for the unpaid wages of the subcontractor if the principal contractor had reason to believe the certification it was provided with was false; and
- Create an offence of knowingly giving false certification.

Provisions of this type are easily applicable to a range of circumstances, most notably labour hire and contracts where certain of the employees of the subcontractor can be readily identified as performing the work required under the contract. Whilst we recommend the Commonwealth to

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90 See e.g. *Competition and Consumer Act 2010* (Cth) sch 2 ("Australian Consumer Law") ss 7, 147.

91 See FW Act ss 789BA-789CE.

adopt such provisions in those contexts, more broadly we would encourage a paradigm shift in accessorial liability for underpayment, more centred on control.

The accessorial liability provisions in section 550 draw on provisions in criminal law and in consumer protection legislation. Such provisions are appropriate for penalising individual actors. Other considerations apply when attempting to regulate economic activity broadly, particularly where underpayment is contributed to by asymmetry in business to business bargaining power.

The *vulnerable workers* amendments introduced broader notions of accessorial liability based on assumptions of legal and economic control existing in franchises and corporate groups<sup>92</sup>. We would encourage the expansion of corporate liability for underpayment based on legal or economic control in broader acquisition and supply contexts, subject to “a reasonable steps” defence of the type set out in the FW Act s 558B(3)-(4). For clarity, we would not restrict this extension of liability to circumstances where business functions had been outsourced or re-tendered, but rather to all contexts where the putative accessory had the practical capacity to act as a price maker.

Another consideration is the penalty that may be imposed where such liability is proven. Whilst section 545 of the FW Act currently provides that a court may make “any order it considers appropriate” where a civil penalty provision has been contravened, a court’s inclination to make particular orders might be affected where other laws appear to constitute a “code” on the imposition of particular sanctions or where the explicit availability of that sanction in another law makes the absence of an explicit reference in the FW Act conspicuous. We are concerned that orders such as director disqualification<sup>93</sup>, the cancellation of registration as a migration agent<sup>94</sup> or an adverse publicity order<sup>95</sup> may be unavailable given the present drafting of section 545 of

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<sup>92</sup> See Explanatory Memorandum to the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 at [39]-[40]; FW Act ss 558B(3)-(4).

<sup>93</sup> *Corporations Act 2001* (Cth) Part 2D.6.

<sup>94</sup> *Migration Act 1958* (Cth) ss 302-303.

<sup>95</sup> *Competition and Consumer Act 2010* (Cth) s 86D

the FW Act. As noted in the Migrant Workers Taskforce report, specific powers should be provided to the courts to make such orders in matters concerning non-compliance with an RRO.

Breaking the wage theft cycle, in highly-competitive industries, supply-chains and beyond requires:

- A regulatory system which enables workers and their unions to detect and combat wage theft;
- A compliance regime which involves penalties and criminal sanctions with true deterrent effect;
- Liability for individuals and accessories which identify the true causes of wage theft in supply chains and attribute accountability accordingly. For instance, a head contractor who procures services for a rate that could not possibly involve paying legal minimum wages, cannot be allowed to escape justice if wage theft is to be stamped out of supply-chains.

## Recommendations

<p><b>Recommendation 8.</b></p>	<p>Extend the existing provisions which sanction involvement in a contravention (see FW Act s 550) to capture all individuals and other parties (such as accessories) who participate in or create an environment of wage theft, such as (but not limited to) franchisors, advisors, head contractors and other supply chain participants.</p>
<p><b>Recommendation 9.</b></p>	<p>Create the following provisions to regulate supply chains:</p> <ul style="list-style-type: none"> <li>• An obligation for principal contractors to obtain certification from subcontractors that wage theft and other contraventions have not occurred and, are not occurring; and to withhold payments where no certification is received.</li> <li>• Creation of an offence of knowingly giving a false certification.</li> <li>• Extension of liability for wage theft and other contraventions to principal and other contractors in supply chains where certification is not received or, where the principal contractor had reason to believe that the certification provided was false.</li> </ul>



**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;**

The enforcement mechanism against wage theft needs to be:

- 1) Accessible; and
- 2) Deterrent.

The current framework is lacking on both counts. The current means of legally combatting wage theft are time-consuming, expensive and daunting for workers. Even where workers are able to identify wage theft, laboriously gather the necessary evidence and then seek and obtain court orders; employers in a number of cases have ultimately escaped with little more liability than the wages owing.

**Holding Contraveners to account – A simple means of redress**

The increased capacity to detect non-compliance we recommend above should be complemented by a more accessible means to hold contraveners to account in order to provide fast, efficient access to justice for underpaid workers.

The present system whereby workers or their unions seeking a “simple” process need to elect not to pursue any penalty in order to recover underpayments sends the wrong message, and in any event still leaves the claiming party in the position of having to prove their claim in a Court. We see far more utility in the enhancement of the Fair Work Commission’s powers to resolve disputes about RROs and the creation of a co-located Industrial Court to deal with enforcement and penalties.

The benefit of a dispute resolution function is that the Commission could take an interventionist approach in resolving a dispute about whether an RRO had been complied with. The Fair Work Commission could ask the parties questions in an effort to narrow the dispute and request or require additional information to be produced in order to establish the facts necessary to resolve the dispute (such as the hours worked and the extent of any underpayment). The foundations

for the Fair Work Commission conducting such a process already exist in its general powers<sup>96</sup>. What is lacking is the capacity to arbitrate where necessary or apply them to a former employee.

There will be some matters that cannot be resolved by the FWC, including where matters in contention strictly require the exercise of judicial powers. Where a matter is not satisfactorily resolved through FWC proceedings, a party to the prior Fair Work Commission matter should be permitted to rely on any result of the Fair Work Commission outcomes in the related dispute to initiate an Industrial Court proceeding. These important streamlining reforms would mean that the prospect of facing a penalty order or other sanction was real and substantial in the mind of the employer, which as already raised, is an essential ingredient in effective deterrence. On the other side of the ledger, a certificate from the Fair Work Commission that an RRO dispute had been resolved by agreement would act as a permanent bar to bringing proceedings in the Industrial Court concerning the matter in dispute between the employee and employer concerned.

Reforms to the civil penalties framework are unlikely to reach their desired deterrent potential without returning a meaningful compliance and enforcement role to workers through their unions. Persevering with the rubric of the FWO as *the* privileged actor in a legalistic compliance and enforcement structure cannot feasibly provide the same level of monitoring and compliance as unions continuously acting for their members in every industry sector throughout the country.

### *Recommendations*

<b>Recommendation 10.</b>	Create a simple, affordable, and accessible means for workers to pursue wage theft claims in a timely manner through the establishment of an Industrial Court co-located with the FWC; vesting such powers in the FWC as are necessary to assist with resolving wage theft matters, and a
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96 See FW Act ss 589-592

	pathway for a wage-theft claim initiated in the FWC to be resolved in the Industrial Court. Further consider the creation of industry-specific tribunals to deal with wage theft (such as the Victorian Building Industry Disputes Panel).
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### **The Civil Penalties need to be higher**

A particularly striking example of the current mismatch between the extent of wage theft and the ultimate penalty is George Calombaris' MAdE group, who were able to make a \$200,000 contrition payment" after engaging in wage theft to a total of \$7.8 million (the fine therefore being less than 3% of the underpayment amount).<sup>97</sup>

The FWO's ratio of wages recovered to court-ordered penalties show that within the known cases of wage theft that are dealt with by the regulator, employers who engage in wage theft – taken as an aggregate – pay a small fraction in penalties compared to the wages originally withheld:

- In FY2016/2017, FWO recovered over \$30 million, and achieved court-ordered fines of about \$4 million.<sup>98</sup>
- In 2017/2018 FWO recovered just under \$30 million, and achieved court-ordered penalties of just over \$7 million.<sup>99</sup>

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97 'George Calombaris' fine for multi-million-dollar wages scandal too low, Attorney-General says', *ABC News* (Online) <<https://www.abc.net.au/news/2019-07-24/george-calombaris-master-chef-judge-fine-too-light/11341096>>; 'George CALombaris's MAdE Establishment underpaid workers \$7.8 million <<https://www.abc.net.au/news/2019-07-18/george-calombaris-made-establishment-backpays-underpaid-workers/11320274>>.

98 Fair Work Ombudsman, '*Annual Reports*' < <https://www.fairwork.gov.au/about-us/access-accountability-and-reporting/annual-reports>>.

99 Ibid.

- In FY2018/19 FWO recovered over \$40 million in stolen wages, and achieved just over \$4 million in court-ordered penalties.<sup>100</sup>

By contrast:

- In Sydney, the fine for travelling without a valid public transport ticket is \$200, with a maximum penalty of \$550, against a ticket price of less than \$10 (making the penalty up to 55 times the price of original compliance).<sup>101</sup>
- In South Australia, the fines for driving an unregistered car are between \$1,000 and \$1,500, against a registration cost of about \$800 (making the penalty up to almost double the price of original compliance).<sup>102</sup>
- In the City of Melbourne, a parking fine is between \$83 and \$165, against an hourly metered rate of \$7, making the fine between about 12 and 23 times the price of compliance.<sup>103</sup>

In all these examples:

- The people who are caught are fined; and,
- the quantum of the fine is many multiples of the cost of compliance in the first instance.

The improvements we advocate for are improvements relating to the civil penalty regime for RROs.

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100 Australian Government Transparency Portal, 'Fair Work Ombudsman and Registered Organisations Commission Entity Annual Report 2018-19' <<https://www.transparency.gov.au/annual-reports/fair-work-ombudsman-and-registered-organisations-commission-entity/reporting-year/2018-2019-12>>; Fair Work Ombudsman, 'FWO recovers \$40 million for workers' <<https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/october-2019/20192110-annual-report-2018-19-media-release>>.

101 Transport New South Wales, 'Fines and Fare Compliance' <<https://transportnsw.info/tickets-opal/fines-fare-compliance>>, 'Adult Fares' <<https://transportnsw.info/tickets-opal/opal/fares-payments/adult-fares>>; *Passenger Transport (General) Regulation 2017* (NSW) r 77A.

102 Brett Williamson, 'Drivers beware: Unregistered vehicle fines in South Australia about to triple', *ABC Adelaide (online)*, 23 December 2013; <<http://www.abc.net.au/local/stories/2013/12/23/3916415.htm>>; Government of South Australia, 'Calculate Registration Fee' <<https://account.ezyreg.sa.gov.au/account/vehicle-rego-enquiry.htm>>.

103 City of Melbourne, 'Parking Fines' <<https://www.melbourne.vic.gov.au/parking-and-transport/parking/parking-fines/Pages/default.aspx>>; City of Melbourne, 'Parking locations and fees' <<https://www.melbourne.vic.gov.au/parking-and-transport/parking/parking-locations-fees/Pages/parking-locations-and-fees.aspx>>

In *Fair Work Ombudsman v Pulis Plumbing PTY LTD & Anor* [2017] FCCA 3013, Riethmuller J described the purpose of civil penalties as follows:

The purpose of imposing penalties under the Fair Work Act 2009 provisions was discussed by the High Court in *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate; Construction, Forestry, Mining and Energy Union v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46 at [55] when the court said:

‘whereas criminal penalties import notions of retribution and rehabilitation, the purpose of a civil penalty, as French J explained in *Trade Practices Commission v CSR Ltd*, is primarily if not wholly protective in promoting the public interest in compliance:

“Punishment for breaches of the criminal law traditionally involves three elements: deterrence, both general and individual, retribution and rehabilitation. Neither retribution nor rehabilitation, within the sense of the Old and New Testament moralities that imbue much of our criminal law, have any part to play in economic regulation of the kind contemplated by Pt IV [of the Trade Practices Act]. ... The principal, and I think probably the only, object of the penalties imposed by s 76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene the Act.”

The introduction, through the *Vulnerable Workers* amendments, of a second level of civil penalty for “serious contraventions” was clearly motivated by the need to respond to underpayment and related issues rather than broader issues concerning non-compliance with common award based requirements (for example to consult regarding the introduction of changes in the workplace or give proper notice of roster changes) or other civil penalty provisions in the Fair Work Act (such as prohibitions on contravening a bargaining order or on taking industrial action before the expiry of an enterprise agreement). Indeed, the only contraventions which may be regarded as serious contraventions under those amendments are those which relate either to contraventions of instruments which set out RROs or the obligations to pay on time and in full (and without

deductions or refunds) and keep proper records and pay slips.<sup>104</sup> Contravention of these types of obligations by an employer have a clear immediate victim, as well as a corresponding direct gain to the employer and, beyond that, a market distortion. All of these impacts need to be considered in developing an appropriate penalty framework.

In our view, a higher level of penalty should apply to employer's RROs in the various instruments presently captured.<sup>105</sup> This would include underpayment, or non-payment, of wages, overtime and other penalties, superannuation contributions, casual loadings, allowances and the like but would not extend to a failure to post a roster on a notice board, for example. This higher-level penalty should also apply to the pay slip and record keeping provisions as well as the provisions concerning frequency of payment, deductions from payment and requirements to spend particular amounts.<sup>106</sup> It should also extend to the prohibitions on sham contracting.<sup>107</sup>

The penalty level we propose is double the level presently set for serious contraventions. This would equate to \$1.26 million for a body corporate, on the present value of penalty units. As explained below, we believe that the maximum penalty should be expressed as the higher of either that figure, or three times the amount of underpayment.

Critically, the object being deterrence, the legislation should not erect barriers to achieving high penalties for the types of contraventions which are regarded as serious, in the form of a technical gateway or threshold to accessing those penalties. The objective of a civil penalty is to put a price on contraventions that is sufficiently high to deter, rather than being an acceptable cost of doing business.<sup>108</sup> That objective of deterrence can be frustrated by too much legislative prescription about when which level of penalty is available. A simple message:

“If you do not pay your workers properly, you could face a fine of up to \$1.26 million”

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104 FW Act ss 557A, 539.

105 i.e. Modern Awards, Enterprise Agreements, Workplace Determinations, National Minimum Wage Orders, Equal Remuneration Orders, Guarantees of Annual Earnings.

106 FW Act ss 323(1), 323(3), 325(1)m 325(1A), 328(1), 328(2), 328(3), 535(1), 535(2), 535(4), 536(1), 536(2), 536(3).

107 FW Act ss 357-359.

108 *ABCC v. CFMEU* [2017] FCAFC 113 at [98]

is far more capable of deterring than a complex one:

“If you do not pay your workers properly, you could face a fine of up to \$1.26 million if it can be proven in Court that you had knowledge of the essential elements of the provision that you contravened and the conduct you engaged in was part of systematic pattern of conduct\* relating to one or more other persons. If either of those things cannot be proved, the maximum fine will be one twentieth of that amount.

\*Whether or not your conduct was part of systematic pattern of conduct will be judged having regard to all relevant factors including but not limited to the number of contraventions, the period over which they occurred, the number of persons affected, how you responded to any complaints about the conduct and whether you kept mandatory records and supplied compliant pay slips.

Deterrence is better served by the creation, in the mind of the putative contravener, of uncertainty and risk regarding the maximum penalty (or to put it another way, the regulatory cost of doing business). A penalty regime that clearly signals that a capacity to demonstrate ignorance of the law necessarily results in a 95% discount of the maximum penalty will do less to promote compliance than one that does not. For that reason, we recommend that the definitional elements of “serious contravention” and “systematic pattern of conduct” do not apply as gateways for accessing the higher-level penalty we propose.

Removing these gateways and thresholds will not result in inappropriately high penalties for those contraveners whose actions were genuine mistakes which were promptly rectified upon discovery, in the unlikely event that those matters do in fact proceed to contested hearings (and in fact, if those matters do proceed to hearing an agreed penalty that is not clearly unreasonable is more likely than not to be accepted<sup>109</sup>). The existing jurisprudence on the determination of civil penalties<sup>110</sup> ensures that a Court considers all relevant circumstances of the contravening conduct before imposing a penalty, for example:

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109 See Commonwealth v. Fair Work Building Industry Inspectorate [2015] HCA 46

110 See e.g. FWO v. NSH North [2017] FCA 1301, Mason v. Harrington [2007] FMCA 7, Australian Ophthalmic Supplies v. McAlary-Smith [2008] FCAFC 8.

- The objective nature and seriousness of the contravention, such as:
  - Whether it was deliberate, reckless, negligent or careless;
  - Whether the conduct constituting the contravention was isolated or whether it was systematic conduct over a period of time;
  - Whether senior officers responsible for the contravening conduct;
  - Whether compliance systems were in place;
  - Whether there was a culture of compliance;
  - The impact or consequences of the contravention; and
  - Whether a benefit or profit was derived from the contravening conduct.
- The particular circumstances of the contravener, such as:
  - Its size and financial position;
  - Whether similar conduct has occurred in the past;
  - Whether it has improved compliance systems since the last contravention;
  - Whether it has exhibited contrition or remorse;
  - Whether the profits or benefits received were given up;
  - Whether reparations have been made;
  - Whether the contravener co-operated with the prosecutor; and
  - Whether the contravener has already suffered any extra-curial punishment or detriment.
- The extent of any overlap between contraventions (so as to avoid any double punishment); and
- Applying the totality principle, that is, to consider whether the sum of penalties considered appropriate in the circumstances for the separate contraventions involved is in fact just and proportionate given the overall conduct.

Given the above, we would expect that redefining the maximum penalty in the way we have proposed would result in little if any impact on the lowest level of inadvertent and promptly remediated contraventions. However, it would provide a flexible a graduated response to the continuum of more serious conduct which is lacking in the present provisions. Such gradations would allow a court to apply greater penalties to employers who fail to act on wage theft (or are obstructive) across their workforce, once it is uncovered by a worker.

For reasons already given, we have concerns about the deterrent effect, or compliance promoting effect, of a civil penalty regime that enables some form of risk calculus or gaming based on set thresholds or criteria. The courts have developed principles to deal with matters on a continuum of seriousness and these should not be usurped.



## Recommendations

<b>Recommendation 11.</b>	Increase the penalties which a court can impose in the case of wage theft or other contraventions by: <ul style="list-style-type: none"><li>• Removing the distinction between a “serious contravention” (see FW Act s 557A) and other RRO related contraventions.</li><li>• Setting the penalty for RRO related contraventions at the current penalty level for Serious Contraventions.</li><li>• Continuing to allow courts to apply discretion, taking into account a range of factors, when deciding on the appropriate penalty.</li></ul>
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## Criminal Sanctions

A Victorian person who steals money or goods from another person may face imprisonment of up to 10 years.<sup>111</sup> However, that same Victorian could currently steal millions of dollars of wages from their employees without facing the prospect of a custodial sentence.<sup>112</sup>

Criminal penalties should be available for non-compliance with an RRO in an Award or Enterprise Agreement, on a strict liability basis (which would still leave open certain defences, such as mistake of fact).

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<sup>111</sup> Crimes Act 1958 (Vic.) s 74.

<sup>112</sup> Note: A number of state jurisdictions, including Victoria, are considering or in the process of introducing wage theft criminalization.

We propose that the maximum penalty for a strict liability offence should be \$1 million for a corporation and \$200,000 for an individual whereas for a secondary, fault based offence the penalty should be \$10 million for a corporation and \$2 million and/or 5 years imprisonment for an individual. The actual level of culpability is capable of being addressed in sentencing. We expect that an employer charged with 70 counts of one offence (i.e. in one count per employee) would be dealt with more harshly than an employer charged with a single count.

As above, we favour an offence of strict liability. However, subject to what we say below regarding interaction with State laws, there may be regulatory efficiency in establishing a secondary offence with a far higher penalty – such as the \$10,000,000 which currently applies for misleading and deceptive conduct in relation to employment - for conduct that is intentional, reckless or dishonest.<sup>113</sup> The availability of such an offence would encourage earlier pleas to the lesser, strict liability offence, where the higher offence was appropriately charged on the facts.

We would not recommend the application of Parts 2.4 or 2.5 of the Criminal Code to an offence of strict liability such as that we have proposed. Rather, accessory and corporate liability could be determined on the basis of sections 550 and 793 of the FW Act. If a secondary, fault-based offence were to be created, it would be appropriate for the accessory liability provisions in part 2.4 of the Criminal Code to apply. However, given the variety of business settings in which the secondary offence may be applicable, we see merit in section 793(2) of the FW Act being merged in with Clause 12.3 of the Criminal Code as a means of establishing corporate criminal responsibility. This would enable liability on the basis of the state of mind of a single individual acting within the scope of their actual or apparent authority, without the necessity to prove that person was a “high managerial agent” of the body corporate.

Some States have indicated their intention to amend their criminal laws to deal with wage theft. The potential for inconsistent laws would already be a consideration in the steps that those States are taking. An advantage of confining Commonwealth offences to those of strict liability

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113 *Competition and Consumer Act 2010* (Cth) sch 2 (Australian Consumer Law) s 31.

is that they are less likely to further complicate the task of those States in devising the laws that they wish to introduce.

Insofar as the Commonwealth does wish to pursue a secondary, fault-based offence, it should consult directly with the States to ensure the laws are capable of simultaneous operation, including with respect to penalty.

Whichever route the Commonwealth elects to take, there will be a need to contend with procedural impacts where civil and criminal penalties are available in respect of the same (or substantially the same) conduct. In terms of evidence gathering, we note that the *Competition and Consumer Act*, which has dual civil and criminal strict liability provisions, provides to individuals a use immunity in respect of criminal but not civil proceedings (and no derivative use immunity at all) where documents are obtained under a compulsion.<sup>114</sup> This precedent is worthy of consideration in re-framing the investigative rights of permit holders as we have proposed. In addition, it will be important to ensure that existing employee rights to request their own records are not diminished by any privilege against self-incrimination or use or derivative use immunities.

The non-criminalisation of wage theft sends a message that echoes perceptions about the treatment of “white-collar” as opposed to other forms of crime. The fact that wage theft is not criminal, whereas stealing an amount of money in most other ways is, does nothing to support efforts to drive a culture of industrial relations where adhering to legal obligations is promoted.

The criminalisation of wage theft needs to occur if the current decline of compliance in relation to labour standards is to be arrested. However, criminalisation of wage theft is only part of the solution. Moreover, the introduction of an inadequate criminal regime may do little to drive compliance.

### *Recommendations*

<b>Recommendation 12.</b>	Create criminal offences in relation to wage theft that:
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<sup>114</sup> *Competition and Consumer Act* (Cth), s. 155(7).

	<ul style="list-style-type: none"> <li>• Are on the basis of strict liability, with a maximum penalty of \$1,000,000 for a corporation and \$200,000 for an individual; and</li> <li>• Sanction misleading or deceptive conduct in relation to wage theft with a penalty of \$10,000,000 for a corporation and \$2,000,000 and/or up to 5 years' imprisonment for an individual.</li> </ul>
<b>Recommendation 13.</b>	Consult with the states about the operation of any Commonwealth criminalisation of wage theft, and the interaction with existing or proposed state legislation.

**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;**

**Commonwealth Procurement**

Commonwealth, State and local Governments are a major purchaser of goods and services, accounting for as much as \$64.5 billion<sup>115</sup>. The significance of Government procurement to the national economy is such that not only do Governments have a responsibility to ensure that their procurement meets ESG standards, but they are also in a position to effect broad-based change by way of their procurement.

An example of the impact that Government can have on employment standards is *the Code for the Tendering and Performance of Building Work 2016* (Cth). That code imposes restrictions on building contractors who tender for Commonwealth Government projects. For example, building

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115 Department of Finance, *Statistics on Australian Government Procurement Contracts* <<https://www.finance.gov.au/government/procurement/statistics-australian-government-procurement-contracts->>

contractors who do tender for Commonwealth Government work are forbidden from agreeing to the following terms in their Enterprise Agreements:

- Terms which allow union officials or delegates to administer workplace inductions;<sup>116</sup>
- Terms which provided a designate area for union meetings and activities;<sup>117</sup>
- Terms which ensure that sub-contracts are afforded the same wages and conditions as direct employees;<sup>118</sup>
- Terms that prohibit loaded rates (and instead require payment of itemised loadings, penalties etc.<sup>119</sup>
- Terms that require employers to encourage or even indicate their support for union membership.<sup>120</sup>

Moreover, an employer who seeks to engage in Commonwealth government building work is prohibited from taking any actions that have the same effect as the content proscribed by the Code.<sup>121</sup> This means that it isn't simply enough for an employer to remove a provision ensuring equal pay and conditions between employees and sub-contractors, the employer would also be restrained from agreeing to that principle in any way shape or form. The effect of the Code is that major employers in the building and construction industry have had to remove labour rights and content from their employment agreements, even where they had been otherwise willing to agree to that content or act accordingly.

This mandated reduction in the rights of unions impacts the abilities of construction unions to ensure that workplaces are cognisant of their rights and obligations and diminishes the ability to combat wage theft in that industry.

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116 Code for the Tendering and Performance of Building Work 2016 (Cth) s 11(1).

117 Ibid s 11(3)(q).

118 Ibid s 11(3)(f).

119 Ibid s 11(3)(i).

120 Ibid s 11(3)(l)-(m).

The Governments Commonwealth Procurement Rules should be rewritten to explicitly require government entities and procurement officers to require supply chain transparency, and assurances that the bidding contractor is capable of and takes steps to ensure that wage and other employment standards are complied with within its own supply chain.

When opening public procurement contracts (above a certain threshold) to bid by private and non-profit suppliers, governments should require in advance a full and transparent reporting by prospective suppliers regarding their adherence to minimum or better labour standards (including the principle of paying at least living wages), and the nature of their own sub-contracting and supply chain relationships with other suppliers.

One way in which the Government can take steps to ensure that wage theft does not occur within its procurement environment is by reviewing and reintroducing the Commonwealth Cleaning Services Guidelines, to include the labour standards and certification scheme requirements set out in the multi-stakeholder industry initiative, the Cleaning Accountability Framework. Such an approach could be taken in a range of industries in which the government procures.

In conjunction with the Australian Bureau of Statistics, the Commonwealth and state governments should jointly establish a comprehensive and consistent database of public procurement expenditures by governments at all levels (including municipalities), to enhance understanding of the size and composition of public purchases from private businesses. This database would be invaluable in guiding follow-up initiatives by governments to enhance the labour and social effects of procurement decisions.

Governments at all levels should set up an office of labour standards within an appropriate existing department or body (Department of Prime Minister/ Premier or the relevant procurement body) to review implementation of government procurement policy and compliance with core standards, assess and prequalify suppliers where required, and resolve any disputes regarding breaches in core standards and failure to prequalify. These offices would be charged with reviewing pre-qualification applications from prospective bidders on public contracts; conducting regular audits; developing relationships with relevant stakeholder organisations (including business associations, unions, human rights advocates, and international supply chain regulation networks); building a positive culture of compliance with labour standards goals; and making recommendations to the respective ministers regarding improvements in reporting, auditing, and compliance processes across the procurement supply chain

## Public Sector

Privatisation of public services and infrastructure has had a devastating impact on Australian workers, service users, and the broader community.

All privatised services that receive government funding to provide a public service should, on an ongoing basis, provide evidence that minimum staffing numbers and standards, including conditions for staff, are met and that accredited qualifications are recognised.

## Recommendations

<b>Recommendation 14.</b>	Government should require and monitor compliance with core labour, superannuation and taxation standards by: <ul style="list-style-type: none"><li>• Including core standards in tender documents and contract requirements, and ensuring that the standards form a critical component of how tenders are assessed and contracts are managed;</li><li>• requiring suppliers to demonstrate historical and ongoing compliance with core standards;</li><li>• immediately repealing the <i>Code for the Tendering and Performance of Building Work 2016</i> (Cth) and any other similar code which restricts the rights of workers and unions, or acts as a barrier to the investigation of wage theft;</li><li>• introducing a procurement compliance framework which places a positive emphasis on complying with wage and other industrial obligations and (partially through fines arising from that framework) funding a compliance unit to ensure suppliers meet core standards and contract requirements;</li><li>• mandating training of government procurement officers on the compliance framework and standards; and</li><li>• introducing key performance indicators (KPIs) and incentive structures that reward compliance with the standards and improvements in performance.</li></ul>
<b>Recommendation 15.</b>	Government should be a model employer and work co-operatively with trade unions to ensure that wage theft does not occur within its own workforce.

### Any related matters.

This submission deals with the broad issues that present in relation to wage theft. However, wage theft is not an academic problem. It is workers who bear the effects of wage theft. It is workers who cannot purchase groceries, cannot pay for transport, cannot buy medicine or school supplies, and cannot participate fully in the economy when they have their wages stolen. It is workers who should be foremost of mind as we consider solving the wage theft crisis. The submissions of the ACTU's affiliates are most informative in this regard and, go to the lived experiences of workers who have their wages stolen.

## Conclusion

This submission has approached the issue of wage theft broadly and by specific reference to the terms of reference of this inquiry.

As this submission has shown:

- There are many different forms of wage theft;
- wage theft is widespread, and has reached epidemic proportions. In many industries, sectors and supply chains, wage theft has become a business model;
- wage theft arises out of a policy and regulatory environment that allows it to flourish.
- the best placed institution to identify, investigate and address wage theft is the Australian trade union movement;
- trade unions need greater powers to enter workplaces, obtain information, and investigate employer compliance in order to be able to identify and resolve instances of wage theft.
- The consequences for employers who engage in wage theft are inadequate and need to be made stronger.

Ending the wage theft epidemic requires action and change. There is no “magic bullet” but rather a set of actions that need to be taken to create a policy and regulatory environment that:

- Drives employer compliance;
- Enables workers and their unions to identify and address wage theft where it does occur; and
- Ensures that employers who do the wrong thing are held to account.

For the reasons above, the ACTU makes the recommendations contained in this submission.



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